

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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The Impact of the United Kingdom's withdrawal from the European Union on Scotland, Wales and Gibraltar

In-depth analysis for the AFCO Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

**The Impact of the United Kingdom's
withdrawal from the European Union on
Scotland, Wales and Gibraltar**

IN-DEPTH ANALYSIS

Abstract

Upon request by the AFCO Committee, the Policy Department for Citizens' Rights and Constitutional Affairs has commissioned this in-depth analysis on the impact of Brexit on the devolved territories of Scotland and Wales as well as the Overseas Territory of Gibraltar. It examines the economic and political implications of Brexit on these territories, the consequences of the possible return to devolved administrations of formerly 'Europeanised' competencies and looks at how Brexit might affect their future status within the UK as well as their relations with the EU.

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Policy departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

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LIST OF ABBREVIATIONS

CAP Common Agricultural Policy

CFP Common Fisheries Policy

DUP Democratic Unionist Party

EEA European Economic Area

EU European Union

GDP Gross Domestic Product

JMC Joint Ministerial Committee

OECD Organization for Economic Cooperation and Development

SDLP Social Democratic Labour Party

SNP Scottish National Party

UKIP UK Independence Party

UK United Kingdom of Great Britain and Northern Ireland

UUP Ulster Unionist Party

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KEY FINDINGS

- The constitutional position of the devolved territories and of Gibraltar is closely linked to the United Kingdom's position in Europe. In several fields, competences that are devolved are also "Europeanized". After Brexit, the requirement to follow European law will have to be removed.
- The referendum result differed across the UK. London, Scotland, Northern Ireland and Gibraltar voted to remain.
- It has been claimed that Brexit could require the consent of the devolved legislatures but this was rejected by the Supreme Court. It has been agreed that the Withdrawal Bill will be subject to legislative consent motions, but these will not be binding. The Scottish and Welsh governments will not recommend that legislative consent be given.
- The devolved administrations are consulted in the negotiations through Joint Ministerial Committees but there is dissatisfaction about these.
- Scotland, Wales and Northern Ireland are more dependent than England on EU exports and benefit proportionally more from spending in agriculture, structural funds (Wales and Northern Ireland) and research (Scotland).
- All three devolved territories have fewer EU migrants than London and a more positive attitude to freedom of movement.
- Gibraltar has a strong interest in keeping open its border with Spain and free movement of EU citizens.
- Scotland, Wales and Gibraltar support the Single Market, which the UK Government has indicated that it will leave.
- Scotland, but not Wales, has argued for a differentiated Brexit to allow it to remain in the Single Market even if the UK leaves.
- The Scottish Parliament has requested that the UK Parliament grant an order to allow a second referendum on independence, allowing it to leave the UK and accede to the EU.

1. DEVOLUTION IN THE UNITED KINGDOM

The United Kingdom is a **plurinational state** consisting of England, Scotland, Wales and Northern Ireland. Since 1999, the last three have had autonomous assemblies and governments. In Scotland and Northern Ireland there is a '**reserved powers**' model in which everything not expressly reserved to the centre is devolved. Wales has a '**defined powers**' model, in which devolved powers are specified although it is now moving to the reserved powers model. Gibraltar is a **self-governing Crown dependency**, which is not part of the United Kingdom but is part of the European Union.

Key features of the UK model are:

Asymmetry

- There is **no** such **devolution for England** or within England but London has an elected mayor and assembly, also established in 1999.
- **The Centre**. There are no central departments in devolved matters such as education, agriculture or environment. The departments in London are UK-wide for some purposes and England-wide in respect of matters devolved to the other nations.

Non-entrenchment

The Westminster Parliament claims absolute sovereignty although there is a convention (the **Sewel Convention**) that it will not legislate in devolved fields or change the powers of devolved bodies without their consent.¹

Informality

Institutions for intergovernmental relations are **under-developed and informal**. There are Joint Ministerial Committees to deal with issues of overlapping responsibility but, with the exception of the one on EU matters, they rarely meet.

Abeyances and lacunae

Many issues, including the locus of sovereignty and the finality of the project are unspecified.

¹ This is named after Lord Sewel, a minister responsible for the Scottish devolution legislation in 1999. He stated that he expected a convention to develop whereby the UK Parliament would not normally legislate in matters devolved to the Scottish Parliament. The understanding was extended to Northern Ireland and, when Wales acquired legislative powers, to the National Assembly for Wales. At the same time Westminster retained its formal right to legislate on all matters. The Convention was put into statute in the Scotland Act (2016) and in the Wales Act (2017). It was tested in the Supreme Court in January 2017, as explained in the briefing.

2. DEVOLUTION AND THE EUROPEAN UNION

Devolution occurred during UK membership of the EU and is profoundly affected by it. In particular:

- It permitted a more ample devolution than otherwise might have been possible because coordination functions and market rules are assured at European level.
- Europe has provided a discursive space for new ideas about **divided and shared sovereignty** and allowed the devolved nations a forum for expression. In the Scottish independence referendum of 2014, the commitment to remain within the EU reduced the prospective impact of secession.
- **Common membership of the UK and Ireland** in the EU was a factor in reducing the importance of the border in Northern Ireland, contributing to the political settlement.
- Membership of the European Union facilitated **border opening between Spain and Gibraltar** and provided external support for Gibraltar.
- EU law applies **directly at the devolved level**, with the courts able to disallow executive and legislative action that violates EU law (and also the European Convention on Human Rights).
- The devolved administrations and Gibraltar are **responsible for transposing EU directives in their areas of responsibility**. These do not include most economic and trade matters in Scotland, Wales and Northern Ireland but they do in Gibraltar.
- Brexit destabilizes this system. If **sovereignty** is to come back to the UK, as promised by the Leave side, it is **not clear to which level it will revert**.

The referendum outcome

The EU referendum was organized on a UK-wide basis, with a single electorate. The outcome, however was differentiated.

Table 1: Percentage Vote, European Referendum, 2016

	Remain	Leave
UK	48	52
England	47	53
Wales	47	53
Northern Ireland	56	44
Scotland	62	38
Gibraltar	96	4

This divergence in votes profoundly affects the politics and constitutional management of Brexit:

- In **Scotland**, there is a **broad pro-European consensus** in civil society. The parties represented in the Scottish Parliament (Scottish National Party (SNP), Labour, Conservative, Liberal Democrat and Green) were largely pro-Remain. The UK Independence Party (UKIP) has no representatives in the Scottish Parliament and gained only two per cent on the regional list which is elected by proportional representation of the vote in the 2016 elections. The Scottish Government, run by the SNP, considers that it has a distinct mandate in relation to Brexit.
- **Northern Ireland is divided**. The nationalist parties (Sinn Féin and SDLP) and the Ulster Unionist Party supported Remain while the Democratic Unionist Party (DUP) supported Leave.
- In **Wales**, both **Labour** and the nationalists of **Plaid Cymru** supported **Remain** but they failed to gain the support of their own electorate and cannot claim a distinct mandate. **UKIP has seven seats** in the National Assembly for Wales, with 13% of the vote on the regional list in 2016.

- In **Gibraltar, support for remaining was virtually unanimous**. There is universal support across civil society, including business and trade unions.

This means that there is not a unity of opinion across the devolved administrations as to what should happen next. There are, however, a number of common issues.

3. THE CONSTITUTIONAL IMPLICATIONS AND THE ROLE OF THE DEVOLVED ADMINISTRATIONS AND LEGISLATURES

There has already been a case before the Supreme Court about whether the UK Government requires parliamentary legislation before invoking Article 50 to start exit negotiations. The position of the Scottish and Welsh Governments was that it did and, furthermore, under the Sewel Convention, **such legislation would also require consent motions in the devolved legislatures.** The UK position was that Brexit was a matter of foreign policy, coming under the prerogative power and thus not subject to Parliament. As foreign affairs, it was also **clearly reserved** and so **did not require the assent of the devolved legislatures.** Finally they argued that the Sewel Convention was not binding, a claim with large ramifications for the devolved settlement. **The Supreme Court sided with the UK Government, agreeing that the Sewel Convention is not legally enforceable.**

This issue recurs in relation to the Withdrawal Bill (to incorporate existing EU law into UK law) and other enabling legislation on Brexit. This will be subject to legislative consent in the devolved territories.² The First Ministers of Scotland and Wales have indicated that they will not recommend that consent be given. While the Supreme Court judgment would suggest that this would have no effect, **there would be serious political repercussions.**

In regular matters of EU policy-making where devolved competences are involved, there are arrangements for the devolved administrations to participate through the Joint Ministerial Committee (Europe), which discusses the line to be taken, although the UK Government has the last word. Ministers of the devolved administrations can participate in the Council of the EU by invitation. There are provisions for the circulation of papers. For the Brexit negotiations, there is a **Joint Ministerial Committee (European Negotiations)**, comprising ministers from central and devolved governments and a Joint Ministerial Committee for Gibraltar. Devolved and Gibraltar ministers, however, do not attend negotiations. The External Affairs and Additional Legislation Committee of the National Assembly for Wales, at an early stage, criticized the new JMC arrangements as inadequate.³ Both the Scottish and Welsh governments have expressed their lack of confidence in the arrangements and the JMC (EN) has not met regularly, partly because of the lack of a Northern Ireland Executive.

Trade and Single Market issues

There is concern about the impact of leaving the Single Market and/or customs union on the economies of the devolved territories. The table below shows that all parts of the UK depend on European markets but **particularly England and Northern Ireland.** The high trade dependency for Northern Ireland is accounted for by cross-border trade with the Republic of Ireland. These figures do fluctuate from year to year, especially for the smaller territories.

² The Secretary of State for Scotland (a UK Government minister) declared that: '*I anticipate that unlike the Article 50 notification the Great Repeal Bill would be the subject of the legislative consent process and I am working on that basis [...] Given that the Great Repeal Bill will both impact on the responsibilities of this parliament and the responsibilities of Scottish ministers I think it is fair to anticipate that it would be the subject of a legislative consent process.*' Daily Telegraph, 26 January 2017.

³ National Assembly for Wales, External Affairs and Additional Legislation Committee, *Implications for Wales of leaving the European Union.* January 2017.

Table 2: EU-27 exports and imports as % of total exports 2016

	Exports	Imports
England	48	57
Wales	66	48
Scotland	45	39
N. Ireland	55	72

HM Revenue and Customs, *Regional Trade Statistics*, 2016.

Northern Ireland is particularly dependent on markets in the Republic of Ireland, which account for about half of the province's imports and export trade with the EU and a third of overall trade.

Scotland's trade with the rest of the UK is around four times higher than its trade with the EU-27. So both markets are important but the UK one more so.⁴ Gibraltar's exports are almost exclusively in services and overwhelmingly with the EU, predominantly the UK.

Inward investment is a particular concern. London leads the UK in attracting inward investment, with Scotland and Wales' share slightly above the UK average.⁵ There is concern that leaving the Single Market will discourage foreign investors.

Agriculture is not a large part of the UK economy but it is **politically salient, especially in Wales and Northern Ireland**, where agricultural employment and dependence on EU support are higher. There is considerable hostility to Europe among farmers, despite their dependence on EU support payments and export markets. Farmers are looking for guarantees that support levels will continue. Gibraltar does not have an agricultural industry and is outside the Common Agricultural Policy.

Table 3: Agriculture in the UK

	% regional Gross Value Added	% Employment	% farm income from CAP	% agriculture exports going to EU
UK	0.62	1.45	55	60
England	0.58	1.08	50	58
Scotland	0.94	2.57	74	60
Wales	0.62	3.88	80	90
N. Ireland	1.43	5.82	87	83
Gibraltar	n.a.	n.a.	n.a.	n.a.

Source: *Agriculture in the United Kingdom, 2015*, Department for Environment, Food and Rural Affairs; Department for Environment, Food and Rural Affairs (Northern Ireland); Welsh Government Department of Rural Affairs and Heritage; Scottish Government, Rural and Environment Research and Analysis Directorate, 2016.

Fisheries also represent a small contribution to UK economy but they are **concentrated in Scotland**, home to about 60 per cent of the fleet and 7.5 per cent of all EU landings;⁶ they are further concentrated in northern Scotland, where they are a significant part of the economy of some communities. There is widespread opposition to the Common Fisheries Policy (CFP) and it is estimated that fishermen overwhelmingly voted Leave. The Scottish Fishermen's Federation did not take a position in the referendum, recognizing that the issue was more complex. It does, however, now insist that Scotland should be outside the CFP and control access to its own waters. Fish exports, on the other hand, are heavily dependent on access to the EU market. 71% of UK fish exports come from Scotland and there is a two-way trade dependency. Scotland exports 80% of its fish but imports 80% of the fish it consumes. Fish farming is particularly dependent on exports and does not have the issues with controlling access that offshore fishermen confront. Around eight per cent of fishing crews are from EU Member States, with a slightly larger proportion from non-EU

⁴ There are not good figures on trade among all the regions and nations of the UK.

⁵ UK Trade and Investment, *Inward Investment Report 2014 to 2015*, June 2015.

⁶ House of Commons Library, *UK Sea Fisheries Statistics*, Briefing Paper n. 2788, November 2016.

countries.⁷ The dependence of the fish processing industry on EU labour is much larger. One firm reported that 79 per cent of its labour force were from the EU.⁸

There is also some concern about **territorially differentiated patterns of trade** and how these might be affected by post-Brexit trade deals. For example, Welsh farmers would be concerned about the effect on lamb production of a trade deal with New Zealand. Fishermen in Scotland (where about half of the UK fishing industry is based) are concerned about access to their waters under possible trade deal packages.

Freedom of Movement

One of the main issues in the referendum campaign was freedom of movement of workers, which became confounded with the broader issue of immigration and the refugee crisis. Restricting freedom of movement was one of David Cameron's key demands in the negotiations and the very limited concession he received (around delaying eligibility for some welfare benefits) was a factor in the Leave victory. This plays out very differently across the UK.

In 2015 13.5 per cent of the UK population were foreign-born; 5.0 per cent were EU citizens.

Table 4: Percentage of non-UK born population 2015

	Non-UK	Non-EU	EU
England	14.6	9.3	5.2
Scotland	7.6	3.8	3.6
Wales	5.6	3.2	2.3
Northern Ireland	7.0	1.9	5.1
London	36.5	25.7	10.8
UK	13.4	8.4	5.0

House of Commons Briefing Paper, *Migration Statistics*, SN06077, 7 March 2017.

In spite of the salience of migration and free movement, the areas that voted Leave are not the ones with the highest levels of non-UK born people. London has by far the highest numbers and voted Remain. Wales has among the lowest and voted Leave, as did North East England. The issue has, however, been framed differently across the United Kingdom. Successive UK governments have seen migration as a problem and freedom of movement was a central part of the negotiations of 2016. **Successive Scottish governments** (Labour-Liberal Democrat coalition and SNP) **have seen immigration and free movement as an opportunity.**

One reason is demographic. Scotland's population stagnated for much of the twentieth century, which became a political issue. In recent years, a third of the growth in UK population has been driven by EU migration; in Scotland it is a half. Scotland's population growth between 2014 and 2039 is estimated at seven per cent on present trends. Without EU migration it would be only three per cent and the dependency ratio would be much worse.⁹

London politicians have also seen migration and free movement as positive, given the economic needs of the capital. **There is less of a consensus in Wales.** The Labour, Liberal Democrat and Plaid Cymru parties value freedom of movement but are sensitive to the popular hostility.

⁷ Scottish Government, *Scottish Sea Fisheries Employment*, 2015.

⁸ Macduff Shellfish, written submission to Scottish Parliament Culture, Tourism, Europe and External Relations Committee, 2016.

⁹ Scottish Government, *Scotland's Place in Europe*, December 2016.

Free movement of labour is most important of all in Gibraltar, which depends on a daily influx of workers across its border with Spain, accounting to some 40 per cent of the labour force. Just over half of these are Spanish and the remainder are citizens of other EU states taking advantage of the free movement provisions.

4. IMPACT ON DEVOLVED COMPETENCES

Several EU competences, including agriculture support and regulation; fisheries; environmental policy; and regional policy and assistance are largely or wholly devolved within the United Kingdom. If nothing else were done, **these would therefore revert to the devolved institutions, with no overall UK policy**. This could permit greater policy divergence, an outcome welcomed by many in Scotland. On the other hand, without something to replace the EU framework, the UK single market could be disrupted and unfair competition be allowed, for example over industrial or agricultural support.

There are **interdependencies between devolved and reserved areas**. Agricultural support would revert to the devolved administrations but not agricultural trade, with which it is closely linked. Inshore fisheries are devolved but there would be a need to negotiate new international fisheries agreements. Environmental policy has external effects on neighbouring jurisdictions, which are currently managed at European level.

There is now a broad acceptance that some UK-wide frameworks will be necessary to deal with these issues, but no agreement on how they will work. The Scottish and Welsh governments have stated that they should be intergovernmental and negotiated among equals. The Welsh Government has proposed a Council of Ministers of the United Kingdom.¹⁰

The proposals in the EU Withdrawal bill are at the other end of the spectrum from this suggestion. A category of 'retained EU law' is created and it is proposed that all EU such law revert to Westminster. At a later stage, some powers may be 'released' to the devolved bodies. In order to achieve this, the Withdrawal Bill amends the devolution statutes for Scotland, Wales and Northern Ireland.

The UK Government has claimed that no decisions currently taken by the devolved administrations will be removed from them but this is open to interpretation.¹¹ Indeed, it claims that they will gain powers: 'we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved.'¹² The argument is that at present the devolved administrations 'are responsible for implementing the common policy frameworks set by the EU.' So 'When the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the UK'.¹³

This is a highly contentious claim. One might argue that, after Brexit, these frameworks will cease to exist. Moreover, taking back all Europeanized competences and then deciding which parts to devolve again reverses the 'reserved powers' model of devolution and replaces it with a concurred powers model in relation to those matters.

If the devolved governments have only selected parts of the relevant competences devolved, that will make it more difficult to frame coherent sectoral policies; this was part of the rationale for the reserved powers model. The Withdrawal Bill provides no time limit for the reservation of retained EU powers.

The UK Government has advanced a further argument, that it is necessary after Brexit to secure the UK's own Single Market.¹⁴ The idea of the UK as an integrated common market is not new, but the reference to the Single Market has potentially far-reaching implications. The European Single Market is a broad set of principles covering multiple policy sectors, developed by the European Commission with the Council of the EU and enforced by the

¹⁰ Welsh Government, *Brexit and Devolution*, 2017.

¹¹ *A Global Britain*. Speech by Prime Minister Rt Hon Theresa May MP, Lancaster House, 17 January 2017.

¹² White Paper, *The United Kingdom's exit from and new partnership with the European Union*, February 2017.

¹³ White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*, March, 2017.

¹⁴ White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*, March, 2017.

Court of Justice. It has extended into some unanticipated fields. For example, the Scottish Government has faced a long-running case on the minimum pricing of alcohol. This was proposed as a public health issue but is being challenged as a violation of competition and single market principles. Were the UK Government to adopt a similar principle, it could involve encroaching on a wide range of devolved competences and not just the specific matters listed above.

The UK has no mechanism for dealing with these UK Single Market issues and none is proposed, apart from the reservation of retained EU powers.

These concerns are less important in Gibraltar, which is geographically removed from the UK and is outside the customs union and the Common Agricultural Policy. There is no suggestion of taking powers away from Gibraltar.

Funding

The United Kingdom is a **net contributor** to the European Union budget, although the figure was greatly exaggerated during the referendum campaign. Calculating the balance for individual nations and regions is more difficult. Below are best estimates of receipts. The amounts received under cohesion policy are particularly hard to calculate because of the vexed issue of additionality.

Table 5: EU funding: CAP, Structural Funds and Research

	% UK CAP receipts	% Structural Funds 2014-20	% UK funding from EU research area	% UK population
England	63	63.8		84
Scotland	18	8.2	10.4	8.2
Wales	9	22.2		4.7
N. Ireland	10	5.6		2.7

Alan Greer, *The European Referendum, Agriculture, Food and Rural Policy Issues*, Royal Society of Edinburgh, 2016; SPERI Political Economy Research Brief, 24, *UK Regions and European Structural and Investment Funds*, University of Sheffield, 2016.

Wales and Northern Ireland do well here. If estimated contributions are added, it seems that **England and Scotland are net contributors** while **Wales and Northern Ireland are beneficiaries**.

Gibraltar also benefits from EU funding but in relatively modest amounts.

The UK is a net contributor to the EU budget. When it leaves, this net contribution will revert to the UK Treasury. Much of this funding is for those competences that are devolved, notably regional development, agriculture and research. It has not yet been decided how these will be distributed within the UK.

The existing devolved funding mechanisms are not designed to handle this type of funding. Currently, the devolved administrations are funded by a **block grant** and, in the case of Scotland, **own taxes**. There are current proposals to devolve some taxes to Wales and Northern Ireland. The block grant is calculated according to the Barnett Formula, which gives the devolved administrations the same resources in each spending round as in the last one, adjusted for the population-based share of the changes in corresponding spending in England. Further adjustments are now made in respect of devolved taxes.

The options for dealing with cohesion and agricultural funds are:

- **Distribution according to a UK-wide formula**, which would imply a UK-wide policy framework;
- **Distribution on a historic basis**, which would favour the devolved governments, given their larger spending on agriculture;

- **Distribution on a per capita basis**, which would not take account of needs and which would favour England;
- **Incorporating** the money **into the block grant** and adjusting according to the Barnett Formula, which would imply transferring existing funds and adjusting thereafter on a per capita basis.

The most likely option for research funding is to transfer it to UK Research and Innovation, which is reserved (although research itself is not) and distribute it competitively.

5. SCOTLAND

Scotland is faced with a number of options in responding to Brexit. These have been subject to debate in the Scottish Parliament and in the wider society. The Scottish Government's position is laid out in a paper issued in December 2016.¹⁵

Acceptance

It could accept the result as binding on the UK and **seek to make the most of it**. Some Brexit supporters, and some Conservatives who were for Remain, argue that the reversion of powers to Scotland provides opportunities to gain more autonomy. A small SNP pro-Brexit group has argued that this is the strategy to pursue in the short term. On the other hand, the powers that would revert are not central to the big Single Market issues; so advocates of this approach have also argued for a general expansion of devolved powers. It has been noted, for example, that outside the EU it would be possible (although technically rather difficult) to devolve Value Added Tax.

Stop Brexit

The SNP did argue, when the referendum was decided, that **leaving should require a concurrent majority across the four nations** of the United Kingdom. This was not accepted and is not being pressed now. Even the argument that legislative consent is required is not being made in order to secure a Scottish veto. The SNP might have used their strength in the UK Parliament (where they hold 35 out of Scotland's 59 seats), to join a blocking coalition but this would have required support from the Labour Party and pro-European Conservatives which has not materialized. The SNP now accepts that this will not happen.

Soft Brexit for the UK

There is wide cross-party agreement in Scotland that, if Brexit has to happen, it should be a 'soft' Brexit, which means **keeping as much of the Single Market as possible**. The SNP and the other main parties in Scotland have few problems with freedom of movement so this does not pose the same problem as for Labour or the Conservatives in England. In its policy paper, the Scottish Government argues for the UK to stay within both the single market and the customs union, keeping freedom of movement. Again, however, this would require a cross-party coalition in the House of Commons. Following the 2017 General Election and the Conservatives' loss of their majority, there is greater scope for parliamentary influence.

Differentiated Brexit

The Scottish Government proposed **a differentiated arrangement** that would allow Scotland to retain as much as possible of EU membership, even if full membership is not possible.

The centrepiece is that **Scotland would remain in the Single Market** even as England and Wales left. This would give it a status analogous to that of the European Economic Area (EEA); indeed Scotland might formally become part of the EEA. As with the EEA, agriculture and fisheries would be excluded. If the UK were to leave the EU customs union, Scotland would also leave, remaining in a customs union with the UK. This would allow it to avoid tariffs and rules of origin on trade in goods between Scotland and the rest of the UK and thus obviate the need for a physical border. There would be full access to the Single Market in services and provision for the free movement of workers between Scotland and the EU-27. Scotland would participate in European social provisions, academic exchange and research and in aspects of EU Justice and Home Affairs policies.

¹⁵ Scottish Government, *Scotland's Place in Europe*, December 2016.

These proposals are legally and technically feasible, although they do pose challenges. Being in a customs union with the UK and a Single Market with the EU could be complex. There is no precedent for this either in the EU or the EEA; Liechtenstein is in a customs union with Switzerland, but both are effectively in the Single Market by virtue of the EEA or the Swiss-EU bilateral treaties.

Retaining a customs union with the UK could remove the need for physical checks on goods traded between Scotland and England. There would, however need to be rules governing the treatment of goods entering the UK from EU countries, depending on whether they were destined for Scotland or for England and Wales (we leave Northern Ireland aside here as it too might have a differentiated settlement). The Scottish Government concedes that there would have to be certification as to the final point of sale of such goods. There would also have to be rules of origin if intermediate goods were passing through England and Wales en route for Scotland.

There would be a **virtual border in services** to the degree that EU and UK rules diverged after Brexit. This could be avoided by double compliance rules to ensure that Scottish services were compliant with both UK and EU regulations. The problem would be reduced to the extent that the UK itself retains EU regulations and succeeds in gaining access to the EU services marketing and passporting rights for financial services.

Free movement of workers between Scotland and the EU would require **controls** to ensure that EU workers did not come into Scotland in order to cross the border to work in England. This is not an insuperable problem since a similar mechanism operates in the Schengen area for third-country nationals with the right to work in one member state but not in another. It would be monitored at the place of work rather than at the border. There would also have to be provisions to define a Scottish worker, for the purposes of rights to work in member states of the EEA.

In order for Scotland to remain compliant with Single Market regulations, the Scottish Parliament and Government would require new competences across a wide range of Single Market matters that are currently reserved to Westminster.

There is the hope that, given promises of an open border in Ireland, similar arrangements could be available to Scotland. The UK Government suggestions with regard to Northern Ireland raise at least as much complexity as those of the Scottish Government.

Independence

Until the 1980s the Scottish National Party looked unfavourably on Europe and in the 1975 referendum favoured leaving. In the mid-1980s the SNP changed direction and joined those other autonomist and secessionist parties that seek Europe as an important external support system, underpinning their own aspirations. In the independence referendum of 2014, nationalists used the promise that both Scotland and the remaining UK would be in the European Union to counter unionist arguments about putting up new economic and physical borders or being isolated.

In that referendum, Scotland voted by 55 per cent to remain in the United Kingdom. It has now voted by a larger majority to remain in the European Union. The unionist parties argue that the independence issue was resolved in 2014 and that the relevant majority in the EU referendum was UK-wide. The SNP notes that, during the 2014 referendum, the unionist side insisted that remaining in the UK was the only way to secure EU membership; yet the opposite happened. In their programme for the 2016 Scottish elections, the SNP accepted that **another independence referendum was off the agenda unless there was a material change of circumstances** such as Scotland being taken out of the EU against its will. This has now happened. In March 2017 the Scottish Government successfully asked the Scottish Parliament for a resolution authorizing it to request the UK Government to

pass a Section 30 order (Scotland Act, 1998) to allow an independence referendum. This was the path used for the 2014 referendum. The UK Government responded that it would not agree 'at this time' but did not rule it out in the future. Following the 2017 UK General Election in which the SNP lost many of its Westminster seats, the idea of a referendum has been put on hold.

Apart from the refusal of the UK Government to agree, there are other obstacles to a successful independence referendum. The opinion polls show support for independence more or less unchanged at a little under half the electorate. **There has not been a post-Brexit boost.** Indeed, most of the electorate have long failed to make the link between Europe and independence that the SNP make. In 2014 Europe provided an essential support system for a putatively independent Scotland on the assumption that the UK would also remain in the EU. If a referendum vote resulted in Scotland leaving the UK, it might stay in the EU but there would be a hard economic border between it and the remaining UK, unless the UK were to remain within the Single Market, for example through the European Economic Area (EEA). The UK Government has now made it clear that it will leave the Single Market. As noted above, Scotland is four times more dependent on UK trade than on EU trade. So the harder the form of Brexit, the more difficult it becomes for Scotland.

The Scottish Government has reaffirmed its commitment to Scottish membership of the EU but various routes have been suggested. At the time of the 2014 referendum, the No side suggested that Scotland might not be able to join the EU. Commission President Barroso said that it would be 'difficult if not impossible' for Scotland to join the EU. There seems no basis in EU law for the assertion that membership would be impossible, as Scotland meets the criteria and not since de Gaulle's veto on UK membership in the 1960s has a democratic country respecting the rule of law been refused admission. The Scottish Government did accept that it would have to apply for membership and suggested two ways: by treaty amendment and by the normal accession route. No member state suggested that it would veto Scotland's membership and none has done so since. The crucial point is that if Scotland were to become independent as a result of an agreement with the United Kingdom, it would be recognized by the UK and there is no reason for any other government to refuse recognition or EU membership.¹⁶ Some opponents of independence have said that Scotland would have to join a 'queue' behind the Balkan countries. EU accession has never worked on the basis of a queue. Applicants are accepted when they are ready, not on the basis of when they applied. There now seems to be a consensus that, were Scotland to become independent by legal means, it could join the Union.

Yet making the transition from being part of the UK to being an independent state would take time. It has been suggested that, in the meantime, Scotland could become part of EFTA and the European Economic Area (EEA), so maintaining membership of the Single Market. It could even be that Scotland would remain in the EEA on a longer term basis, so staying outside the controversial fisheries policy. As an EEA state, Scotland could also negotiate a trade agreement with the United Kingdom. This, too, would be complicated and raise many of the same difficulties as the Scottish Government's proposal for differentiated Brexit, with Scotland remaining both in the EU Single Market and in the UK, notably around rules of origin.

¹⁶ Spanish Foreign Minister García Margallo stated: '*España no trabaja sobre hipótesis. Lo que sí le digo es que sería determinante a la hora de decidir nuestro voto cuál fuese la actitud del Reino Unido*' (Spain does not work on assumptions. What I do say is that, when deciding our vote, what will be the attitude of the United Kingdom would be decisive), *La Vanguardia*, 16 December 2013. Spanish ministers have been careful to stress that the constitutional situation as concerns Catalonia is quite different.

6. WALES

Although the Welsh Government (a coalition of the Labour Party with a single Liberal Democrat minister) campaigned for Remain, **it has accepted the Leave vote in the UK and Wales**. It has not sought to join in a coalition to reverse the vote but, like the Scottish Government, argued that the UK Parliament's approval is needed to trigger Article 50 and that the devolved administrations have an input to the negotiations. The position was elaborated in a paper published in March 2017 by the Welsh Government (Labour and Liberal Democrat parties) with Plaid Cymru (Welsh nationalists).¹⁷

Unlike the Scottish Government, this paper does not argue for a differentiated settlement for Wales. Instead, **it calls for a 'soft Brexit' for the UK**. This would ideally mean remaining within the Single Market and (preferably) the customs union, either through the EEA or a special deal. If this is not possible, then it argues for as close as possible a relationship with the Single Market. The paper notes the **positive benefits for free movement for Wales**. It recognizes public concern about migration, while noting that it is highest in some of the areas with fewest migrants. The result is a rather ambivalent commitment to limiting free movement to workers or students (which is more or less what happens at present).

The issue of repatriated powers is also treated differently. Whereas the emphasis in Scotland is on gaining autonomy in matters like agriculture and fisheries, **the Welsh Government's paper emphasizes the need for continued UK policy frameworks to replace the EU ones** and on the dangers of a race to the bottom if such frameworks are absent. It proposes, however, that such frameworks should be **negotiated horizontally among the four nations**, with the London departments speaking only for England, rather than by recentralization. This would differ from the current arrangements for agreeing positions in advance of European negotiations through the Joint Ministerial Committee (Europe), which gives the last word to the UK Government. This demand is tied into a wider argument on the need for a firmer grounding for the devolution settlement.

Some issues specific to Wales are highlighted. One is cross-border cooperation and trade with the Republic of Ireland, given the sea border and the importance of Welsh ports. There is a European Territorial Cooperation Programme spanning Wales and Ireland.

Wales is also concerned with **funding after Brexit**, given its high dependence on European funding, notably in agriculture and structural programmes. There is concern that EU spending in these fields should be fully replaced. This does not strictly concern the Brexit negotiations but rather domestic decisions by the UK Government. It is also suggested that Wales could remain part of other EU programmes, including the research area, and access to the European Investment Bank.

Unlike Scotland, Wales cannot use the prospect of independence as a means to further its aims because (a) support for independence in Wales rarely exceeds single figures and (b) Wales voted to leave the EU. On the other hand, both the main UK political parties have more of a political stake in Wales than in Scotland, where the Labour, Conservative and Liberal Democrat parties hold only one seat each at Westminster.

¹⁷ Welsh Government, *Securing Wales' Future. Transition from the European Union to a new relationship with Europe*, January 2017.

7. GIBRALTAR

Status of Gibraltar

Gibraltar was annexed by Great Britain in the Treaty of Utrecht (1713) but its sovereignty is disputed with Spain. Gibraltar has a very different relationship with the EU from the devolved UK territories as is a self-governing Crown dependency, which decided, unlike the Channel Islands and the Isle of Man, to join the EU with the United Kingdom in 1973. This is governed under EU law by article 355(3) of the Treaty referring to 'European territories for whose external relations a Member State is responsible'. With its **wide competences** (effectively everything except defence and foreign affairs), Gibraltar's powers cover most EU matters and it is responsible for transposing Single Market directives. These are not regarded as 'foreign affairs', which would be reserved to the UK in the person of the Governor. Following a legal action, Gibraltar is represented in the European Parliament, sharing a constituency with south-west England. Gibraltar has a representative office in Brussels but, unlike the devolved administrations, it does not participate in the UK delegation to the Council of the EU.

While subject to most EU law, Gibraltar **did not join the customs union but retains its own tariffs. It is within the Single Market** and so enjoys free trade in services with the EU including the UK.

The sovereignty dispute with Spain is a key conditioning factor in the politics of Gibraltar, with regular tensions at the border, which was closed in 1969 by the dictator Franco and not opened until Spain's accession to the European Communities in the 1980s. There are also disputes about the existence and extent of Gibraltar's territorial waters. Proposals for joint sovereignty floated by the UK Government in the early 2000s were strongly opposed by Gibraltar (98% of citizens rejecting it in a referendum in 2002) and came to nothing. Europe is important to Gibraltar as an imaginative space providing broader horizons in the context of its relationship with Spain and its trading past. The EU has also been an arbiter when there have been disputes about the working of the border.

Gibraltar was historically a naval base, with a dockyard as an important employer but in recent years has reinvented itself as a centre for **financial services and on-line gaming**, which together account for some 40 per cent of its GDP. This depends on a low-tax regime and encouraging regulatory framework. The on-line gaming business depends on the UK market. In financial services, the UK accounts for some 80 per cent of the market, with the rest coming from other EU countries, in both cases using Single Market regulations. There is almost no agriculture or manufacturing in Gibraltar, meaning that food and goods have to be imported, mostly through the land border. There is also a substantial business in tourism, including cruise ships and cross-border shopping for low-taxed goods, including demand from British expatriates living in neighbouring parts of Spain.

There have been accusations in Spain that Gibraltar is a tax haven and should be so designated by the EU.¹⁸ The Gibraltar Government's position is that it is now a 'low tax' jurisdiction, a different matter.¹⁹ Reforms in 2009 meant that by 2014 the OECD accepted it as largely compliant with the international standards.²⁰ This report makes no judgment on the merits of the matter, merely noting that it remains in contention between Gibraltar and Spain.

¹⁸ José María Carrascal, *Gibraltar, paraíso fiscal*, ABC, 22 April 2016. 'Montoro lamenta que la UE no considera a Gibraltar un paraíso fiscal', *Cinco Días*, 20 June 2015.

¹⁹ Interview with Gibraltar officials.

²⁰ OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Review: Gibraltar* (2014). Phillip Morton, 'Gibraltar Gains Place On OECD White List', *Investors Offshore.com Tax News*, 23 October 2009.

EU free movement provisions are an essential element in the Gibraltar economic model. Forty per cent of its labour force commutes across the border from Spain. Just over half of these are Spanish and the remainder mostly citizens of other EU states. 9.6 million tourists arrived in 2015, 93 per cent across the land frontier.²¹ Gibraltar thus provides an important economic driver for the neighbouring areas of Andalucia, which suffer from high unemployment and low incomes. There is cross-border cooperation at a local level and proposals for a European cross-border initiative have been drawn up by a consortium including local governments, business and trade unions on both sides of the border.

Gibraltar and Brexit

In the June 2016 referendum, Gibraltar voted 96 per cent to remain, more than in any part of the UK. All parties, business and the trade unions were strongly in favour of remaining. Since Gibraltar is not part of the UK and not represented in Westminster, **it is unable to join an effective anti-Brexit political coalition or directly influence the triggering of Article 50 or the Withdrawal Bill.** On the other hand, like Scotland it has argued for a differentiated own settlement. Unlike Scotland it already has a special relationship with the EU.

The dominating concern in Gibraltar is **the border**. There is universal support for free movement of workers, although this is usually phrased as 'flexibility' to avoid terms that might provoke British Brexit supporters.²² Close attention is being paid to developments in Ireland, which might provide a precedent but there are important differences. In Ireland, the issue of cross-border movement of workers might be dealt with by a bilateral UK-Ireland agreement to allow citizens of each country to work in the other. In the case of Gibraltar, the agreement would have to extend to the non-Spanish EU citizens crossing the border. On the other hand, Gibraltar already has border passport controls with both Spain and the UK, so there would be no risk of EU workers using free movement to access Gibraltar and then moving invisibly into Spain (or UK workers going in the opposite direction). So there is no technical obstacle to Gibraltar operating its own policy on access for both EU and UK workers.

A second concern is the **free market in services**. The existing framework depends on European regulations and this would have to be negotiated with the UK if the UK comes out of the Single Market. Gibraltar would risk losing the 20 per cent of its service trade with the EU 27, but that is less important than the UK market.

Gibraltar has been very active in seeking support in London, the devolved territories and Europe. There is **a bilateral UK-Gibraltar Joint Ministerial Committee** on Brexit separate from that for the devolved administrations. This provides for access to UK ministers to present Gibraltar's priorities but there is no guarantee that these will not be traded off in the negotiations.

The Spanish Government position is that any settlement for Gibraltar must be negotiated bilaterally between Spain and the UK. This position is reinforced in the draft guidelines of the European Council issued on 31 March 2017 which state in point 22 "After the United Kingdom leaves the Union, no agreement between the EU and the United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom". It renewed its proposal for joint sovereignty but this has been rejected by the governments of both Gibraltar and the United Kingdom.

²¹ Gibraltar Chamber of Commerce, An Economic impact study and analysis of the economies of Gibraltar and the Campo de Gibraltar, 2015.

²² Interviews with politicians, officials, business and trade unions.

8. THE UK GOVERNMENT

The position of UK in regard to the details of Brexit has remained unclear although some indications were given in the Prime Minister's speech of January 2017²³ and the UK Government's White Paper of the same month.²⁴ The UK will leave the Single Market and the customs union but will try and retain some of the benefits of both. This is a long way from the position of the Scottish, Welsh and Gibraltar Governments, all of which favour the Single Market.

It will not accept freedom of movement of workers on present terms, posing difficulties for Scotland, Wales and Northern Ireland. It has proposed a 'UK Brexit' which seems to rule out differentiated relationships with the UK, at least in Scotland and Wales. The UK Government has recognized that the Irish border poses problems but has not come up with a specific solution. It has opened a dialogue with the devolved territories and Gibraltar but the governments in Scotland and Wales are not satisfied with their role. They complain that they are not consulted in advance of major statements by the UK Government and do not get information in time.

²³ *A Global Britain*. Speech by Prime Minister Rt Hon Theresa May MP, Lancaster House, 17 January 2017.

²⁴ *The United Kingdom's exit from and new partnership with the European Union White Paper*, HM Government, January 2017.

9. CONCLUSIONS

- Brexit will affect the balance of the devolution settlement within the United Kingdom and relations between the UK and Ireland. When the UK leaves the EU, unless the devolution statutes were changed, those competences currently both devolved and Europeanized would revert to the devolved legislatures.
- The UK Government's Withdrawal Bill proposes that these powers revert, at least initially, to Westminster.
- It may be desirable to establish UK frameworks in these policy fields to replace the EU frameworks, in order to secure the UK single market and fair competition. The key question is whether such frameworks would be imposed from the centre or negotiated with the devolved bodies.
- There is common ground and cooperation between the Scottish and Welsh governments.
- The Supreme Court has declared that the consent of the devolved territories is not necessary to trigger Article 50 but this issue has returned in relation to consent for the withdrawal legislation. The Scottish and Welsh governments have announced that they will not recommend legislative consent for this.
- Brexit poses serious difficulties for Northern Ireland in that there will be an economic border (not necessarily physical) between the two parts of Ireland. As of now, no solution has been found to this.
- The positions of the UK and the Scottish and Welsh governments on Single Market membership for the UK are far apart.
- Proposals for a differentiated settlement for Scotland are technically feasible. The UK Government has not accepted the idea of a such differentiated.
- The Scottish Government has asserted the right to hold a second independence referendum now that Scotland faces being taken out of the Single Market. The UK Government has not accepted this as of now but has not ruled it out forever. Following the 2017 General Election, the issue has been temporarily shelved.
- The agenda in relation to Gibraltar is less extensive than that in relation to Scotland or Northern Ireland. The main concern is free movement across the border, which might be retained without having implications for the nations and regions of the UK itself. It would, however, require agreement with Spain.
- It is not possible to give a definitive answer to most of the questions posed about Brexit and devolution given that the UK Constitution is mostly unwritten, dependent on conventions and flexible. It is also difficult to model the economic effects of Brexit for the devolved administrations, although work has been done.²⁵ There is a complex political game in which the various actors are making claims and assertions, few of which have been tested in law. Even the very principle of sovereignty, the foundation of constitutional law in most countries, is disputed in the UK.

²⁵ *Modelling the long-term impact of Brexit on the Scottish economy*, Fraser of Allander Institute, University of Strathclyde, 2016.

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