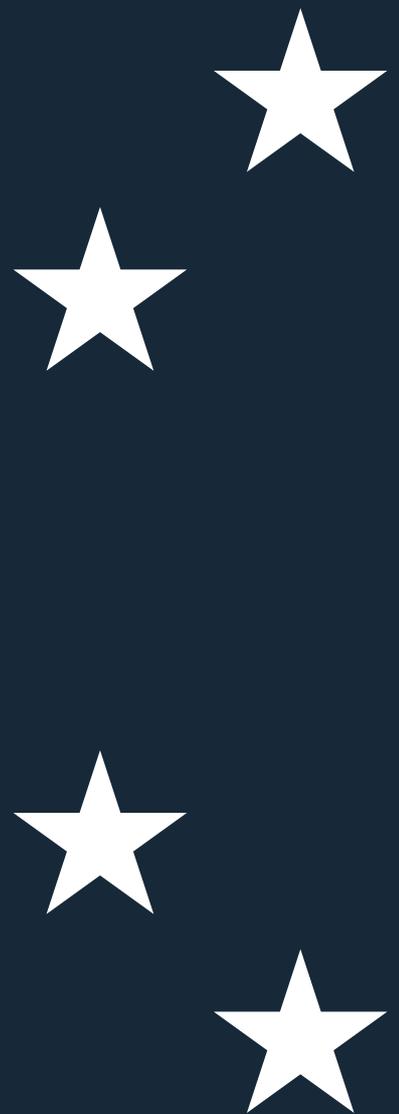


Four-nation Brexit

How the UK and devolved governments should work together on leaving the EU

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Briefing paper

October 2016

Our Brexit work programme

Following the UK's vote to leave the European Union (EU), the Institute for Government has launched a major programme of work looking at the negotiations, the UK's future relationship with the EU and the impact of Brexit on the UK as a union.

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Acknowledgements

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Summary

On 24 October 2016, the Prime Minister and her counterparts from Edinburgh, Cardiff and Belfast convene in London for a summit to discuss Brexit. This meeting offers the first proper chance to assess the willingness and ability of the four governments of the UK to find agreement on the way forward. Reaching consensus will not be an easy task. Around the table will be an English Tory, a Scottish nationalist, a Welsh socialist, an Ulster unionist and (since Northern Ireland is represented by both halves of its coalition) an Irish republican. There is little political common ground between these leaders on the EU, the future of the UK or almost anything else.

So as with the dog walking on its hind legs, perhaps we should be impressed if the four governments manage to work together at all, rather than overly critical of how skilfully they perform the task. But the stakes are high. If it proves impossible to find consensus and the dog topples over after a few tentative steps, the result may be a serious breakdown in relations between the four governments (and nations) of the UK.

Negotiating the terms of Brexit with the EU will be a highly complex task and, from a UK Government perspective, it would simplify matters if the existence of the devolved governments could be ignored. But Brexit cannot be treated as a simple matter of foreign relations. Leaving the EU will have a significant impact on the powers and budgets of the devolved bodies. This means the devolved parliaments will almost certainly seek to vote at some point on whether to give consent to the terms of Brexit.

Imposing a Brexit settlement in the absence of consent from the devolved bodies may be legally possible, given that the UK Parliament remains sovereign. However, this would run contrary to convention and to the spirit of devolution, which recognises the right of the three devolved nations to determine their own form of government. It would also be a reckless strategy for a government committed to the Union, since it would seriously undermine relationships between the four governments, and increase the chances of Scottish independence and rifts in Northern Ireland's fragile power-sharing arrangements.

The devolved governments should be treated as partners in the Brexit process, not as mere consultees alongside business or other lobby groups. However, this does not mean the four governments of the UK will have equal influence. The UK Government will lead the Brexit process, and Westminster will retain the right to have the final say.

Now that a firm deadline for triggering Article 50 has been set, the governments must collectively step up a gear and establish the necessary systems for joint working on this issue. Working in partnership in this way will naturally require all sides to compromise. If agreement proves elusive, then each of the four governments should be held to account for their contribution to this failure.

Recent developments have not been reassuring. The Prime Minister initially committed to agreeing on 'a UK approach and objectives' before Article 50 is invoked, but has now announced that the trigger will be pulled by March 2017 regardless, and that negotiations are for her government alone. And the Scottish First Minister has set her government on a collision course with Westminster by publishing a bill to hold a second independence referendum. It is possible that, in the end, consensus will not be found

on a four-nation Brexit deal. In that case, the Scottish people may indeed have to choose between their membership of the UK and the EU. But this is not inevitable.

In this paper we outline the steps that we believe are required, starting from today, to prevent political spats from escalating into a full-blown constitutional crisis. The paper addresses four questions about cooperation between the four governments on Brexit: What is needed? What has happened so far? What is the constitutional position? What is the scale of the challenge?

Working together on Brexit: what is needed?

Top-level political commitment

A joint UK approach to Brexit will only work to the extent that the four governments are committed to this at the political level from the top downwards. So the October 2016 Joint Ministerial Committee summit must send out **a clear and strong message that the Prime Minister and the devolved first ministers** (including the Deputy First Minister in the case of Northern Ireland) **are willing to work together** to find a common approach. They must subsequently be held accountable by their respective parliaments and in wider public debate for how they live up to this pledge.

Agreed principles for joint working

The principles guiding how the four governments will work together over the coming months and years are crucial and should be set out in published terms of reference. There should be **'parity of esteem'** between the four administrations. This would not mean the four governments will be equal partners in the process, but it would involve recognition that these are four democratically elected governments working together in good faith to seek a joint approach, even if Westminster retains the power to have the final say.

The objective should be to reach consensus, but as there are highly-charged political issues at stake, this will not always be possible. The four governments will have to agree on **how disagreements will be resolved**. The most serious disagreements may need to be referred to the heads of government to consider. Where no compromise can be found, the UK Government should be required to make a public statement and explanation if it chooses to proceed with a decision without the backing of one or more of the devolved bodies.

The arrangements for reaching a UK-wide agreement on Brexit should also be founded on the principles of **transparency and accountability**. Information on the agenda and decisions taken should be provided in advance of, and after, all inter-ministerial meetings so that the respective legislatures can hold their ministers to account, and so that there can be wider public scrutiny of the process in a way that has rarely been possible for past intergovernmental negotiations. There is already a written agreement between the Scottish Government and Scottish Parliament on more transparent intergovernmental relations,¹ and this should be put into practice on this issue. Ideally, a similar approach would apply in Westminster and in the Welsh and Northern Ireland assemblies too.

Clarity about what will be agreed, when and how

There should be **clarity about how the devolved governments and parliaments will be involved at crucial decision points in the Brexit process**: for instance, at the point of triggering Article 50, and when legislation is being drafted and introduced at Westminster to implement Brexit. At what point(s) will legislative consent be sought from the devolved legislatures? How will the devolved bodies be involved in determining which areas of EU regulation to retain in UK law and which to scrap? So far as possible, the four governments should agree at the outset on these critical rules of the game.

There should also be clarity about the range of issues that the four governments will seek to agree upon during each phase of the process:

- **Phase one** will be the period until Article 50 notification is sent to the European Council (by March 2017). Before that point, the four governments should seek to agree upon the core planks of the UK negotiating position on withdrawal from the EU and the framework of a new relationship with the EU. The former will cover issues including the rights of EU citizens resident in the UK, and the latter issues such as the trade-off the country is willing to make between Single Market access and control of immigration.

Compared to the UK Government, the devolved governments are likely to prefer a softer form of Brexit, with greater market access and a more open border. They will also highlight economic sectors of particular importance to them and push for market access in those areas to be at the centre of the UK's negotiation position.

- **Phase two** will be the period of negotiation between the UK and EU. These negotiations are likely to cover both the formal terms of exit and the nature (at least in broad terms) of the future UK-EU economic relationship.

In this period, the concern for the devolved governments will be the struggle to make their voice heard since British ministers will be leading the process. The devolved governments might seek formal involvement in the UK negotiating team to ensure their interests are being adequately represented. They will want to ensure that their economic interests are not being traded away by the UK Government in return for concessions that may be low priorities (or even negatives) for the devolved bodies.

- **Phase three**, which might well take place in parallel with phase two, will be the period of negotiation about the post-Brexit relationship between the four nations of the UK. As we discuss below, Brexit is likely to reopen questions about the distribution of powers between central and devolved government, and the funding arrangements for devolution. In this phase the devolved governments may also seek guarantees about their rights to be involved in future trade negotiations with countries outside the EU.

Will the objective be to resolve all of these wider questions during the two-year Brexit negotiation period? There might well be a desire in Westminster to keep the negotiations focused on the immediate business of securing a Brexit deal with the EU. However, the devolved governments may demand concessions on funding and devolved powers, and perhaps even UK support on seeking a differential relationship of some kind with EU institutions. If these guarantees are not forthcoming, the devolved governments may refuse

to support the terms of the deal, and may use the legislative consent process to register their opposition and attempt to force Westminster into concessions.

Dedicated intergovernmental machinery

A clear plan should be announced about how ministers from the four governments will work together over the coming months. This should include the creation of **a new committee that brings together lead ministers for Brexit from each of the four governments** to discuss and agree upon the UK strategy for exiting the EU. The most serious political disagreements will need to be resolved between the four heads of government, but the detailed discussions between the four governments need to be delegated, in particular in the case of the UK Government, given the other pressures on the time of the Prime Minister.

This new ministerial committee could be established within the existing Joint Ministerial Committee framework, as a dedicated JMC (Brexit) subcommittee, but it will need to work in a qualitatively different way from most past approaches to intergovernmental working, as we discuss below. It must be clear that this is **a jointly-owned body of the four governments**, and it should be supported by **a joint secretariat of officials from across the UK**.

The new ministerial committee should meet regularly – probably at least monthly – and **the schedule of meetings should be agreed collectively by the four governments**, be published in advance and be adhered to. Postponements or cancellations should be publicly accounted for. Meetings should be scheduled to fit in with key milestones in the Brexit process, so that there is opportunity for genuine input and influence from the devolved governments before decisions are taken within Whitehall.

Sharing of information and evidence

So far as possible, a **shared evidence base** on Brexit options and challenges should be created across the four governments to inform the discussions. The UK Government in particular should commit to openness and information sharing, and devolved governments will have to commit to maintaining confidentiality about certain aspects of the negotiations. Ministers must make clear to officials across government that they have their backing to engage closely with counterparts in the other administrations. There may be a need for published guidance or a memorandum of understanding setting out the governments' approach to information sharing.

Effective coordination within Whitehall

Developing a UK approach to Brexit will be **a task for the whole of government** and much intergovernmental working will take place on a bilateral basis between devolved governments and individual Whitehall departments. For instance, all three devolved governments will engage closely with the Department for Environment, Food and Rural Affairs (Defra) on agriculture and environmental issues; with the Home Office on freedom of movement, and with the Department for Business, Energy and Industrial Strategy on issues including employment regulation and research funding post-Brexit.

The UK Governance Group (UKGG) in the Cabinet Office, encompassing the Scotland and Wales Offices, will play a crucial role in ensuring both that the whole of Whitehall engages effectively with the devolved governments, and that the centre of government is aware of any tricky intergovernmental issues arising in particular departments that need escalation to ministers to resolve. Devolved officials report that since its creation in 2015 UKGG has significantly improved how Whitehall understands and engages with devolution issues. On Brexit, the task facing UKGG will be greater than ever.

What has happened so far?

After moving into 10 Downing Street, Theresa May made symbolically important visits to Scotland, Wales and Northern Ireland to meet with the first ministers and declare her commitment to involving each in setting a UK position. The devolved governments responded positively, making clear their desire to be closely involved in the formulation of Britain's Brexit strategy.

In Edinburgh, the Prime Minister employed a particularly strong formulation in promising that 'I won't be triggering Article 50 until I think that we have a UK approach and objectives for negotiations'.² The Scottish Government welcomed this as promising them a seat at the table, but the meaning of the pledge was left deliberately vague, along with much else about the UK Government's Brexit strategy.

Subsequent statements by British ministers have sent a more ambivalent message about the status of the devolved governments in the Brexit process, and have grouped the devolved governments together with other stakeholders, such as business and local government, rather than them having a privileged role in the process.³ This has led to pessimism at the devolved level about the UK Government's genuine openness to working in partnership on Brexit.

In early October 2016, the fog apparently started to lift from the UK Government's plans, as Theresa May committed to:

- triggering Article 50 by the end of March 2017, implying that the country would exit the EU in Spring 2019
- introducing a 'Great Repeal Bill' that would scrap the European Communities Act 1972 and transfer all EU law into domestic law until the Government decides which parts to keep (although this later announcement was in reality simply a statement of legal necessity).

However, the commitment to working with the devolved governments to develop a 'UK approach and objectives' appeared to have been watered down to a looser promise to 'consult and work with the devolved administrations'. The announced deadline for triggering Article 50 was also a UK Government decision alone, not the product of agreement with the other governments, which may indicate readiness at Westminster to press ahead in the face of devolved opposition. The Prime Minister also sent a clear message to the devolved governments by declaring that 'the negotiations between the United Kingdom and the European Union are the responsibility of the [UK] Government and nobody else', adding that 'we will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom'.⁴

The Prime Minister's visits to Edinburgh, Cardiff and Belfast in July 2016 were followed up by significant contact and communication at the official level, as civil servants across the UK started to think through the scale of the challenge; to identify priorities for their respective nations; and to consider options for intergovernmental working. However, we have been told, civil servants' ability to engage openly and share information with each other has been hindered by lack of agreement at a political level about how the Brexit process should be managed.

Challenges for the devolved governments

For the devolved governments, there has also been the practical challenge of identifying the right channels of communication with Whitehall at a time of significant churn following the creation of the new Department for Exiting the EU (DExEU) and the Department for International Trade (DIT). In DExEU, there is a policy team responsible for ensuring that the department keeps devolution in mind during the Brexit process, but as of early October 2016 there were still just three officials in this team. It is expected to increase in size to nine or so following further recruitment rounds.

In Whitehall, there has also been recognition that extensive engagement would have to wait until the new Cabinet worked out its Brexit priorities and strategy, and communicated this to officials. The time taken to undertake this process in part reflects the fact that the Civil Service was told not to prepare a contingency plan for a Leave vote before the referendum, in line with the then government's pro-Remain stance. From a devolved administration perspective, however, this can look worryingly like Whitehall getting into a huddle and working out its own position before engaging with them.

The Scottish Government chose not to create a new dedicated directorate to work on Brexit, but the First Minister did appoint a new Cabinet minister, Michael Russell, to lead on the Scottish Government response. There has also been internal reorganisation to increase the size of key policy teams working on EU-related issues such as trade and investment policy. In Wales, First Minister Carwyn Jones is himself leading on the issue, but with a significant role for Finance Minister Mark Drakeford. Both Wales and Scotland have also established expert advisory groups to inform their work. In Northern Ireland, responsibility for Brexit rests with the Executive Office, which is the central department working to both First Minister Arlene Foster (Democratic Unionist Party (DUP)) and Deputy First Minister Martin McGuinness (Sinn Féin).

With all four governments taking some time to think through their priorities and to reorganise their machinery, it has taken four months for the first summit of the heads of the four governments to be organised. But now that a firm deadline for triggering Article 50 has been set, the governments must collectively step up a gear and establish the necessary systems for joint working on this issue. These must build upon, but go a long way beyond, the existing approaches to working together.

Enabling joint working

Dating back to 1999, there is a memorandum of understanding that provides for consultation and information sharing between the British and devolved governments. This agreement created the Joint Ministerial Committee, which in its plenary form is the forum in which the Prime Minister and first ministers are meeting on 24 October 2016, for the first time in nearly two years.

On EU business, the four governments engage through a sub-committee of this main Joint Ministerial Committee. This body – the Joint Ministerial Committee on Europe (JMCE) – has typically met several times a year since 1999, usually in advance of European Council meetings. The committee, chaired by the UK Foreign Secretary, gives devolved administrations the opportunity to voice their views and raise concerns about EU policy issues that are being negotiated in Brussels, and on which the UK has to take a unified position.

However, JMCE is not seen as the appropriate forum for working together on Brexit. From the devolved government perspective, JMCE is perceived to allow devolved voices to be heard, but decisions are taken by the UK Government alone. There is also no obligation to explain or publicly account for how decisions are reached and whether devolved concerns have been taken into account. All meetings are held in London, with a UK minister in the chair. The UK Government also retains control over the agenda and timetable for when this body meets.

This point was illustrated when David Cameron was leading renegotiations on the UK's settlement with the EU in late 2015/16. No JMCE meeting was held ahead of the crucial European Council summit in February 2016 at which EU leaders agreed on the UK's new settlement, leaving the devolved governments with very limited ability to influence the process. Ahead of the UK Government's talks with EU leaders, Carwyn Jones complained that he had learned of the UK's negotiating position 'through the pages of the Sunday Telegraph'.⁵

This is a reflection of the traditional view, expressed by the then Foreign Secretary Philip Hammond, that while the devolved administrations are important stakeholders, 'our relationship with the European Union is a reserved matter, so it is for the United Kingdom Government to negotiate these issues'.⁶ On the apparently fairly narrow (although ultimately highly significant) matter of the 'renegotiation', this approach was arguably justifiable. For Brexit it will not be.

The past two years have in fact seen the Joint Ministerial Committee machinery cease operation almost entirely. The last Joint Ministerial Committee summit meeting was in December 2014, shortly after the Scottish independence referendum. At this meeting, a review was announced into the UK's systems and principles of intergovernmental relations, which had been recognised in a series of reports as being in need of strengthening.⁷

This review has been ongoing at the Civil Service level since then, but it has never published its findings, since no occasion could be found to bring the four heads of government together. Now that the Prime Minister and the first ministers are finally meeting, it is to be hoped that the results of this work will see the light of day, and that this sets out a clear path for how the governments should work together on Brexit.

Working together on Brexit: what is the constitutional position?

A narrow majority of 52% of voters across the UK voted to leave the EU in June 2016, while in Scotland and Northern Ireland – as well as in London and some other English cities – a majority voted to remain. Does this matter? The European Union Referendum Act 2015 did not include a 'dual majority' clause, as proposed by the Scottish Government and others. This would have meant that a vote to leave would only be valid if backed by majorities in all four of the UK's nations, in line with constitutional practice in federal systems such as Canada.

The UK is not a federal country, in which legal sovereignty is shared between national and devolved governments, but neither is it a unitary state in which Westminster can remake the constitution at will. Devolution created powerful law-making bodies for Scotland, Wales and Northern Ireland. These

bodies gained legitimacy through public referendums held on their creation and they are now recognised in law (for Scotland and soon for Wales) as 'a permanent part of the United Kingdom's constitutional arrangements' that can be repealed only following a further referendum.⁸ In Northern Ireland, the Good Friday Agreement established the devolution settlement as a part of an international agreement between the UK and the Republic of Ireland, supported by EU institutions.⁹ It too must be regarded as an entrenched part of the territorial constitution, which Westminster cannot amend unilaterally.

The UK's post-1999 constitution therefore rests on the principle that the people of Scotland, Wales and Northern Ireland have the right to determine their own form of government. This extends to the point of a right to withdraw from the UK. The Northern Ireland Act 1998 explicitly recognises this, and includes provision for a poll on the reunification of Ireland. The UK Government's willingness to facilitate the 2014 Scottish independence referendum likewise implied acceptance of the principle that the Union's continued existence rests on the ongoing consent of its constituent nations.

A need for consent?

Since 1999, Westminster has also upheld the convention that it will 'not normally legislate with regard to devolved matters' without consent from the parliament or assembly in question. This 'legislative consent convention' is now recognised in law (for Scotland and soon for Wales), and while Westminster retains the legal ability to override the devolved bodies, to do so on such a major issue would be without precedent. In practice, the convention has been interpreted also to cover legislation that changes the competences of the devolved bodies.

Almost 300 legislative consent motions have been passed by the three devolved legislatures since 1999, and fewer than 10 rejected.¹⁰ The usual approach in the event of disagreement has been for Westminster to offer concessions in order to secure consent, or to introduce amendments so that consent is no longer required. There have been a few cases in Wales where the UK Government denied that Assembly consent was required and pushed ahead regardless, and this has led to Supreme Court cases on more than one occasion.¹¹

The UK Government has repeatedly emphasised since 23 June 2016 that it regards the Brexit process as falling within the non-devolved category of foreign relations.¹² The devolution legislation does indeed reserve 'relations with the EU' to the UK Parliament at Westminster. But EU law is embedded in the devolution settlements and affects many devolved policy areas, so withdrawing will have a direct impact on the operation of devolution. The Scottish Government has consistently argued that the consent of the Scottish Parliament will be required for legislation implementing Brexit. The Welsh First Minister has also argued that once a Brexit deal is negotiated 'its acceptance should be subject to the support of the four parliaments that now legislate for the UK'. In Northern Ireland, the First Minister, Arlene Foster of the DUP, campaigned for Brexit and has not called for the Northern Ireland Assembly to be given a vote on the matter. However, Deputy First Minister Martin McGuinness has stated that 'if there's a way to veto [Brexit], we in Sinn Féin will veto it'.¹³

In practice, when and whether the legislative consent convention comes into play will depend upon the nature of legislation brought forward at Westminster. If the UK Government proceeds with its plan to invoke Article 50 without passing legislation in the UK Parliament, the question of legislative consent from the devolved bodies at this stage will be moot. The Prime Minister has already made clear, however, that

legislation (dubbed the Great Repeal Bill) will be introduced in the 2017 Queen's Speech to remove the European Communities Act from the statute book.

Further legislation will also be required to implement the terms of the Brexit deal, and to enact any new trade agreement between the UK and EU. Some of this legislation may be carefully drafted to avoid directly impinging on devolved law, thereby avoiding the question of legislative consent. Or secondary legislation may be used to make significant changes, which could also avoid the requirement for legislative consent motions.¹⁴ But it is difficult to imagine how the eventual terms of Brexit can avoid changing the powers of the devolved bodies altogether, for instance in areas currently dominated by EU law but implemented at devolved level, such as agriculture, fisheries and environmental regulation. Leaving the EU will also presumably require amendments to remove references to EU law in the legislation that establishes the devolved bodies. At some point, it seems probable that legislative consent motions will be put to the devolved legislatures, and could be rejected. At the SNP annual conference on 13 October 2016, First Minister Nicola Sturgeon made it clear that her party would seek to block the proposed 'Great Repeal Bill' at both Westminster and Holyrood if possible.¹⁵

Compromise and consensus

The UK Government might seek to push through Brexit legislation even if legislative consent is withheld. The legislative consent convention is included in the Scotland Act 1998 and Wales Bill, but as these statutes only 'recognise' the convention, it is highly unlikely the courts would rule against Westminster if it passed Brexit legislation that one or more of the devolved bodies had opposed outright.¹⁶ But the UK Parliament has never previously simply ignored the convention and legislated in the face of devolved opposition to alter the devolution settlements in a significant way. To do so on Brexit would be arguably unconstitutional, but unarguably reckless, given the risks this would pose to the stability of the Union. It would strengthen the case for Scottish independence, which Nicola Sturgeon has placed back on the agenda by committing to publish a draft Independence Referendum Bill. It might also undermine power-sharing between unionists and nationalists in Belfast. More broadly, it would worsen relations between the governments and make it harder for them to work together, even on issues unconnected to Brexit.

Brexit will also end devolved access to at least some EU funding streams, which will in turn reopen the fiscal arrangements for devolution, as we discuss below. Again, it is possible that the UK Government will simply take unilateral decisions on how the devolved governments' budgets will be revised post-Brexit. The Barnett Formula and block grants that still provide the bulk of devolved government budgets have no statutory basis, so there would be no legal impediment to HM Treasury unilaterally revising this system once EU budget streams are turned off. But this too would be highly controversial. It would also run counter to recent precedent about how changes to the funding arrangements for devolution are agreed.

In Spring 2016, the passage of the Scotland Bill was delayed until agreement was reached on the supporting fiscal framework after the Scottish Government made this a precondition for giving legislative consent to the bill. The UK Government accepted this and a negotiated compromise was reached before the bill completed its passage. Negotiations are now beginning on a new fiscal framework for Wales on a similar basis, with passage of the Wales Bill dependent on agreement. Compromise and consensus are thus established as the principles for changing both the powers and the funding arrangements for the devolved bodies.

Brexit will be a hugely complex task and it would certainly make life easier for Whitehall if there were no other levels of government to worry about. There are worrying signs that meaningful involvement of the devolved governments may be falling down the list of priorities for the UK Government. But ignoring the devolved governments would be a mistake. The UK Government should take seriously the objective of reaching UK-wide consensus on the terms of Brexit, and be prepared to work in genuine partnership with the three devolved governments to achieve this. There is a need for far more than a box-ticking consultation exercise with marginal opportunity for devolved influence. The right of the three devolved governments to speak for 'their' nation in the negotiations must be respected – especially since the UK Government's electoral mandate rests almost entirely on seats won in England.

Negotiations only work if there is willingness to engage and compromise on both sides. So the devolved governments should themselves commit publicly to working in good faith with the UK Government to work out the country's strategy and priorities. This will require acceptance that there will not be four equal players at the table. The devolved governments must accept first that the UK as a whole has voted to leave the EU, second that it is the responsibility of the UK Government to lead the Brexit negotiation process, and third that the legislative consent convention does not give them a legal veto over Brexit. If consensus cannot be reached for whatever reason, then ultimately the UK Parliament retains the power to pass legislation in spite of devolved opposition. In this event, all governments will have to account for the failure to reach agreement and for any consequences that flow from that.

Working together on Brexit: what is the scale of the challenge?

Scotland

Following the EU referendum, the Scottish Government immediately declared that for Scotland to be taken out of the EU would be 'democratically unacceptable' given that 62% of Scots had backed Remain and that this issue made a second independence referendum 'highly likely'.¹⁷ So the Scottish Government might refuse to back Brexit in any form, or at least any form acceptable to English public and political opinion.

The Scottish Government has now published a draft independence referendum bill for consultation, though there is no confirmed plan about when the Scottish Government intends to pass this legislation or to hold a referendum. A second independence referendum may in any case require agreement with the UK Government, since the power to hold the 2014 referendum was devolved from Westminster only temporarily and has now expired. If agreement is not forthcoming, a legal battle might ensue.

So it may be that the Scottish Government has placed this issue back on the agenda in order to increase its negotiating leverage over the terms of Brexit, while keeping the option of independence alive in the event that the eventual Brexit deal is regarded as damaging to Scotland's interests. The SNP may also not want to rush to the polls given the absence of a polling surge in favour of independence, and the low oil price, which makes the economic case for independence a harder sell than in 2014.

In terms of what the Scottish Government will want to secure from Brexit negotiations, it is clear that it will push for a softer form of Brexit. Shortly after the EU referendum, Sturgeon laid out her priorities, which included a strong commitment to single market membership, freedom of movement, continued

access to Common Agricultural Policy and research funding, retention of social and employment rights currently backed by EU law, participation in schemes such as the European Arrest Warrant and the Erasmus scheme for student exchanges, and a guarantee that the rights of EU residents currently in Scotland will be preserved. Work is also being carried out to identify key economic sectors whose interests the Scottish Government will seek to defend in negotiations about the UK's future trade relationship with the EU and other countries. These include financial services, agriculture and fisheries, food and drink production, and higher education.

Scotland also has distinct priorities on trade that rest on differences of principle rather than just pure economic interest. This has been illustrated during the EU–US Transatlantic Trade and Investment Partnership negotiations, during which the Scottish Government has expressed concerns over whether this deal could force Scotland to open up the NHS to private providers or to allow the use of genetically modified organisms. These are further examples of how a non-devolved area such as trade policy can have an impact on devolved domains such as health and agriculture policy. These interactions will need to be borne in mind during the UK–EU negotiations and in any future trade deals the UK enters into. The Scottish Government may therefore seek the right to be part of future trade negotiations that the UK enters into.

The Scottish Government has also raised the possibility of a 'differential' relationship with the EU, in which Scotland retains a closer integration with the Single Market than the rest of the UK. It appears that a special deal could be negotiated only if the UK Government was itself in favour, and whether there is any appetite for this at Westminster remains to be seen. A post-Brexit Scotland could, however, take policy decisions to maintain parity with EU law in certain areas – for instance, environmental regulation – even if the UK Government seeks to move England in a different direction. This could ensure that if Scotland one day became independent, its path back into the EU would be simplified.

Wales

Having taken a strong pro-Remain position during the EU referendum campaign, the Welsh Government was left in a difficult position by the decision of 52% of Welsh voters to back Brexit, including majorities in many Labour heartlands. In response, First Minister Carwyn Jones said that he was 'deeply disappointed with the result... But a decision has been taken. And we must respect that.'¹⁸ Shortly after the referendum, the Welsh Government set out six priorities for Wales that it would seek to protect during the Brexit process, including retention of full access to the Single Market.

It was initially unclear whether this extended to a continued commitment to unrestricted freedom of movement, but the First Minister has subsequently accepted the need for some restrictions on migration from the EU, drawing criticism from the opposition Plaid Cymru for so doing.¹⁹ The Welsh Government will also identify specific economic interests to defend. The Welsh economy is more dependent on manufacturing than other parts of the UK, so free trade in goods will be important. Higher education is another area of strength, so additional restrictions on international students will not be favoured.

The Welsh Government also spelt out its expectation that Wales 'must play a full part in discussions about the timing and terms of UK withdrawal from the EU', and that Brexit should lead to a wider process of constitutional reform to place the relationship between the UK and devolved governments 'onto an entirely different footing'.²⁰ The First Minister has long argued that the UK should become more like a

federal system, in which Welsh devolution is constitutionally entrenched, and the Welsh Government has clearer rights to be consulted and involved in decision-making in areas that affect Wales in distinct ways.

Northern Ireland

Northern Ireland First Minister Arlene Foster and her Democratic Unionist Party backed Brexit and she has declared that 'we must all respect the democratically expressed wishes in what was a UK-wide referendum'.²¹ By contrast, the Deputy First Minister, Sinn Féin's Martin McGuinness, has argued that 'dragging the north of Ireland out of the European Union' would be an 'affront to democracy', given that 57% of voters in Northern Ireland chose to stay in the EU.²²

For Northern Ireland, a major issue of concern is the Irish border, where immigration or customs controls could be both economically damaging and politically destabilising. A paper published in June 2016 by the Centre for Cross-Border Studies argued that, at a minimum, it would be necessary to have customs checks, as passport-free travel 'would make it impossible to distinguish between business and personal travel' and so make 'the enforcement of the EU's customs arrangements nearly impossible'.²³

However, there is wide support for finding a practical solution and keeping the border open. Theresa May has stated that 'nobody wants to return to the borders of the past'²⁴ and Irish Taoiseach Enda Kenny has warned of the 'psychological effect of a hardening border'. Northern Ireland Secretary James Brokenshire recently announced that the UK and Irish governments were working together 'to strengthen the external border of the common travel area [CTA], building on the strong collaboration with our Irish partners'.²⁵ The plan therefore appears to be to have border checks at the common border but not between the north and south of Ireland. This would require the consent of the EU, which is itself heavily invested in the Peace Process, so may be open to a bespoke arrangement.

The Northern Ireland Executive also highlighted a number of other 'issues of particular significance' in a letter to the Prime Minister on the Brexit process. These included potential negative effects on Northern Ireland's energy market, its agri-food and fisheries sector, and the ability for business to maintain access to both skilled and unskilled labour.²⁶

Impact on budgets

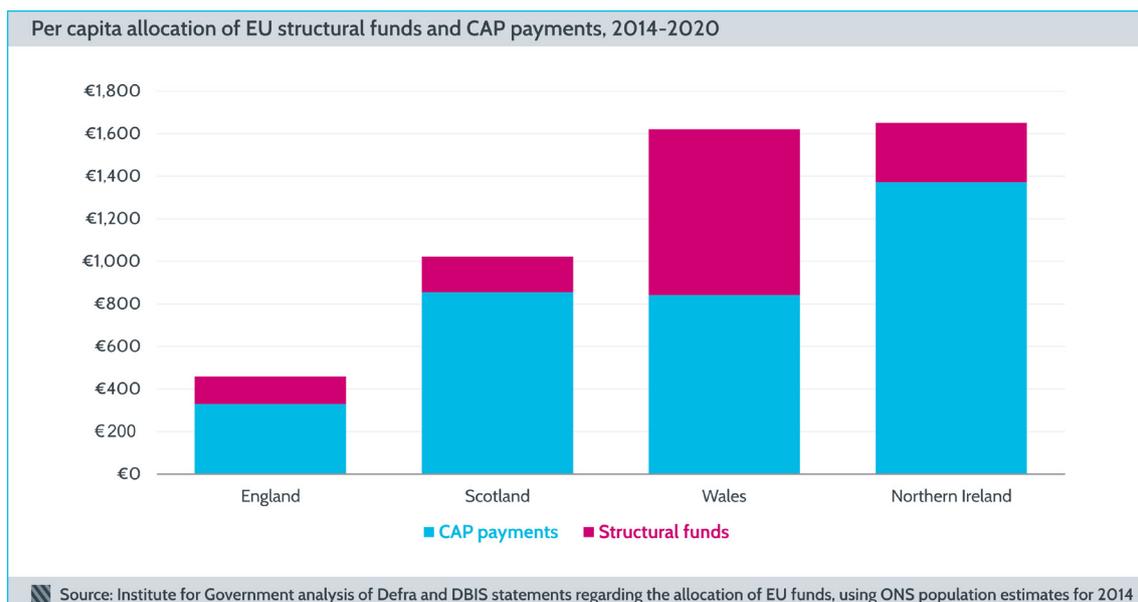
All the devolved governments have concerns about the impact of Brexit on their budgets, since the three nations benefit from EU funds to a greater extent than England. Subsidies for farming through the Common Agricultural Policy (CAP) make up 51% of EU spending in the UK, and Scotland, Wales and Northern Ireland all receive more than double the figure for England in per capita terms (see Figure 1).²⁷

The next biggest category of EU spending is the structural funds that support economic development in poorer regions. Of the four UK nations, Wales is the greatest beneficiary of structural funds (see Figure 1).²⁸ Northern Ireland also gains from significant levels of EU funding provided to the PEACE IV initiative that supports the peace process and cross-border activity (€229 million over the 2014–2020 period).²⁹ And Scotland has a comparatively strong record of securing competitive EU research grants, for instance securing over €248 million through the Horizon 2020 programme by the end of July 2016, representing 11.4% of all UK funding awards through this scheme, significantly above Scotland's 8.3% of the UK population.³⁰

The Chancellor of the Exchequer announced in October 2016 that the Government would guarantee EU funding for projects agreed before the UK leaves the EU, but this guarantee is subject to projects being deemed good value for money and 'in line with domestic strategic priorities'. It also remains to be determined what will replace these funding streams after Brexit.³¹ Since the UK is a net contributor to the EU budget, it is possible there may be more than enough money to replace all these funding streams, although that assumes leaving the EU does not depress tax revenues to a greater extent than the money saved. The devolved governments will in any case push for further funding guarantees.

The simplest option might be to add current levels of EU spending onto the devolved government block grants, and then calculate further budget changes via the Barnett Formula. However, this may not be the favoured option for the devolved governments, as it would mean they would cease to receive additional money in direct relation to their level of economic need. It would also mean that if the UK Government chose to cut agriculture subsidies or regional support in England, the devolved budgets would be reduced accordingly through the Barnett Formula. This is a particular concern of the Welsh Government, which has long campaigned for a needs-based replacement for the Barnett system.

Figure 1: Allocation of EU funding by UK nation



Change to the devolution settlements

Finally, there is a growing debate about whether Brexit might reopen elements of the existing devolution settlements. For instance, there are a number of policy areas that are in principle devolved under current legislation, but in practice dominated by EU legislation. This applies in areas such as agriculture, fisheries and environmental protection. Once the UK leaves the EU, the default legal position will be that these policy areas will become fully devolved, since to return these powers to Westminster would require new areas of reserved power to be added to the devolution legislation. Similarly, if the UK withdraws from EU state aid rules and puts nothing in their place, the devolved governments would become freer to provide subsidies and other support for particular regions and industries. Likewise, the Scottish Government would be able to impose minimum alcohol pricing, which was ruled illegal by the European Court of Justice.

However, there might be a desire to create new UK-wide coordinating systems to replace the EU-wide systems the country will be leaving. The concern may be that having left the EU Single Market (assuming this is the outcome), steps will need to be taken to ensure that the UK Single Market does not itself fragment. This might therefore require regulatory standardisation, for instance to prevent a race to the bottom or other unintended spillover effects. The devolved governments are unlikely to consent to Westminster taking back powers, so there might instead be a need for new federal-style systems that are jointly owned by the four governments. This would involve recognition that some policy areas should be considered neither fully devolved nor fully reserved, but in fact shared between central and subnational government, as for instance immigration and agriculture policy is in Canada.

There is also a debate over whether powers should be devolved in fully reserved areas such as immigration and employment policy to reflect differing policy preferences and economic needs across the UK. For instance, might the devolved nations (and perhaps some cities or regions of England too) gain the ability to issue work permits or post-study work visas in order to fill specific labour shortages in the local economy? This has already been proposed for Scotland as well as being floated by Sadiq Khan, Mayor of London. There is also already some debate about devolution of aspects of employment policy so that the devolved nations can retain EU-level social protections even if the UK Government wishes to cut these in England, to fulfil the Leave campaign promise that business should be freed from 'red tape'. Outside the EU, control of VAT or the power to create new sales taxes could in principle be devolved too.

Many of these issues do not necessarily have to be resolved during the Brexit negotiation period, but the devolved governments may seek concessions over funding, powers and constitutional change in exchange for supporting the terms of a deal. The challenge of forging consensus across this whole set of issues is massive, and the clock is now ticking.

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