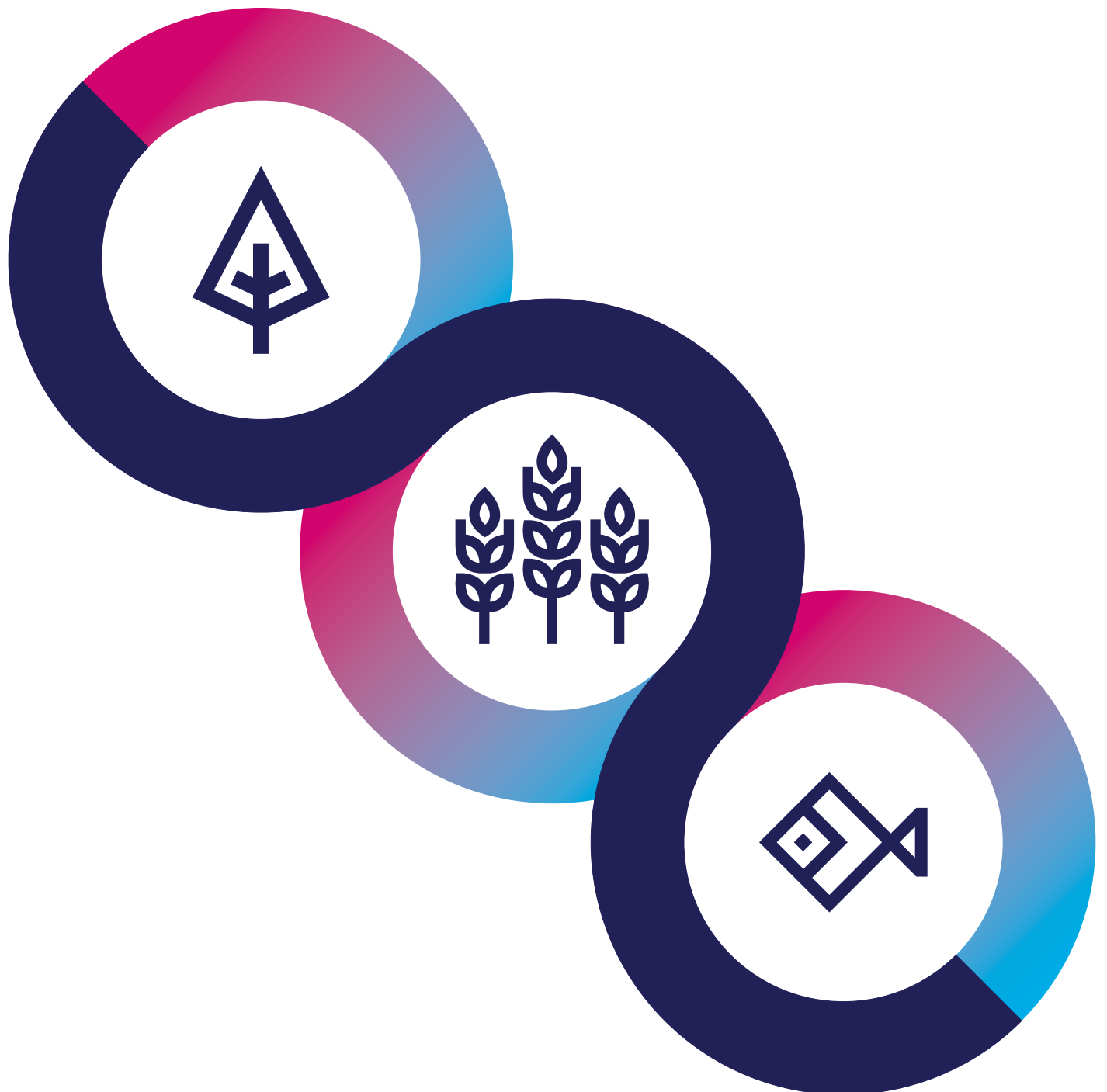


# Devolution after Brexit

Managing the environment, agriculture  
and fisheries



# About this report

Brexit has put devolution in the UK under serious strain. There is a stark divide between how the devolution settlements are interpreted in Westminster and how they are interpreted in Cardiff and Edinburgh. Brexit also divides the main parties in Northern Ireland.

This paper sets out how the governments of the UK could forge new UK-wide agreements. It focuses primarily on the environment, agriculture and fisheries, three policy domains where devolved competence intersects significantly with current EU competence.

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# Summary

**Brexit has put devolution in the UK under serious strain. It has highlighted the stark divide between how existing devolution arrangements are interpreted in Westminster and Whitehall, and how they are interpreted in Cardiff and Edinburgh. And it has divided the main parties in Northern Ireland, whose inability to form a government has largely silenced Belfast's voice in discussions of devolution after Brexit.**

The Prime Minister, Theresa May, has been very clear that strengthening the union of the UK is one of her five tests of a successful Brexit, and that “no new barriers to living and doing business within our own Union are created” by Brexit.<sup>1</sup> But with only a year until the UK formally leaves the European Union (EU), existing tensions in the constitutional relationship between the UK and the devolved governments have been thrown into sharp relief by the Brexit negotiations.

These tensions have surfaced in discussions over the EU Withdrawal Bill – a key piece of legislation giving effect to the UK's departure from the EU. The bill will determine to where within the UK powers currently exercised in Brussels will initially return. The UK Government estimates there are around 153 areas of policy that have been devolved, but where EU frameworks have limited the scope for policy variation across the UK. The devolved administrations want these powers to return directly to their capitals. The UK Government wants the default destination to be London, pending further decisions, not least because it is the best way to provide assurance of continuity and certainty.

There is one important area of agreement: all sides recognise that, after Brexit, ‘frameworks’ or agreements between the four nations will be required in some of the policy areas where powers are returning from the EU. One of the key reasons these new agreements are necessary is to ensure the functioning of the ‘UK internal market’, by avoiding new barriers to doing business across the UK and unfair competition between businesses based in different parts of the UK. Frameworks will also be important enablers for the UK government as they pursue new international agreements and trade deals.

In some of the 153 areas identified, frameworks may need to take the form of UK-wide legislation, but in the majority of cases, non-legislative agreements are likely to be sufficient. There will be some areas where no new agreement is necessary, with each part of the UK able to go its own way after Brexit.

In this paper, we set out how the governments of the UK should approach these new UK-wide agreements. We consider what mechanisms and institutions will be necessary to support new agreements and broader relationships between the governments after Brexit. Our focus is primarily on the environment, agriculture and fisheries; three key policy domains which together make up 41 of the 153 areas in which powers returning from the EU are devolved.

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The four nations must strike a careful balance. For the UK Government, centralising control has potential benefits for UK economic performance and makes it easier to conduct international negotiations. But keeping powers at the centre will threaten the stability of existing devolution arrangements and could cause irreparable harm to the relationship between the devolved administrations and Westminster.

We argue that if the Prime Minister is to achieve her objective of a stronger union after Brexit, there must be a comprehensive review of the way in which the relationship between the UK and its constituent nations is managed. Brexit will require the UK and the devolved nations to co-operate actively in a way that has not always been necessary within the EU structures. The four nations should seize this chance to strengthen their relationship.

We set out eight key challenges that need to be addressed if the UK and its constituent nations are to co-operate successfully once the UK leaves the EU, and we make recommendations about how the four governments should approach these challenges.

## **An opportunity to rebuild the relationship between the UK and the devolved nations**

Ensuring that the UK's 'internal market' continues to work after Brexit, by limiting divergence in the way the four nations regulate business and manage key policy areas such as the environment, agriculture and fisheries, will require a new approach to co-operation between the UK's governments. The current mechanisms for facilitating co-operation is the Joint Ministerial Committee (JMC). The structure of the JMC and its terms of reference were established on the basis of the UK's membership of the EU.

**The four governments should urgently review how they can work together in light of Brexit.**

This review should produce a revised terms of reference for the JMC that should include a new set of guiding principles for 'intergovernmental relations', covering transparency, accountability and a commitment from the four nations to co-operate in a spirit of trust.

The Minister for the Cabinet Office should work with the devolved administrations to ensure that **a new JMC system has a fixed timetable of meetings, including an annual 'plenary' meeting, and works on the basis of jointly agreed agendas.** The four governments should also establish new mechanisms to allow for the settling of technical disputes outside of politically contentious ministerial forums.

### **Challenge One: Reaching agreement on new frameworks**

Most of the 41 environment, agriculture and fisheries policy areas which have been devolved but which to date have been dealt with by the EU will require some kind of four-nation agreement after Brexit. In approaching these agreements, the UK Government will need to balance its own desire for a robust, UK-wide statutory underpinning, with the political and constitutional realities of devolution in the UK.

**Decisions on the scope of new agreements should be based on the principles agreed by the four governments in October 2017.**

Opting for non-legislative agreements would avoid some of the political handling issues of UK-wide legislation. However, there are likely to be some challenges in operating such non-legislative agreements in practice, for example determining how disagreements or disputes are to be managed.

In the small number of areas in which UK-wide law is unavoidable, such as chemicals and animal health, **new legislation should be agreed with the devolved administrations and then passed with the consent of their legislatures.** In managing this process, avoiding a repeat of the political stand-off taking place over the EU Withdrawal Bill will require early, meaningful engagement between the UK Government and the devolved administrations.

### **Challenge Two: Distributing funding between the four nations**

One of the most politically contentious issues will be how any replacement for EU funding should be distributed between the four nations. Within the policy areas we are looking at, this is most relevant for agricultural financial support. The four nations could agree to distribute money through the 'block grant', which accounts for a significant portion of the devolved administrations' budgets, or come up with an alternative means of ring-fencing a budget with a separate mechanism to reflect changes.

**The four nations will also need to agree a policy framework to restrict how money can be spent.** While this must recognise the UK's international obligations – for example, commitments made in trade deals or multilateral environmental agreements – the UK Government will need to honour its commitment that the devolved administrations will continue to have at least the current levels of flexibility.

### **Challenge Three: Co-ordinating UK-wide input into international negotiations**

The UK's increased ability to strike international agreements after Brexit will require new consultation mechanisms to ensure the views of the devolved administrations can be heard. **New JMC sub-committees should be established, including on international trade, to provide a forum for consultation.**

In order to understand the options for enhancing the involvement of the devolved administrations in negotiations, **the UK should look to international examples,** particularly the involvement of the Canadian provinces in the Canada–EU Comprehensive Economic and Trade Agreement negotiations.

### **Challenge Four: Updating intergovernmental agreements in the future**

Agreements reached between the UK Government and the devolved administrations will inevitably, at some point, need to change. New governments will bring new priorities, while international agreements will bring external pressures for change. **UK-wide agreements must therefore contain provisions that outline how they can be updated.**

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## Challenge Five: Establishing new regulators and public bodies across the UK

If the UK chooses to leave – or fails to negotiate access to – EU environmental agencies, it will need new regulators and institutions to manage the implementation of functions currently exercised by the EU that will return to the UK, for example those of the European Chemicals Agency. **New public bodies should be UK-wide wherever possible, as this pools expertise, is more cost efficient, and reduces compliance costs for business.** These bodies should be co-designed between the four nations, with shared ownership and funding. Where shared bodies are not possible as the four nations pursue different policy priorities, separate bodies should nonetheless co-operate, with common research and analytical resource.

## Challenge Six: Ensuring the governments comply with their commitments

Michael Gove, the Secretary of State for Environment, Food and Rural Affairs, has proposed a new government institution to ensure government compliance with environmental standards after Brexit. The current proposal is for this body to operate in England only. However a **new environmental watchdog would be more robust if it was given a four-nation remit, and was designed and owned jointly by the four nations.** The body could be made more independent and less likely to be abolished under subsequent political leadership if it reported to, and was co-funded by, the four legislatures rather than just the UK government.

## Challenge Seven: Ensuring the four legislatures hold the governments to account for agreements between countries

There is currently no formal role for the four legislatures in scrutinising agreements between the four nations of the UK. **In key policy areas now subject to agreement between the four nations, there should be clearer legislative accountability.**

The four legislatures should work together to improve their relations with each other to help support the scrutiny of new agreements, including via joint evidence sessions and inquiries, and interparliamentary forums.

## Challenge Eight: Ensuring post-Brexit policy is informed by external stakeholders

There is an opportunity for the UK Government and the devolved administrations to involve external stakeholders as they design new policies in shared policy areas after Brexit.

**An urgent review of how the four governments can work together in light of Brexit should address transparency, opening up the JMC process.** This should allow civil society and industry an opportunity to make a positive contribution to the processes of post-Brexit policymaking and implementation.



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# Introduction

**When the UK leaves the European Union (EU), powers will return from Brussels. But for the areas which are devolved within the context of the EU framework, it is not yet clear how they will be managed by the UK Government and the devolved administrations.**

Both sides recognise that there must be new UK-wide agreements to substitute for existing EU frameworks. They agree that withdrawal could have unintended consequences, such as undermining the 'UK internal market', by adding new barriers to doing business across the UK and unfair competition between businesses based in different nations, and making it harder for the UK to conclude new trade deals. But how to approach these new UK-wide agreements has proved a major bone of contention.

Cardiff and Edinburgh see the powers returning from Brussels in areas such as the environment and agriculture as already theirs under the devolution settlements. They are willing to agree new UK-wide agreements, but on the basis of mutual consent between the four governments.

The UK Government, on the other hand, is reluctant to commit to a full-scale transfer of powers. It instead wants to retain the power for Westminster to set UK-wide frameworks in certain priority areas.

This dispute reflects the wider state of the relationship between the governments. Although Theresa May has committed to ensuring Brexit strengthens the union, Westminster has largely kept the devolved administrations in the dark on the Brexit process. The Joint Ministerial Committee on European Negotiations (JMC (EN)), the primary means for the UK government to consult with the devolved administrations, did not meet between February and October in 2017; during which time Article 50 was triggered, negotiations began and a number of important UK position papers were published.

This report explores how the UK Government and the devolved administrations should work together to decide what co-operation should look like and how to make UK-wide agreements operational after Brexit. The challenge will be to avoid the risks of unconstrained regulatory divergence, while respecting and enhancing the devolution settlements.

We approach these questions through the lens of the policy areas of the environment, agriculture and fisheries, which are of particular importance to the devolved administrations and together make up a substantial proportion of contested policy areas (41 of 153 identified by the UK Government). We make recommendations about how eight key challenges can be overcome and how the four governments can work together to make these agreements operate successfully in the longer term.

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Protection of Birds (RSPB) and the World Wide Fund (WWF). We have spoken with officials, academic experts, and civil society and business representatives from across the UK to understand their different perspectives and priorities as the four governments work to agree the new environmental frameworks that will be needed in post-Brexit Britain.

## **Progress so far: Principles for new UK-wide agreements**

The devolution settlements agreed in the late 1990s were predicated on the UK's membership of the EU. Membership provided an EU-wide framework for policy in areas of shared competence including agriculture, fisheries and the environment, and gave the European Commission sole competence on trade. It also provided mechanisms to ensure compliance.

When Britain leaves the EU, subject to the precise terms of the future UK–EU relationship, it will cease to be bound by European law in these areas. Brexit therefore creates the potential for a significant increase in policy differentiation within the UK.

This is not necessarily a cause for concern: devolution is designed to allow each part of the country to tailor policy to its own needs. Policy variation allows for experimentation and learning about which approaches work best. For example, the UK government has already adopted policies for England which have been successful in other nations in the UK, such as the ban on smoking in enclosed spaces (first adopted in Scotland in 2006) and the levy on plastic bags (first adopted in Wales in 2011). But unconstrained and unco-ordinated divergence could have negative consequences, as we explore below.

The UK, Scottish and Welsh governments agreed in October 2017 that new UK-wide arrangements should be created to replace EU law in some areas, to provide legal certainty and regulatory consistency. Northern Ireland was represented only by civil servants due to the ongoing absence of a devolved government in Belfast. Meanwhile, in this forum, the UK Government has to act both in that capacity and as the representative of England. The three administrations announced six broad principles to determine where new UK-wide 'common frameworks' should be established. Four apply to agriculture, fisheries and environment\*: the commitment to work together to 'protect the UK internal market', to 'manage common resources', and to ensure the UK can negotiate and implement 'trade deals' and other 'international agreements'.<sup>1</sup> These pledges signal acceptance from the devolved administrations that there needs to be some constraints on future devolved policy autonomy. However, these principles still leave considerable room for interpretation. The concept of the 'UK internal market', in particular, requires definition.

The commitments to UK-wide co-operation were balanced by guarantees to the devolved governments. The UK Government specified that the devolved administrations would not lose any power they currently hold within the context of EU law, and that the overall effect of Brexit will be a 'significant increase' in devolved autonomy. New frameworks can therefore only be as restrictive as current EU law, and in many cases, may be more permissive.

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\* The other two are: 'administer and provide access to justice in cases with a cross-border element' and 'safeguard the security of the UK'.

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Finally, it was agreed that 'the competence of the devolved institutions will not normally be adjusted without their consent'.<sup>2</sup> This means the UK Government must work in partnership with its devolved counterparts to agree the details of the new arrangements. This is both to ensure consent from the devolved legislatures for new pieces of legislation which might be required – including the fisheries and agriculture bills promised in the 2017 Queen's Speech – and to establish a positive starting point for co-operation between the four governments after Brexit.

### **What next for the environment, agriculture and fisheries?**

On 9 March 2018, the UK Government published a provisional analysis of 153 areas where EU law intersects with devolved competence. The analysis also included a further 12 policy areas which it believes are already within the competence of the UK government, although this is 'subject to ongoing discussion with the devolved administrations'.<sup>3</sup> Of the list of 153, 41 of these are related to the environment, agriculture and fisheries. These include almost the entirety of the policy remit of the Department for Environment, Food and Rural Affairs (Defra), as well as various environmental functions of the Department for Business, Energy and Industrial Strategy, the Ministry of Housing, Communities and Local Government, and others (see Appendix). Of the 24 areas which the UK Government believes will need some form of legislative framework, 19 relate to these policy areas. Therefore there is a clear need for the four nations to agree how co-operation in these policy areas should be managed after the UK leaves the EU.

Failure to co-operate could have an impact on the UK internal market and its ability to meet international obligations and trade objectives. For instance, setting minimum environmental standards and rules for subsidising farming is likely to be necessary to create a 'level playing field' across the UK. Likewise, to minimise compliance costs there is a case for uniform chemicals and food labelling regulations. Concluding trade deals with third parties that include level playing field provisions might also limit freedom to vary agricultural subsidy regimes or food standards regulations. Joint working will be necessary to meet the ambitious targets set by international obligations, such as the United Nations Framework Convention on Climate Change. Co-operation will also be required to manage common resources such as fisheries stocks and waterways, and to mitigate against shared threats.

### **What about Northern Ireland?**

The issues addressed in this paper affect Northern Ireland. However, the absence of an Executive has meant that concerns raised by Scotland and Wales have not been heard from Northern Ireland. In the current negotiations between the four nations, it has been left to the Northern Ireland Office and the Northern Ireland Civil Service to protect the interests of Northern Ireland, making sure that whatever settlement is reached suits their particular circumstances.

The situation is further complicated by the commitment from both the EU member states and the UK in December 2017 to avoid the emergence of a hard border in Northern Ireland. Policy flexibility in Northern Ireland will be constrained by whatever commitments make their way into the withdrawal treaty with the EU. That may require separate arrangements to ensure adequate alignment with the Republic of Ireland and, depending on the agreement, with the rest of the UK.

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In this report we refer frequently to the four governments of the UK. However, we acknowledge that in certain cases the points we make may only be relevant to the UK government, Wales and Scotland. We also acknowledge that some of the decisions made in the coming months will be made in the absence of a Northern Ireland Executive.

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# 1. Reaching agreement on new frameworks

## Challenge One

**The four nations recognise that agreements will be required to manage some devolved policy areas within the UK after Brexit. But it is not yet clear what form those agreements will take.**

As discussed in the Introduction, agreement was reached in October 2017 between the devolved administrations and the UK Government about the broad principles that will determine whether new UK-wide 'common frameworks' will be required after Brexit. The four nations defined what they meant by the term 'common framework', making it clear that different types of agreements will be needed depending on the specifics of each policy area:

"A framework will set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate."<sup>1</sup>

 A framework will set out a common UK, or GB, approach and how it will be operated and governed 

In broad terms, policy areas will fall into three categories:

1. No further action is required, where full policy divergence poses no risks.
2. Non-legislative agreements between the UK and devolved governments on how they will work together, where broad co-operation is desirable but policy divergence does not pose significant risks.
3. Legislative frameworks, where binding legislation is necessary to ensure regulatory consistency across the UK.

The UK Government's analysis demonstrates that even where legislation at the UK level may be needed, this may only be 'in part'.<sup>2</sup> It could be supplemented with other forms of co-operation and non-legislative agreements. Therefore certain policy areas may require a combination of approaches and a web of agreements to co-ordinate them. This is particularly true of the broader categories within the 41 policy areas linked to the environment, agriculture and fisheries, such as 'animal welfare' or 'fisheries management and support'.

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The analysis also includes a further 12 policy areas which the UK Government believes to already be within its competence, although this is subject to further discussion with the devolved administrations.

**When determining the scope of a future framework, an agreed definition of the six principles will be crucial**

It was an important milestone for the three governments to agree the six principles determining where common frameworks will be needed. But the principles leave plenty of room for interpretation. Agreeing the detail of future frameworks is a significant task.

The broad principles will need definition. For example, they will need to define what they mean by 'common resources' and how they are effectively managed. Perhaps one of the most likely principles to be contested in negotiations will be on the functioning of the 'UK internal market', with different ways the four governments could interpret this principle. Lessons might be drawn from the EU single market, which is founded on the free movement of goods, people, services and capital (the so-called 'four freedoms'), to remove barriers to economic activity.<sup>3</sup> Another potentially relevant example comes from the US, whose Constitution reserves the US Congress the power to regulate interstate commerce.<sup>4</sup>

In whatever way the UK Government and the devolved administrations decide to define the internal market, and other terms such as 'common resources', it is important they do so soon in order to facilitate discussions around future co-operation. It will also be important to reach a shared understanding of how to define where divergence becomes distortion; something we discuss in Challenge Two.

**UK-wide legislation will provide greater certainty for businesses and third country trading partners, either by setting legally enforceable outcomes or through detailed regulations**

The two most relevant principles for agreeing which policy areas need UK-wide legislation are: enabling the 'functioning of the UK internal market' and ensuring the UK can 'enter into and implement new trade agreements'.

When it comes to areas that are likely to be important features of future trade relationships, UK-wide legislation would reassure international partners that the UK is going to meet its side of the bargain. Likewise, legally enforceable standards or regulations offer stability and consistency for businesses operating across the UK.

Such legislation could operate in two different ways, as is currently the case at the EU level with regulations and directives. Areas such as chemicals regulation, and sanitary and phytosanitary rules are likely to need UK-wide laws to set strict technical standards and to prevent divergence. Other areas may need less prescriptive legislation, setting outcome frameworks or minimum standards with freedom as to how they can be achieved.

**Where legislation is required, it should be passed with consent, keeping amendments to the devolution settlements to a minimum**

There are two possible approaches for passing new UK-wide legislation.<sup>5</sup>

The first would be for the UK Government to have 'exclusive power' over these policies. This would add specific policy areas to the list of reserved areas in the

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devolution settlements, permanently removing the ability of the devolved administrations to legislate on them. Such a change to the devolution settlements would require consent from the devolved legislatures under the Sewel Convention, which is unlikely to be forthcoming. If the UK Government wishes to pursue this approach, additional guarantees will certainly be required. For instance, that future frameworks in these areas must be jointly agreed between the UK and the devolved governments, with rights for devolved ministers to have their say, and clear dispute-resolution mechanisms.

The other option would be to maintain the current division of powers, but have Westminster legislate for a UK-wide approach where necessary, seeking consent from the devolved legislatures. This would not fundamentally change the balance of power in the UK. It would therefore be reliant on the continuing positive involvement of the devolved administrations in formulating new legislation to ensure consent. For more sensitive areas of regulation, where it will be important to guarantee certainty over a longer period, the UK Government might be concerned that this approach could make updating legislation in the future more challenging.

**Non-legislative agreements would not interfere with the legislative competence of the devolved administrations, but would bring some operational challenges**

From the UK Government's analysis, nine environmental policy areas are likely to need non-legislative agreements.<sup>6</sup> Although overall this is the largest group of policy areas; the UK Government anticipates that 82 will fall into this category.

These agreements could take the form of concordats, protocols or memoranda of understanding between the four nations. Many are likely to cover technical provisions around joint working, rather than detailing clear policy objectives.

These largely political agreements will be designed to minimise the risk of constitutional wrangling. They will have the advantage of avoiding changes to the devolved administrations' legislative competence, demonstrating a commitment to joint working while respecting the current constitutional settlements.

But while 'non-legislative agreements' provide a basis for co-operation, they also bring operational challenges. The 2012 four-nation concordat on fisheries management is an example.<sup>7</sup> The agreement, which covers the licensing of vessels and the allocation of quotas as part of the EU's Common Fisheries Policy, is considered by officials to be quite successful, but challenges have still arisen.

The absence of formal mechanisms for settling disputes, other than by escalating to ministerial level through the JMC system, means it has been difficult to resolve issues. For instance, the Scottish Government placed a moratorium on the sale of Scottish fishing quotas to the rest of the UK under the current concordat in 2014. Unable to challenge this situation through the concordat, the UK Government and the Welsh and Northern Irish administrations retaliated by suspending the sale of fishing quotas to Scotland in December 2016.<sup>8</sup>

The effectiveness of such non-legislative agreements relies upon similar policy objectives and trust between the four governments. The fractious nature of the



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relationship between the governments since the EU referendum in June 2016 means that the required level of trust cannot be taken for granted. Without legally enforceable rules in such circumstances, agreements around co-operation can falter and can create confusion around operation.

**Where more formal mechanisms for co-operation are unnecessary, divergence can present a learning opportunity for the different nations in the UK**

According to the UK Government's analysis, there are 13 environmental policy areas where none of the six principles agreed in October 2017 apply. These may not require any UK-wide approach and each administration would be free to set its own policy.

Policy divergence between the four nations can be a catalyst for innovation. The Institute for Government has previously argued that different approaches across the devolved nations can create an opportunity for the UK to act as a 'policy laboratory'.<sup>9</sup> Different solutions can be used to address similar problems, creating an opportunity for learning in different parts of the UK. For example, in 2011 Wales introduced a 5p charge for plastic bags. Following its success, this was later adopted across the UK.

For certain policy areas which may fall within this category, co-ordination could continue to be managed through local co-operation, without the need for formal intergovernmental agreements. Flood protection is a good example. The EU directive requiring all member states to take a common approach to flood risk management is currently implemented at a local level by the four governments and local authorities.<sup>10</sup> In the absence of a formal UK-wide agreement, existing joint working arrangements – such as the Cross Border Advisory Group in the Solway Tweed and Northumbrian river basin districts – could continue.<sup>11</sup>

**The way forward**

In deciding the scope of new legislation and non-legislative agreements, the principles agreed in October 2017 will be key. To facilitate discussions and minimise the potential for dispute, **the UK Government and the devolved administrations should publish an agreed definition of the principles.**

Where UK-wide laws are required, the competence of the devolved administrations should still be respected. **The UK Government should** avoid amending the devolution settlements where possible, and instead **introduce new legislation with the consent of the devolved legislatures;** the devolved administrations should be involved at an early stage.

Avoiding UK-wide legislation helps minimise political wrangling, but could bring operational challenges. Such **non-legislative agreements should be supported by mechanisms for formal and informal co-operation,** the details of which we discuss in later sections.



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## 2. Distributing funding between the four nations

### Challenge Two

**When the responsibility for agricultural policy returns to the UK, the four governments need to make two key decisions:**

- 1. How funding will be distributed between the four nations.**
- 2. What constraints there will be on the spending decisions of each government.**

The distribution of funding across the UK is likely to be one of the most politically sensitive issues when it comes to devolution after Brexit. In the policy areas that are the focus of this paper, the biggest challenge is the future of agricultural funding.

The UK currently receives a significant amount of financial support for agriculture from the EU, divided between the four nations based on a historical allocation. In 2016, total Common Agricultural Policy (CAP) payments to the UK were €3.9 billion, with Wales, Scotland and Northern Ireland all receiving substantially more support per capita than England.<sup>1</sup> Northern Ireland received the most with €203.50 per capita; both Wales and Scotland received around €108 per capita; while England only received €47.50 per capita.\* The variance reflects key differences in agriculture across the UK, both in terms of its relative importance to the economy and the type of farming that is most prevalent.

The CAP contains specific policy objectives to constrain how the money is spent. For example, 30% of the direct payments to farmers must be used for 'greening payments' for actions that benefit the environment, such as protection of soil and biodiversity.<sup>2</sup> But there is still 'a great deal of flexibility of implementation', meaning the devolved administrations and the UK government can vary their subsidy regimes to match their priorities. The distribution of direct grants under the Basic Payment Scheme is one example. England and Northern Ireland take a different approach, with England distributing money based on different 'categories' of land, whereas Northern Ireland has a single category.<sup>3</sup>

After Brexit, the level of funding for agriculture will change depending on the government of the day. But on the basis of commitments made by the current Government, it seems likely that immediately after we leave the EU the distribution of funding between the four nations will replicate the amounts received in the year before EU exit. The governments have previously avoided reassessing the

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\* Calculations based on Office for National Statistics (ONS) mid-year population estimates for 2016. [www.ons.gov.uk/timeseries?topic=/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries](http://www.ons.gov.uk/timeseries?topic=/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries)

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relative distribution of CAP funding between the four nations, rolling forward historical allocations.


In this report we address another two key agreements, which will need to be reached between the four governments before exit. First, how agricultural funding will be divided between the four nations after the initial allocation. Second, what constraints are placed on how that money can be spent.

While the constraints on how money is spent will be driven by international obligations and domestic pressures, the decision on how to distribute agricultural funding to each nation will be a political choice. Below, we set out the two main

options, addressing their advantages and disadvantages.



## The UK Government will be keen to avoid repeated political discussions over funding



For the devolved administrations, the priority will be reaching an agreement that protects current levels of funding and their freedom to pursue their own priorities.

The UK Government will be keen to avoid repeated political discussions over funding and to ensure it will be able to strike new trade deals once outside of the EU.

### **Option one: Use the Barnett formula, which would give greater flexibility to the devolved administrations, but leave devolved budgets more vulnerable to UK government cuts**

In deciding how agricultural support will be managed in the future, the default position is likely to be to include the initial distribution in the 'block grant' and adjust for changes using the Barnett formula.

Most of the devolved administrations' budgets come from a single 'block grant' from the UK government. The Barnett formula is used to calculate changes to the grant, reflecting increases or decreases in planned spending in England by UK government departments, and each country's relative population size.<sup>4</sup> But there is no compulsion to spend the money in the same way as the UK government has planned in England.

Under this approach, the devolved administrations would be free to adjust how the money is spent, redirecting it to other priorities or policy areas if they wish. The devolved administrations would have greater autonomy over their budget and how it is used, but farmers might be worried that future funding could be diverted to other priorities.

Distributing this funding through the Barnett formula would mean that the future level of agricultural funding available for the devolved administrations would be tied to policy decisions made by the UK government. While the devolved administrations would gain greater day-to-day control over how their budget is spent, they would run the risk of their budgets being squeezed in the event the UK government chose to cut the English agriculture budget – although this would be mitigated if the savings were reallocated to other budgets, for example for devolved services such as schools or hospitals.

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### **Option two: The UK could decide to create a ring-fenced agricultural support budget, which would be the least change to the current arrangement**

An alternative approach would be for the UK to establish a new agricultural support budget, protected and separated from the wider devolution budget settlement and 'block grant'. The initial distribution would likely reflect the current split through CAP and these levels would be maintained until 2022; reflecting Michael Gove's commitment to match-fund agricultural support payments.<sup>5</sup>

After that, there would need to be an agreement on how the budget was agreed for future years. The Barnett formula would be one option, but the creation of a new, separate budget is an opportunity to take a different approach. A new budget could allow the governments to create a new funding mechanism, taking into account some of the criticisms of Barnett.<sup>6</sup> The budget could be negotiated periodically, formally and at a four-nation level, as part of the UK government's spending review.

A ring-fenced agricultural budget for each nation would offer a greater guarantee to farmers in the devolved nations, with funding levels set for a specific period of time. It would protect them against money being reallocated to other policy priorities. A ring-fenced budget would also make the UK rather than the devolved governments responsible for resolving the difficult trade-offs between agriculture and other policy areas.

Ultimately, from the devolved administrations' perspective, agreeing to this type of budget could be a missed opportunity for greater autonomy in spending decisions, preventing them from making their own decisions around policy priorities and funding.

### **Regardless of how this money is divided between the four nations, they need to decide what constraints there should be on how it can be spent**

Once money has been allocated to the devolved administrations, there is a decision to be made about what restrictions should be placed on spending. The four governments may choose to agree a new policy framework that would limit how funding support is used.

Some of these restrictions will come from international obligations. The World Trade Organisation's (WTO) Agriculture Agreement provides the parameters within which parties to the agreement can provide domestic agricultural support, and places restrictions on the levels of trade-distorting domestic support for agriculture (also referred to as 'Amber Box' measures) covering subsidies related to production levels or prices.<sup>7</sup> Future trade deals – including any with the EU – also may include agreements around the levels of support given to agriculture.

However, these constraints alone are unlikely to be sufficient in preventing certain market distortion within the UK. For example, current WTO rules would not prevent the Scottish government from substantially subsidising beef farmers, even if the UK government chose not to do so in England, which would give an advantage to Scottish beef farmers trading within the UK.

Preventing this kind of market distorting divergence will require a new policy framework to be agreed between the four nations. Either through the funding

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settlement or a separate agreement, the four nations should agree how subsidies should be constrained.

**Administrations should be free to pursue different policy objectives – but there needs to be a common understanding of what is an unacceptable market distortion**

As we have already said, agreeing a clear definition of the key principles signed up to in October will be critical to talks on new UK-wide agreements. That is particularly true for agricultural support funding, where an important first step will be reaching consensus on what the UK 'internal market' is, and where divergence becomes market distortion. Just as the EU's single market contains provisions to ensure a 'level playing field', the UK Government and the devolved administrations will need to consider what a UK level playing field should look like.

Any agreement on agricultural subsidies should also align with other policy objectives. The UK Government has published a 25-year environment plan, with clear policy objectives for financing agriculture after Brexit, focusing on 'public money for public goods' through a new environmental land management system.<sup>8</sup>

But there are limits on how prescriptive a UK-wide framework should be. The agreement will need to honour the commitment made in October, which assured the devolved administrations that any new frameworks would maintain 'equivalent flexibility'. Any future funding agreement will need to at least allow the devolved governments the same scope 'for tailoring policies to the specific needs of each territory as is afforded by current EU rules'.<sup>9</sup>

### **The way forward**

**The governments face a political choice in how to divide agricultural funding between the four nations after Brexit.** It can either be added to the block grant and **managed through the Barnett formula**, or they could **establish a new ring-fenced budget** with an alternative approach to future changes (such as a 'needs-based' allocation). Each option comes with different advantages to businesses, the devolved administrations and the UK government.

Aside from this, **the four governments will need to agree a new funding framework** to ensure agricultural subsidies are consistent with the constraints of international obligations (including potential provisions in a UK–EU trade deal) and avoid undermining the UK internal market. This should be done based on a shared definition of market distortion.

An agricultural **agreement should respect the commitment made in October to preserve the devolved administrations' current levels of flexibility.**

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## 3. Co-ordinating UK-wide input into international negotiations

### Challenge Three

**Once outside the EU, the UK can negotiate new international agreements. But from trade agreements to multilateral environmental agreements, these will affect areas within devolved competence. The UK Government will need to consider how to take into account the priorities of the devolved administrations and give them a voice in negotiations.**

The management of 'international relations' is a reserved competence of the UK government.<sup>1</sup> For agriculture, environment and fisheries issues, the UK government represents the UK position at the EU and other international forums, feeding into the EU's approach to multilateral diplomacy and trade policy.

After Brexit, the UK will be outside the formal EU structures and will be able to form new international agreements independently. This could have a large impact across these devolved policy areas, for example:

- the UK will now be an independent actor in multilateral environment agreements
- the UK will have to manage international negotiations on fisheries quotas
- agriculture will be a key element of many of the UK's future trade deals with third countries.

In the white paper *Preparing for our future UK trade policy*, the UK Government committed 'to [seeking] the input of the devolved administrations to ensure they influence the UK's future trade policy'.<sup>2</sup> But it has given no information about how this will work in practice.

### **There is already a system that allows devolved administrations to feed into the UK's position at the EU**

A mechanism already exists for four-nation consultation on EU policy decisions. The Joint Ministerial Committee on Europe (JMC (E)) is the primary means for the devolved administrations to influence the UK position in Europe. It meets ahead of European Councils to 'consider the UK's early influencing priorities based on a list provided by the Foreign Secretary and following publication of the European Commission's annual Work Programme'.<sup>3</sup>

This forum is supplemented by more informal relationships. In particular, the connections between UK Representation to the EU and the devolved administrations' offices in Brussels.

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In 2015 the Institute for Government found that the JMC structure lacked a clear process and led to a tendency to 'political grandstanding'.<sup>4</sup> However, the JMC (E) has met most often out of all the JMC sub-committees, maintaining a regular pattern of meeting before each EU Council Meeting for most of the post-1999 period, and seeking to operate by consensus wherever possible.<sup>5</sup>

While it has not prevented devolved frustrations about their limited influence over decision making in Brussels, the JMC (E) is, overall, more effective than other parts of the intergovernmental machinery.

### **A new forum for the four governments to meet and discuss international obligations should be established**

The JMC (E) should be replaced by a forum where the devolved administrations can contribute to the formulation of future UK trade policy. A new committee should give them an opportunity to influence trade mandates and the UK's negotiating position on future international agreements.

The Institute for Government has previously recommended that that a JMC on international trade would improve engagement on negotiations and the implementation of new agreements, minimising the chances of a political stand-off within the UK at the same time as third-party negotiations.<sup>6</sup>

### **// New sub-committees for other policy areas would also enable the discussion of more targeted international obligations**

New sub-committees for other policy areas would also enable the discussion of more targeted international obligations and negotiations (as well as facilitate domestic co-ordination). For example, sub-committees on agriculture and fish would provide a space for the UK government to consult the devolved administrations ahead of specific negotiations which would impact these policy areas. A separate JMC on the environment would

also enable the four nations to agree on the UK's position ahead of international environment conventions, for example co-ordinating a UK position on the post-2020 biodiversity framework.

Any new sub-committees should be underpinned by official-level forums, where discussion of detailed policy issues can take place.

### **New sub-committees will not be sufficient where the devolved administrations want more than just consultation**

In both Canada and Australia, federal systems with a formal division of sovereignty between tiers of government, the governments have taken steps to establish a clear opportunity for their provincial and state governments to be involved in international negotiations.

During the negotiations on the Australia–United States Free Trade Agreement, state government representatives were present for discussions on public procurement because it would mean a significant change to the states' current practice. Although

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representatives did not formally negotiate, they could be consulted to ensure they would be able to comply with new practice.

For similar reasons – the need for reforms at the provincial level (including on procurement) – the provinces were more directly involved in negotiations on the Comprehensive Economic and Trade Agreement between Canada and the EU than they had been previously.<sup>7</sup>

In evidence to the House of Lords EU Energy and Environment Sub-Committee, Fergus Ewing MSP, Cabinet Secretary for the Rural Economy and Connectivity, suggested that the Scottish Government would seek greater involvement than in the Canadian and Australian cases. He stated that the Scottish Government 'will rightly demand and expect that we have the lead negotiating role for issues in which Scotland has the majority interest'.<sup>8</sup> This would apply principally to fisheries. Scotland landed 59% of the total value of the UK's fishing catch between 2011 and 2015.<sup>9</sup>

Formally authorising Scotland to act as lead negotiator for the UK on fisheries would be very unusual. An alternate approach would be to recognise Scotland as a separate 'coastal state', and allow them to negotiate their own international treaties on fisheries – as the Faroe Islands are permitted to, while remaining part of the Kingdom of Denmark.<sup>10</sup> But doing this would dramatically reduce the UK's influence in fisheries negotiations, and is unlikely to be acceptable to UK ministers. It is also not obvious that the Faroe precedent is directly relevant, since the Faroe Islands are geographically distant from Denmark and therefore have entirely separate fish stocks.

### **The way forward**

The devolved administrations' voice in international negotiations after Brexit is likely to be a key concern for them.

To ensure the devolved administrations can feed into the UK's negotiating position for future trade agreements, **the four governments should establish a new JMC sub-committee on international trade.**

They should also look at other policy areas – for example agriculture, fisheries and the environment – where **dedicated sub-committees would facilitate policy co-ordination and targeted consultation.**

In some areas, such as fisheries, the devolved administrations may want more influence in negotiations. **The UK should look at international precedents** to understand how to involve devolved administrations effectively in negotiations.





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## 4. Updating intergovernmental agreements in the future

### Challenge Four

**UK-wide agreements will need to adapt over time, either as a result of changes in government and policy, or as the UK enters new international agreements. The four governments must decide how this will happen and make provisions in new agreements.**

Scotland and Wales are due to hold their next elections in 2021, while the UK general election and the Northern Ireland Assembly election are currently scheduled for 2022. As new governments are formed in London, Edinburgh, Cardiff and Belfast, new political priorities will need to be managed.

Intergovernmental agreements will need to adapt in response. The agreements reached now will need to include a clear process for how the devolved governments and the UK government can discuss and revise provisions for co-operation or, where necessary, policy objectives.

There are different ways to manage this. An agreement could have a fixed timetable, annual or multi-annual, for when the four governments will carry out a formal review process – as the EU does with CAP. Alternatively, a less structured approach could see agreements containing provisions for review, which could be triggered by one or more of the nations.

### **Agreements with a fixed timeframe provide certainty, but will give less flexibility to new governments**

For a number of policy areas, EU membership has meant that changes occur at regular, planned intervals. Fishing quotas are negotiated annually; while the EU's Multiannual Financial Framework, lasting seven years, offers an opportunity for the European Commission and European Parliament to implement, reflect on and then revise a broad number of policy areas. The EU's CAP is reformed every seven years through this cycle.

During the latest reform cycle, the European Commission launched a consultation with civil society in 2010; held political debates with the Council of Ministers and the European Parliament; then presented legislative proposals in 2011.<sup>1</sup> The CAP reform cycle provides farmers with certainty and stability, allowing them to adjust their investment plans with confidence around funding and policy priorities. It also gives a specific opportunity for member states and external stakeholders to feed into and influence policy changes.

But set timelines could restrict new governments in delivering on manifesto commitments. While structure and process suits industry, it could have consequences

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for the flexibility of the governments across the four nations. The political preference may be for a more ad hoc approach.

### **Current non-legislative agreements develop on an ad hoc basis, limiting the opportunity for review**

An alternative, less formal approach would allow the four nations to update agreements as and when the need arises.

This approach has been used for the 2012 Fisheries Concordat, which was revised at the end of 2016 by the four governments in the UK. The update was intended to clarify the division of responsibilities between the four nations over vessel licensing, as well as their respective powers on allocating quotas. Officials from across the four nations worked through the changes, bringing in ministers where necessary. But the ad hoc nature of the change process meant there was an inconsistent approach to the

**After Brexit, the four nations should consider a more consistent approach to reviewing and updating agreements**

discussions across the four nations. The Welsh, Northern Irish and UK governments chose to publish the revised concordat for consultation, while the Scottish Government did not.<sup>2</sup> The revised concordat has still not been adopted.

After Brexit, even if timelines for updates or amendments remain variable, the four nations should consider a more consistent approach to reviewing and updating them. With a high

volume of non-legislative agreements expected, it is important the four nations set clear parameters, such as how to trigger a review of content, the process of wider consultation and how to reach future agreements, particularly if there are disagreements.

### **External circumstances will drive policy change, which may need to be reflected in certain agreements**

The other key driver for changes to agreements will be external. The UK is a signatory to a number of multilateral environmental agreements, both as a current member of the EU and in its own right. A report from the Institute for European Environmental Policy argues that although these multilateral agreements will not restrict policy development across all environmental and agricultural policy areas, certain policies will be influenced by commitments the UK has already made and will make going forward. For example, the United Nations Economic Commission for Europe's Convention on Long-Range Transboundary Air Pollution places specific requirements for emission reductions in the UK, which the UK government and the devolved administrations will have to honour.<sup>3</sup>

Although the UK will have left, future EU decisions will mean changes to four-nation agreements. If the deal reached between the UK and the EU includes a promise to match rules or standards, the UK will need to respond to changes made in Brussels. The EU is likely to press for this kind of arrangement when it comes to 'level playing field' provisions, which includes areas such as environmental standards, where divergence could lead to a competitive advantage.<sup>4</sup>

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Similarly, future UK trade deals could affect agreements between the devolved administrations and the UK government. If the UK's independent trade policy means it strikes deals that touch on areas such as fertiliser regulation or the marketing of genetically modified organism (GMO) products, for example, both of which are possible through a UK–US trade arrangement, it could have implications for devolved policy areas.

The UK Government and the devolved administrations will need to agree at the outset how changing international obligations will be reflected in their agreements. Where changes are a result of new international agreements, signed by the UK, there should be agreement about what role the devolved administrations will play.

### **Revised JMC architecture and a consistent approach to research can help in updating policy areas**

New JMC architecture supporting international negotiations, as discussed in Challenge Three, could help smooth the process of updating agreements. Involving the devolved administrations at an early stage in international agreements would give them an opportunity to influence decisions affecting their areas of competence.

The updating of agreements could also be more effective if the four nations agree to share data and use a common evidence base. We address this in Challenge Five.

#### **The way forward**

The **UK Government and the devolved administrations should ensure that new agreements on co-operation include provisions on how they can be updated.**

The process is a political choice for the four nations.

A fixed timeframe for updates would give certainty to business, but would be less flexible as government priorities change. On the other hand, informal mechanisms for review would give that flexibility, but could be difficult to manage in practice if all four governments do not agree that a change is necessary.

Some agreements will need to respond to changes in international obligations, either through new trade deals or new multilateral environmental agreements.

**New JMC architecture would support the updating process in providing a space for the devolved administrations to influence the UK's international negotiating position, as well as to discuss varying policy priorities.**



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# 5. Establishing new regulators and public bodies across the UK

## Challenge Five

**The UK may choose to leave – or may be unable to negotiate access to – European agencies. The four governments will need to agree how to replace these functions and where four-nation bodies may be most appropriate.**

Leaving the EU could mean leaving certain European institutions. For UK domestic policy, particularly environment and agriculture, EU organisations have played an important role in the development and implementation of law and policy.

For example, the European Chemicals Agency 'helps companies to comply with the [EU's chemicals] legislation, advances the safe use of chemicals, provides information on chemicals and addresses chemicals of concern'.<sup>1</sup> Other bodies, such as the European Environment Agency or the European Food Safety Authority, provide independent advice to support policymaking.

### **The UK has said it will try and negotiate continued access to some European bodies**

In her Mansion House speech, Theresa May said that the UK wanted "to explore with the EU, the terms on which the UK could remain part of EU agencies", giving the European Chemicals Agency as one of four examples.<sup>2</sup>

These bodies can be important mechanisms for influencing EU rules, and in certain cases help set policy direction at a global level. For example, the European Chemicals Agency worked with the Organisation for Economic Co-operation and Development (OECD) to develop software to manage the data on hazardous properties of chemical substances. The OECD Secretariat, the US Environment Protection Agency and the Japanese Ministry of Economy, Trade and Industry, all use this system.<sup>3</sup>

Both the Confederation of British Industry (CBI) and the UK Environmental Law Association have also advocated continued membership of a number of these EU agencies, including the European Food Safety Authority and the European Chemicals Agency.<sup>4</sup> This is particularly due to the continued relevance of these bodies for businesses exporting to the EU.

There is precedent for external involvement in some of these bodies. EEA-EFTA (European Economic Area-European Free Trade Association – Norway, Iceland and Liechtenstein) states are given access, often through observer status, while others allow EU candidate countries the same rights. The UK could try and negotiate a similar level of access.

However the EU's guidelines for negotiations with the UK over its future relationship with the EU have ruled out UK participation in EU institutions, agencies or bodies.<sup>5</sup> This is the first step in the negotiation, but whatever their outcome the UK is still likely to


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need some new bodies to perform functions currently undertaken by EU agencies. These bodies could be UK-wide, or devolved to each of the nations.


**Where new bodies are required, establishing them with a UK-wide remit should help to minimise costs to both governments and businesses who operate across the four nations**

Creating new bodies at a UK level is a more efficient use of expertise and it minimises unnecessary costs. In policy areas where UK-wide legislation is expected, such as chemicals regulation, it makes little sense to establish four independent bodies to carry out the same task.

It also ensures consistency. Where the four nations have the same objectives, whether or not agreed in legislation, it makes sense for them to be implemented in a similar way,

 **Creating new bodies at a UK level is a more efficient use of expertise and it minimises unnecessary costs**

sharing best practice and expertise. Not only does this consistent application of standards benefit government and policymakers, it also benefits industry.

 A common approach to implementation, with a single agency responsible, would save businesses time as well as money.

For companies that operate over national boundaries, having a single point of authorisation and avoiding duplicate forms or payments makes a significant difference.

**But a 'four-nation' body requires a genuinely 'four-nation' approach**

While there are clear benefits to creating UK-wide bodies in theory, the devolved governments are likely to question whether, in practice, what will result is Whitehall-run organisations that are primarily focused on England, and over which they have little influence.

To address these concerns, there are a number of important steps the four governments can take. First, any UK-wide body could have offices in all four nations, allowing it to respond to local concerns where necessary. The Health and Safety Executive, which operates across Great Britain, has offices in England, Scotland and Wales.

Second, there should be nominated representatives from all four governments on the board to encourage genuine joint ownership. There should also be joint staffing and funding.

Some of the most likely candidates for new UK-wide agencies in these policy areas are the implementation of chemicals regulation, and animal and plant health standards. There are already public bodies responsible for the UK implementation of EU regulation of these areas – the Health and Safety Executive, and the Animal and Plant Health Agency both operate across Great Britain – therefore their capacity could be increased, or new UK-wide public bodies established.

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## Where potential policy divergence rules out a single body, co-operation around information is still a valuable policy development tool

A four-nation body is unlikely to be necessary in all scenarios, for example in areas where there is no legislative common framework setting binding regulations across the UK and divergence is significant. Each government may prefer to establish their own implementing bodies to implement their own policy priorities – although they should still consider whether there are benefits in a multi-jurisdictional body.

Even where separate bodies are in place across the four nations, some degree of co-operation should exist. A consistent approach to the data and research underpinning policy formation and implementation is particularly important.

A 2015 Institute for Government report argued that joint research infrastructure and a consistent approach to collecting and publishing performance data can facilitate evidence exchange across the UK and lead to better policy development.<sup>6</sup> One low-profile example of where this already occurs is through the Joint Nature Conservation Committee (JNCC), which works with nature conservation bodies across the four nations. One of its purposes is to 'create common standards throughout the UK for nature conservation, including monitoring, research, and the analysis of results'.<sup>7</sup> This means that, although the four nature conservation bodies deliver separate policy objectives, there is a forum for information sharing and joint research. While the JNCC is seen as a positive example of this shared infrastructure, in practice its impact has been modest.

Nonetheless, a shared research body or consistent approach to data and analysis should be considered, particularly in relation to environmental protection. The four governments might decide to give additional resource to the JNCC to achieve this, or consider establishing a new four-nation research body to cover a broader range of environmental policy areas. Such an approach could support policy experimentation on a basis that allows lessons to be shared easily between the four nations. It would also facilitate reporting on UK international obligations and commitments.

### The way forward

The UK Government and the devolved administrations should consider creating UK-wide public bodies in areas where gaps appear after the UK leaves the EU.

**UK-wide bodies present an opportunity to invest in expertise, would be more cost efficient, and would reduce compliance costs for businesses.**

When doing this, **the UK Government should engage with the devolved administrations from the start of the process** to ensure that four-nation bodies are co-designed and run.

Even where functions are exercised by separate bodies, the four governments should look for opportunities to co-operate. For instance, a shared research body or a common approach to data analysis would encourage lesson learning and improve policymaking.





# 6. Ensuring the governments comply with their commitments

## Challenge Six

**When the UK leaves the EU, it will leave the jurisdiction of the European Court of Justice (ECJ), which ensures member states are compliant with EU law. There is widespread concern that this will result in a 'governance gap' in environmental policy, which the four governments will need to address after Brexit.**

As a member state, the UK's implementation of EU rules is monitored by the European Commission and enforced by the ECJ. When a member state government fails to comply with EU rules, they can be referred to the court and – when ECJ judgments are not complied with – fined.

Institute for Government analysis found that the UK government has been a relatively compliant member state. But on the occasions where they have found themselves in front of the ECJ, it has most frequently been as a result of an infringement relating to the environment. Nearly half of the ECJ judgments (46%) handed down to the UK between 2003 and 2016 related to the environment.<sup>1</sup>

Leaving the jurisdiction of the ECJ is a major concern for environmental non-governmental organisations (NGOs) in the UK, who fear a 'governance gap' after Brexit.<sup>2</sup> Without the court, NGOs fear it will become much harder to hold government to account. The ECJ offers NGOs and private citizens an important route to raise concerns of which there is no real equivalent domestically. For example, ClientEarth brought three cases against the UK Government in the last three years over the high levels of air pollution in the UK: the UK Government lost in all three cases.<sup>3</sup> The fear of court rulings and fines is also seen as a positive influence on government policy.<sup>4</sup>

Michael Gove, Secretary of State for Environment, Food and Rural Affairs, has offered some assurance, with the commitment to creating a new independent environmental watchdog.<sup>5</sup> This is welcome, although there are still questions about whether the new institution will be able to provide the same access to justice for private citizens as the ECJ currently does, as well as concerns that it will not have the 'teeth' to ensure compliance.

**[an environmental watchdog] would be more effective with a four-nation remit**

For the purposes of this report, the important issue is the jurisdiction of a new body. Michael Gove has suggested that it will have an England-only remit.<sup>6</sup> Here we explore how such a body would be more effective with a four-nation remit.

### **A four-nation environmental watchdog would be more robust**

In the UK Government's 25-year environment plan it committed to establishing 'an independent, statutory body, to hold Government to account for upholding

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environmental standards'.<sup>7</sup> The body would be able to oversee long-term objectives and reassure the EU of the UK's approach to environmental standards.

But just as governments can create new oversight bodies, they can abolish them too. Of the three environmental oversight bodies that existed in 2010, only the Committee on Climate Change survived the subsequent 'bonfire of the quangos': the Sustainable Development Commission and Royal Commission on Environmental Pollution were both abolished in 2011.<sup>8</sup> Government can also change objectives, as they did when they removed the child poverty targets in the Welfare Reform and Work Act 2016.<sup>9</sup>

Creating a UK-wide watchdog, established in legislation, scrutinised and passed by all four parliaments, and jointly owned by all four governments, would make it harder for the UK government to abolish or weaken it in the future. Standards could not easily be undercut, and the institution would speak with greater authority.

In evidence to the House of Lords Natural Environment and Rural Communities Act 2006 committee, David Baldock from the Institute for European Environmental Policy suggested that the Committee on Climate Change (CCC) was an important precedent to consider.<sup>10</sup> The CCC conducts independent analysis to advise the four governments of the UK on emissions targets, reporting on progress to Parliament and the devolved administrations.<sup>11</sup> Like the JNCC, the CCC demonstrates how one body can consolidate technical expertise and provide independent advice.

However, a four-nation watchdog will work best if it is the product of a four-nation approach, rather than designed in the centre with the option for the devolved administrations to join and use the body if they wish. The watchdog will only be effective over four nations if there is a shared sense of ownership, which requires genuine co-design.

### **Any 'four-nation' watchdog should report to all four parliaments**

Like the CCC, a new environmental watchdog should report to Westminster and the devolved legislatures. It therefore could address any variation in policy objectives across the four nations, as the CCC currently is able to do. It could also take into account the different requirements of each nation's current environmental legislation and the different approaches they are pursuing to achieve their objectives. It will mean building relationships with the public bodies charged with environmental responsibilities in each jurisdiction. For example, the Environment (Wales) Act 2016 requires Natural Resources Wales to publish reports on its assessment of natural resources in Wales.<sup>12</sup> A new watchdog should be able to work with the different relevant public bodies in the four nations.

The parliamentary reporting line would also give the body a degree of independence from the four governments.

The National Audit Office (NAO) – which is an independent body established to scrutinise government funding – shows how to go one step further than the CCC. Rather than being funded by government, the NAO is funded by Parliament. It also specifically reports to the Public Accounts Committee (PAC) at Westminster, which can then hold the government to account over its spending decisions.<sup>13</sup> If the UK

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government and the devolved administrations want to create a more robust watchdog, this model is worth considering. The four legislatures could co-fund a new UK-wide environmental watchdog, oversee appointments, and it could report to committees in all four legislatures, or to committees working together across the four nations, as discussed in more detail in Challenge Seven.

If given adequate staff support, this body might be a step towards raising the status and impact of the Environmental Audit Committee in Westminster – intended, when established, to be a PAC for the environment, but yet to achieve that level of clout.

**The four governments should also consider whether there are adequate mechanisms to ensure compliance with commitments each government makes**

On 26 February 2018, David Lidington, Minister for the Cabinet Office and responsible for working with the devolved administrations on Brexit, said that “the devolved governments are best placed to manage the safety and quality of the water they drink, as well as looking after and caring for their natural environment”.<sup>14</sup> In areas such as this, where there is no formal agreement between the governments, a four-nation environmental watchdog would report to each legislature on its respective government’s actions.

However, international obligations may mean that the four governments will have to collectively commit to achieving certain environmental objectives. If one of the four governments fails to meet this commitment, there is currently no domestic means for the other three governments to challenge its compliance. The JMC machinery only contains provisions for a political dispute resolution mechanism where the devolved administrations can challenge a decision of the UK government.

The four governments should consider how governmental compliance should be achieved after Brexit, particularly in circumstances where the UK government – acting for England – fails to live up to its side of the bargain.

**The way forward**

As part of Defra’s planned consultation on the new environmental watchdog, it should engage with the devolved administrations on the potential for such a body having a four-nation remit.

**A four-nation watchdog would be more robust in its monitoring of government** as it would be less prone to abolition. It could report to all the devolved legislatures, to reflect different policy objectives.

**Parliamentary funding would also provide greater guarantee against abolition –** but unless this was co-funded by the four legislatures, it could make operation on a four-nation basis more difficult.

Defra’s consultation must also consider how compliance with intergovernmental commitments should be guaranteed after Brexit, looking at areas such as dispute resolution.



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# 7. Ensuring the four legislatures hold the governments to account for agreements between countries

## Challenge Seven

**The current opportunity for parliamentary scrutiny of non-legislative agreements between the four governments is limited. The four governments need to involve the four legislatures in the scrutiny of new frameworks in areas of co-operation.**

The UK Parliament, the Scottish Parliament, the National Assembly of Wales and the Northern Ireland Assembly have established processes for scrutinising new pieces of legislation when they are introduced. There is also a clear process for the devolved legislatures to give consent to legislation passed at Westminster which covers areas of devolved competence.<sup>1</sup>

However, there is currently no formal process for the involvement of the four parliaments in intergovernmental agreements. Research into 'intergovernmental relations' (IGR) shows that as more policy decisions are taken jointly between different levels of government, ensuring transparency and accountability is more difficult, therefore decision making becomes more opaque.<sup>2</sup>

### **There is currently limited involvement of the legislatures in intergovernmental agreements**

Co-operation on some of these policy areas will require non-legislative agreements, however, as things currently stand, there will be limited opportunities for scrutiny.

The best example of involvement of a legislature in IGR is the Written Agreement between the Scottish Government and Scottish Parliament, established in response to a recommendation from the Smith Commission in 2014.<sup>3</sup> This requires the government to provide written notice in advance of scheduled intergovernmental meetings to the relevant parliamentary committee, and provide a written summary of the issues discussed after it takes place.<sup>4</sup>

However, even in this case, the written summaries lack detail and there is limited opportunity for the devolved legislatures to directly influence the outcome of intergovernmental negotiations.

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**When decisions are made through bilateral and multilateral negotiations, the four governments should be accountable to their respective legislatures**

It is still unclear exactly what non-legislative agreements on these policy areas will look like. Many of them are likely to codify methods for co-operation around technical issues, rather than reflect substantial policy decisions.

The anticipated increase in the number of informal agreements between the UK government and the devolved administrations means that the four governments should think seriously about how to involve their legislatures more formally in these mechanisms. Many other countries with multi-level or federal systems have better provisions than those in the UK.<sup>5</sup>

In Germany, agreements between the federal states are put before the respective parliaments for scrutiny before they can be signed. The parliaments then have four weeks to scrutinise the deals before delivering 'an opinion' or requesting additional time. While these opinions are not all legally binding, in areas of exclusive competence, the governments are strongly obliged to consider them.

The UK could look to international examples like Germany where there is a high level of transparency, to improve parliamentary accountability. At a minimum, there could be a commitment to complete an annual report on co-operation between the UK and devolved governments to the respective legislatures, which could be incorporated into an improved JMC reporting mechanism.

**Stronger interparliamentary relationships would help support the operation of new agreements for co-operation**

Scrutiny can also be encouraged through stronger 'interparliamentary' relationships. A Public Administration and Constitutional Affairs Committee (PACAC) report called it the 'poorer and less well-developed relative of IGR'.<sup>6</sup>

Since the UK voted to leave the EU, there has been one new case of co-operation which could prove to be a useful model. The Interparliamentary Forum on Brexit was established in October 2017 to 'support more effective scrutiny of the

 **Scrutiny can be encouraged through stronger 'interparliamentary' relationships**

Government's handling of Brexit'. It is comprised of the chairs of the committees scrutinising Brexit-related issues in the House of Commons, House of Lords, Scottish Parliament, Welsh Assembly and – when power-sharing institutions are restored – the Northern Ireland Assembly.<sup>7</sup>

This is a positive step in recognising the value of information-sharing between parliaments, as well as co-ordinating scrutiny more effectively. This model could be used to convene scrutiny committees for policy areas covered by commitments to joint working as a way to co-ordinate – and share experiences – across the UK.

Furthermore, there is currently provision for the Welsh Affairs Committee in the Commons to hold joint evidence sessions with committees from the Welsh Assembly. As PACAC recommended in 2016, extending this provision to enable all committees

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of the House of Commons to hold joint evidence sessions with any committees of the three devolved legislatures would be an important step.<sup>8</sup>

### **The way forward**

**The four governments should involve their respective legislatures in the scrutiny of non-legislative agreements.** The four legislatures should be clearly involved in the discussions around what each framework should look like, as well as once the agreements are operational. For example, there could be commitment to improving the current JMC reporting mechanism or completing an annual report on co-operation.

**The four legislatures should work together to improve interparliamentary relations.** This would support the scrutiny of new agreements in these policy areas, for example through interparliamentary forums and joint evidence sessions.





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## 8. Ensuring post-Brexit policy is informed by external stakeholders

### Challenge Eight

**After the UK leaves the EU, stakeholders will lose important mechanisms for influence and engagement. If decisions are to be taken at a UK-wide level, new provisions for engaging stakeholders will be required.**

The environment, agriculture and fisheries have many concerned stakeholders, both in the NGO community and from key industries. When the UK leaves the EU, these organisations' current opportunities for engagement on policy development at the EU will disappear.

The EU has established institutional provisions for engaging with civil society. After Brexit, civil society will lose this infrastructure for influencing policy at an EU level.

The approach to four-nation Brexit discussions so far – behind closed doors with little information on details – sets a bad precedent for the future. Businesses and NGOs have had little say on how these policy areas should be managed across the UK after Brexit.

### **When the UK leaves the EU, civil society will lose a space where they currently influence and challenge policy decisions**

The EU currently sets policy objectives across the environment, agriculture and fisheries for member states. NGOs, businesses and industry look to feed into – and influence – policy development at this level: the environment is one of the most common themes of interests for lobbyists in Brussels.<sup>1</sup>

A clear institutional opportunity for this is the European Economic and Social Committee (EESC), which brings together representatives from economic and social interest groups in Europe to give 'opinions' on policy issues. It has 350 members nominated by national governments representing three groups: employers, workers and 'various interests'. Within the EESC are a number of sections – for example the Agriculture, Rural Development and Environment (NAT) section – which give 'opinions' on more specific policy areas, for example the revision of CAP in 2016.<sup>2</sup>

However, transparency has also been an issue in Brussels: the European Commission has now mandated a 'transparency register' to help manage lobbying efforts.<sup>3</sup>

### **Leaving the EU gives an opportunity to develop new mechanisms for engagement with stakeholders**

As the UK and the devolved administrations consider how to create new policies in these areas, there are opportunities to develop better strategies for engaging with civil society at a national and UK-wide level. Trade-related issues are a key example of where a new dialogue in the UK will be required.

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Outside formal EU structures, the UK will need to come up with a new approach for engaging key groups such as the fishing and agricultural industries, as well as relevant NGOs. The UK could look to formalise the engagement that already takes place, using best practice internationally, to come up with UK-wide mechanisms for engagement. For example, the Norwegian government engages with stakeholders on fisheries policy through the Advisory Meeting for Fisheries Regulations, which represents different stakeholders, such as trade unions, fishermen's organisations and environmental organisations.<sup>4</sup>

Another good example is the European IPPC (Integrated Pollution Prevention and Control) Bureau (the Seville Process).<sup>5</sup> This EU agency is a forum for member states and industries to work together to set standards for industrial processes designed to prevent or reduce emissions and environmental impacts.

### **The lack of transparency in current intergovernmental machinery is another barrier for external engagement**

The lack of transparency around current IGR is not just a problem for the legislatures of the UK, as we mentioned in Challenge Seven, but is also a problem for NGOs and business. Their views and expertise should be taken into account during the process of taking policy decisions affecting the environment, agriculture or fisheries after Brexit.

### **// The four nations should commit to opening up decision making**



At present, the negotiations between the UK and the devolved administrations over common frameworks are taking place in private. It means it has been unclear to external stakeholders how different principles such as

'the UK internal market' are being interpreted in different sectors, and to what extent the UK Government expects trade negotiations to impinge upon environmental and agricultural policy.

In this context, it is very difficult for concerned organisations to make a meaningful contribution to the debate about these important matters, raising the risk that private agreements are made between governments based on political bargaining rather than a comprehensive and balanced understanding of the sectors in question. The four nations should commit to opening up decision making, allowing industry and civil society greater access to, and influence on, the policymaking process.

### **The way forward**

There is an opportunity for **the UK Government and the devolved administrations to involve external stakeholders as they design new policies in these areas after Brexit.**

But currently, intergovernmental agreements often lack transparency. **The four nations should open the JMC process and offer civil society and industry an opportunity to meaningfully engage.**

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# An opportunity to rebuild the relationship between the UK and the devolved nations

In this paper we have set out eight key challenges facing the UK Government and the devolved administrations as they manage agriculture, the environment and fisheries after Brexit.

Addressing these challenges is a careful balancing act. On the one hand, the UK Government has committed to an increase in the decision-making powers of the devolved administrations. On the other, it needs to be able to provide certainty to businesses operating across the UK and to third countries with whom the UK will be looking to strike new trade deals.

Getting the balance right will require a step change in the quality and quantity of four-nation engagement. Brexit should provoke a reset of their relationship, encouraging greater collaboration on key policy areas and facilitating better policymaking across the UK. In this respect, Brexit offers a major opportunity.

## **Agreeing and operating 'common frameworks' will require trust and active co-operation between the four governments of the UK**

Over the last 18 months, Brexit negotiations and the accompanying legislative process have seriously undermined an already fragile relationship between the devolved administrations and Westminster. The current approach will need to change if the four nations are going to co-operate on key policy areas after Brexit.

Any new UK-wide legislation will have to be developed in partnership between the UK and devolved governments, and then passed with legislative consent. The ongoing operation and occasional renegotiation of these laws will place a premium on effective intergovernmental relations.

 **The current approach will need to change if the four nations are going to co-operate on key policy areas after Brexit** 

Some aspects of environmental policy will be managed through non-legislative agreements. Without a statutory underpinning, their success will depend even more heavily on ongoing co-operation between governments.

The current system of intergovernmental machinery was designed for a very different set of circumstances. EU rules prevented significant divergence, while giving the devolved nations some flexibility over how to implement policy objectives. EU law also ensured cross-border co-operation between different tiers of government where necessary, for example in most aspects of environmental policy. In short, there was little need for extensive governance machinery for joint working between central and devolved government in the UK. After Brexit, this current set of machinery will not be sufficient.

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## **This will require an overhaul of governance arrangements, with an urgent review of the JMC machinery**

The heart of intergovernmental machinery is the Joint Ministerial Committee (JMC) system. The terms of reference for the JMC are set out in the Memorandum of Understanding on devolution, last amended in 2013.<sup>1</sup> In 2014, the UK and devolved governments agreed 'to commission work on a revised Memorandum of Understanding', following recommendations made by the Smith Commission established after the Scottish independence referendum.<sup>2</sup> However, this work never came to fruition due to lack of agreement about how to revamp the system.

On 14 March 2018, the Prime Minister and the First Ministers of Scotland and Wales agreed that officials should review existing intergovernmental structures 'to ensure they are fit for purpose in light of the UK's exit from the EU'.<sup>3</sup> This is an important step. But there needs to be an additional commitment from the governments to work together on implementing recommendations to avoid this being another missed opportunity. This review should consider not only new sub-committees in trade, environment, agriculture and fisheries, as highlighted earlier in this report, but the terms of reference upon which all JMC meetings take place.

To start, there should be a greater commitment to joint decision making. At the moment, the JMC is only a 'consultative body' – agreements do not bind the participating administrations. In principle this gives freedom to all four governments to determine their own policies in light of discussions at the JMC, but in practice the Welsh Government has characterised it as a 'talking shop'.<sup>4</sup> The increase in the number of policy areas where more detailed joint working will be needed means the committees must take on a more decisive role.

A fixed timetable for meetings should be set, with a process for agreeing agendas. At the moment, meetings are called at the behest of Westminster and agendas are set from London. The JMC Plenary – a meeting of the leaders of the four governments – should meet annually; a recommendation made previously by the Institute for Government.<sup>5</sup> This would be made easier with a properly resourced joint secretariat, separate from the four governments. It should be sufficiently staffed to support the four governments in decision making over the operation and future of these agreements.

A new set of guiding principles for intergovernmental relations should be agreed upon and published as part of a revised Memorandum of Understanding. These should include commitments to transparency, accountability and to co-operate in a spirit of trust and in the interests of the UK as a whole.

Provisions must also be made for settling disputes. As we have seen with the 2012 fisheries concordat, the existing JMC dispute resolution and avoidance protocol is not effective. The process is rarely used and is not considered robust enough, particularly considering the potential issues around compliance. The Welsh Government has already made calls for a new system for resolving issues.<sup>6</sup>

Finally, a review of intergovernmental machinery should also consider whether the JMC – or alternative intergovernmental mechanism – should be placed on a statutory

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footing. Although such a move has previously been resisted, it would show a significant commitment to the principle of devolution. Legislation could contain commitments to information-sharing between the governments and enforceable rights for devolved ministers to be involved in certain decision-making processes.<sup>7</sup> Legislation could also require greater openness, for instance with legal requirements for regular reports to the UK and devolved legislatures on JMC proceedings.

**Working in partnership rather than in opposition will enable better policymaking**

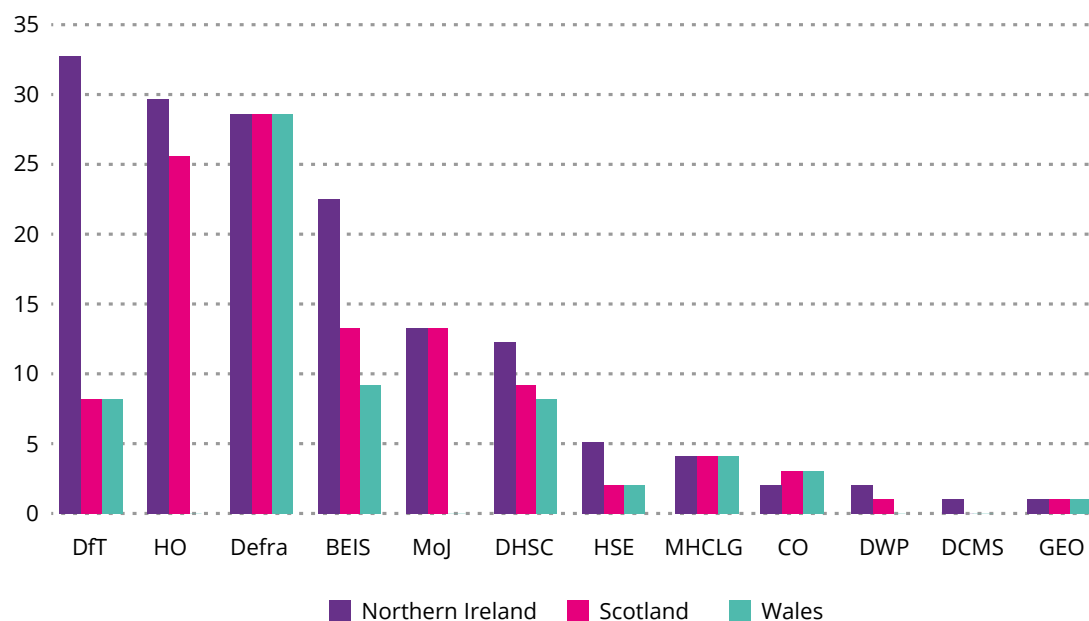
More robust intergovernmental machinery is an important part of ensuring co-operation will work well after the UK leaves the EU. In particular, this would facilitate a more positive working relationship between ministers from the four governments and provide an opportunity for better collaboration at the political level. It would also open the way for closer, more constructive relationships between officials.

As we have shown in this report, a collaborative approach to these policy areas should be reflected in the wider institutions which underpin them. Four-nation public bodies will be best placed to support UK-wide frameworks, and where policies may diverge, would still provide a shared resource and research base. They would also be more robust when jointly owned by the four nations. Joint working between the four legislatures will ensure effective scrutiny and oversight of the operation of these agreements.

Underpinning all of this is the need for a common understanding of the purpose of these agreements. The four governments should commit to work in partnership, prioritising practical policies, to navigate the challenges raised by Brexit.

# Appendix

**Figure 1: Policy areas where EU powers intersect with devolved competences**



Source: UK Government, 'Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland', 2018.

Note: BEIS, Department for Business, Energy and Industrial Strategy; CO, Cabinet Office; DCMS, Department for Culture, Media and Sport; Defra, Department for Environment, Food and Rural Affairs; DfT, Department for Transport; DHSC, Department for Health and Social Care; DWP, Department for Work and Pensions; HO, Home Office; HSE, Health and Safety Executive; GEO, Government Equalities Office; MHCLG, Ministry of Housing, Communities and Local Government; MoJ, Ministry of Justice.

**Table 1: UK Government analysis of environmental policy areas (including energy and climate) where EU and devolved powers intersect**

Common framework	Policy area	Lead department
<b>UK legislative</b>	Agriculture – GMO marketing and cultivation	Defra
	Agriculture – organic farming	Defra
	Agriculture – zootech	Defra
	Animal health and traceability	Defra
	Animal welfare	Defra
	Chemicals regulation (including pesticides)	Defra
	Environmental quality – chemicals	Defra
	Environmental quality – ozone depleting substances and F-gases	Defra
	Environmental quality – pesticides	Defra
	Environmental quality – waste packaging and product regulations	Defra
	Fisheries management and support	Defra

<b>Common framework</b>	<b>Policy area</b>	<b>Lead department</b>
<b>UK legislative (cont.)</b>	Food and feed safety and hygiene law, and the official controls that verify compliance with food and feed law	Defra
	Food compositional standards	Defra
	Food labelling	Defra
	Hazardous substances planning	MHCLG
	Implementation of EU Emissions Trading System	BEIS
	Plant health, seeds and propagating material	Defra
<b>UK non-legislative</b>	Environmental law concerning energy planning consents**	BEIS
	Environmental quality – air quality	Defra
	Environmental quality – biodiversity – access and benefit sharing of genetic resources (ABS)	Defra
	Environmental quality – marine environment	Defra
	Environment quality – natural environment and biodiversity	Defra
	Environmental quality – spatial data infrastructure standards	Defra
	Environmental quality – waste management	Defra
	Radioactive waste treatment and disposal	BEIS
	Strategic Environmental Assessment (SEA) Directive	MHCLG
	Agricultural support	Defra
	Agriculture – fertiliser regulations	Defra
	<b>No further action</b>	Carbon capture and storage
Elements of harbours (marine environment issues)		DfT
Energy Performance of Buildings Directive		MHCLG
Environmental Impact Assessment (EIA) Directive		MHCLG
Environmental law concerning energy industries		BEIS
Environmental quality – flood risk management		Defra
Environmental quality – water quality		Defra
Environmental quality – water resources		Defra
Forestry (domestic)		Defra
Genetically modified micro-organisms contained use (i.e. rules on protection of human health and the environment during development)		HSE
Land use		Defra
Onshore hydrocarbons licensing		BEIS
Renewable Energy Directive*		BEIS

\* Scotland and Northern Ireland only.

\*\* Northern Ireland and Wales only.

<b>Common framework</b>	<b>Policy area</b>	<b>Lead department</b>
<b>Reserved (subject to ongoing discussion)</b>	Ecodesign and energy labelling	BEIS
	Environmental quality – International timber trade (EUTR and FLEGT)	Defra
	Food Geographical Indicators (protected food names)	Defra
	Radioactive source notifications and transfrontier shipments of radioactive waste	BEIS

Note: BEIS, Department for Business, Energy and Industrial Strategy; Defra, Department for Environment, Food and Rural Affairs; DfT, Department for Transport; EUTR, European Union Timber Regulation; FLEGT, Forest Law Enforcement, Governance and Trade; GMO, genetically modified organism; HSE, Health and Safety Executive; MHCLG, Ministry of Housing, Communities and Local Government.



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