

## Written evidence submitted by Prof Nicola McEwen (FRE0035)

### 1. Introduction

This briefing considers the devolution dimension of the committee's inquiry, with particular focus on Scotland and Wales. It addresses three main areas: (i) the priorities of the devolved governments in Brexit negotiations, which contrast sharply with those of the UK Government; (ii) the state of intergovernmental engagement with respect to Brexit negotiations, and (iii) preparations for UK common regulatory frameworks for the period after transition.

### 2. Divergent Priorities

- 2.1 The Scottish and Welsh governments on the one hand, and the UK Government on the other, have starkly divergent priorities with respect to Brexit negotiations. These reflect their distinctive political, nationalist and economic perspectives.
- 2.2 The strong Remain vote in Scotland lent the Scottish Government a mandate to push for continued membership of the EU internal market for the UK as a whole or, failing that, for Scotland alone. It is also committed to continued participation in EU programmes and alignment with EU law in areas of devolved competence. A Continuity bill is expected to be introduced in the autumn to facilitate the commitment to 'keep pace' with EU law.
- 2.3 The Welsh Government accepted the Brexit vote in Wales but has consistently called for 'full and unfettered access to the single market' to be the top priority in negotiations. It supports level playing field commitments, dynamic alignment with EU regulations and continued participation in EU programmes and agencies.<sup>1</sup> Responding to the publication of the UK's mandate, the Counsel General and Brexit Minister noted: *'It is clear from the mandate that the UK Government has a completely different set of priorities for the UK's future relationship with the EU than the ones we have consistently advocated.'*<sup>2</sup>
- 2.4 Distinctive nationalist outlooks help to explain divergences. The current Conservative Government's nationalism regards national sovereignty as paramount, making it unlikely that it would accept an outcome that ceded decision-making authority to EU institutions or the ECJ. By contrast, both the pro-independence administration in Scotland and the pro-devolution administration in Wales are comfortable combining territorial self-government with shared sovereignty with EU institutions.
- 2.5 Both the Welsh and Scottish governments attach higher priority to limiting the economic impact of EU exit. The Scottish Government estimates that a future UK-EU relationship based on WTO-style terms would reduce Scotland's economic output by 8.5% by 2030, and 6.1%

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<sup>1</sup> Welsh Government, 2020, [The future UK/EU relationship: negotiating priorities for Wales](#)

<sup>2</sup> Jeremy Myles, AM, Counsel General and Brexit Minister, 2020, [Written Statement: Welsh Government's analysis of the UK Government's negotiating mandate for the Future Relationship with the EU](#)

with a basic Free Trade Agreement.<sup>3</sup> In Wales, 60% of internationally-bound goods are destined for the EU. For both administrations, close regulatory alignment and the absence of tariffs and non-tariff barriers represent the least bad Brexit.

- 2.6 All three devolved administrations have called for an extension to the transition period, in order to concentrate resources on the public health and economic emergencies generated by Covid-19.

### 3. Brexit Negotiations and Intergovernmental Relations

- 3.1 The Joint Ministerial Committee (EU Negotiations, or JMC [EN] - a sub-committee of the intergovernmental JMC) was set up in 2016 specifically to support communication and coordination between the UK's four governments in Brexit negotiations. In a departure from previous intergovernmental forums, its terms of reference committed all four administrations to *'seek to agree a UK approach to, and objectives for, Article 50 negotiations'*, and to *'provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations'*.<sup>4</sup>
- 3.2 The experience of Phase 1 of Brexit negotiations failed to live up to this remit. The devolved governments were barely consulted on the UK's negotiating priorities and had no influence over the UK's approach. All three devolved administrations opposed the Withdrawal Agreement. In addition, for the first time since devolution, all three devolved legislatures withheld consent for the EU (Withdrawal Agreement) bill, after their consent had been sought over the sections affecting devolved competence.<sup>5</sup>
- 3.3 The UK Government gave a commitment in January to enhanced engagement with the devolved governments during phase 2 of the negotiations. However, this does not appear to have materialised to date. Ministerial statements from the devolved governments indicate repeated calls for more engagement ahead of negotiating rounds. In March, the three devolved administrations issued a joint call for *'a meaningful, comprehensive and transparent process for the Devolved Governments to influence the UK's negotiating position'*.<sup>6</sup>
- 3.4 The devolved governments appear to have had little opportunity to feed into or shape the negotiating mandate. Addressing a parliamentary committee on 20<sup>th</sup> February, the Scottish Government Cabinet Secretary for the Constitution, Europe and External Affairs noted that the UK position - as then set out in the Prime Minister's speech on 3<sup>rd</sup> February, the Chancellor of the Duchy of Lancaster's statement on 10<sup>th</sup> February, and David Frost's lecture on 17<sup>th</sup> February - reported that: *'Devolved Administration ministers have so far been given no chance even to look at it, let alone to influence it. UK ministers cite plenty of meetings taking place, especially among officials, but as yet there has been no sharing of the text of the*

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<sup>3</sup> Scottish Government, 2018, [Scotland's place in Europe: people, jobs and investment](#), para 57

<sup>4</sup> Joint Ministerial Committee (2016) [Communiqué](#).

<sup>5</sup> Nicola McEwen (2020) Negotiating Brexit: power dynamics in British intergovernmental relations, Regional Studies, DOI: [10.1080/00343404.2020.1735000](#)

<sup>6</sup> [Government must engage with devolved administrations on EU negotiations](#)

*deal, no role for the devolved Governments in deciding the UK position, and no meaningful ministerial discussion.*<sup>7</sup>

- 3.5 The devolved governments reported receiving advanced copies of the draft legal texts 24 hours prior to their publication, despite *'calling for many weeks'* for these to be shared.<sup>8</sup> Consequently, they had no opportunity to shape the texts. Several of the draft legal texts address areas that are within devolved competence, including fisheries, law enforcement and judicial cooperation, social security coordination, and energy and climate change. None of the texts appear to consider the devolution dimension.
- 3.6 There have been regular bilateral discussions between the respective Brexit ministers in the devolved governments and the UK Government's Paymaster General, Penny Mordaunt MP. These discussions serve to update devolved governments on the progress of negotiations from the UK Government's perspective. But, according to the Scottish Government's Constitutional Secretary, the process *'isn't about influencing what is happening still less deciding on crucial issues for which we are responsible. It is merely about hearing what is happening'*.<sup>9</sup> This view was echoed by his Welsh counterpart, who described the UK Government as *'fundamentally uninterested'* in the views of the devolved governments.<sup>10</sup> Instead, devolved governments have called for structured multilateral discussions involving all four administrations, ahead of negotiating rounds, in line with the terms of reference of the JMC (EN).<sup>11</sup>
- 3.7 In order for the devolved governments to be engaged with the Brexit negotiations, it seems appropriate that there is inter-ministerial engagement involving all four administrations *ahead of* negotiating rounds, with sufficient time to create opportunities for the devolved administrations to be consulted upon and feed into the UK's negotiating position. This could follow the model of the JMC (Europe), the only JMC forum to meet routinely throughout the devolution period ahead of meetings of the European Council.
- 3.8 The divergent priorities of the UK and devolved governments render a shared 'UK approach' extremely unlikely. It would nevertheless seem pragmatic and constitutionally appropriate to alert the devolved governments to the evolving UK position, and to give them a voice in the process, especially where it engages directly, or touches upon, policy spheres for which the devolved institutions are competent under the respective devolution settlements. This would be in the spirit of the *Memorandum of Understanding* that underpins relationships between the UK's four administrations.<sup>12</sup>

#### **4. Common Frameworks**

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<sup>7</sup> Scottish Parliament Culture, Tourism and External Affairs committee, 2020, *Official Report*, 20 February.

<sup>8</sup> <https://gov.wales/written-statement-joint-ministerial-committee-eu-negotiations-3>

<sup>9</sup> <https://news.gov.scot/speeches-and-briefings/ministerial-statement-update-on-the-eu-uk-future-relationship-negotiations>

<sup>10</sup> Senedd External Affairs and Additional Legislation Committee, 02 June 2020

<sup>11</sup> <https://gov.wales/written-statement-joint-ministerial-committee-eu-negotiations-2>

<sup>12</sup> *Devolution: Memorandum of Understanding and supplementary agreements*, 2012

- 4.1 Officials from across the four administrations have been meeting regularly to explore whether and when common policy frameworks may be required once the UK departs from the regulatory umbrella of the European Union. The areas under consideration are those where current EU law intersects with devolved competence. A set of principles to underpin this work was agreed at the JMC (EN) in October 2017. Principles include respect for the devolution settlement, recognition of the linkages between Northern Ireland and Ireland, and the potential need for frameworks to manage common resources, comply with international obligations, negotiate new trade deals and *'enable the functioning of the UK internal market, while acknowledging policy divergence'*.<sup>13</sup>
- 4.2 The common frameworks strand has been coordinated by Cabinet Office but is co-owned by all four administrations. Officials convene in (approximately) monthly project board meetings, supplemented by weekly calls, and proceed on the basis of consent through a five-step process starting with proof of concept to post-implementation governance. It is intended that ministerial approval for framework agreements will be secured during phase 4 at a JMC (EN). A related, more centrally-driven, strand of work on the UK internal market is led by BEIS and the Treasury, in consultation with the devolved administrations. The Scottish Government has chosen not to engage with this work.
- 4.3 The 2019 Revised Frameworks Analysis, published by the Cabinet Office, identified 160 policy areas where EU law intersects with devolved competence. Of these, 78 were considered to require a non-legislative framework, such as a concordat, with a further 21 thought to require legislative underpinning in whole or in part. The latter include the Emissions Trading System, fisheries management and support, agricultural support and the Services directive. Competence over some additional areas, including state aid, is disputed.
- 4.4 The UK Government is obliged by statute to report progress in the development of common frameworks. The latest (7<sup>th</sup>) report was published on 20 May and covers the period from 26 December 2019 – 25 March 2020.<sup>14</sup> By the end of this reporting period, two non-legislative frameworks had completed phase 3: the Hazardous Substances (Planning) framework and the Nutrition Health Claims, Composition and Labelling framework. The Emissions Trading Systems (ETS) and Statistics frameworks had completed phase 2. A Public Procurement framework was still undergoing Phase 2 review.
- 4.5 The timetable for completing frameworks before the end of the transition period, as currently set, was always very tight. It is now even less likely that legislative or non-legislative frameworks will be completed before the end of the year. Intergovernmental work on frameworks had been disrupted by no deal planning towards the end of 2019, and many project board officials have now been redeployed to work on government responses to the Covid-19 pandemic.

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<sup>13</sup> Joint Ministerial Committee (EU Negotiations, 2017, [Communiqué](#), 16 October.

<sup>14</sup> [European Union \(Withdrawal\) Act and Common Frameworks report](#), 20 May

- 4.6 The Welsh Counsel General revealed in evidence that the governments have worked on developing a shared understanding of what the priority areas are.<sup>15</sup> He expected two or three of these to secure ministerial approval in the JMC (EN) by the autumn and be available for scrutiny thereafter. For the remainder of the priority areas, it is hoped that outline frameworks may have secured ministerial approval, and be available for consultation and scrutiny in the new year. In other areas, interim arrangements are anticipated, including a statement of purpose, mechanisms for resolving disputes and managing divergence, and a timeline for resolution.
- 4.7 There are, however, considerable challenges that may make the agreement of any frameworks difficult. First, the scope of frameworks will be determined by the nature of the UK's relationship with the EU. This may not be known for some time. If exiting transition without agreement looks increasingly likely in the coming months, domestic frameworks may become more critical whilst being more difficult to agree, both because of the political tensions that such a scenario would likely generate between the UK's territories and the likelihood that officials may be redeployed on more pressing 'no deal' preparations.
- 4.8 Second, frameworks are related to the strand of work on the internal market. The UK internal market is much more contentious politically, with considerable divergence between the perspectives of the UK and devolved governments respectively. If the UK Government proceeds with statutory underpinning for a domestic internal market – which appears to be its preferred approach - in the face of opposition from the devolved governments, securing ministerial agreement over common frameworks may become more difficult.
- 4.9 Third, common frameworks will intersect with the Northern Ireland protocol in ways that are as yet uncertain. If the Northern Ireland Executive is to be party to domestic common frameworks, these may have to be sufficiently loose as to allow for the continued obligation for Northern Ireland to comply with EU regulations as set out in the protocol. Excluding Northern Ireland from common frameworks may be politically problematic for Unionist parties, and would also signal to the Scottish and Welsh governments that frameworks may place unacceptable constraints on policy divergence. This would be particularly problematic in Scotland where there is expected to be a legislative commitment to remaining aligned with EU law. Given the potential of the protocol to have an impact upon devolved competences and economies, the devolved governments in Wales and Scotland have complained of the absence of a joint workstream and detailed information-sharing on its implementation.
- 4.10 Fourth, any agreements that require compromise between governments led by competing political parties are likely to be more difficult to reach the closer we get to the devolved elections, scheduled for May 2021.
- 4.11 The implications of a failure to agree are difficult to identify, but will depend upon the willingness of the governments to commit to 'standstill' or interim arrangements or, conversely, to press ahead with potentially divergent policies within their spheres of competence. Retained EU law may permit policy continuity in the short term. The EU

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<sup>15</sup> Senedd, *External Affairs and Additional Legislation Committee*, 02 June 2020

(Withdrawal) Act lent the UK Government regulatory authority to prevent the devolved institutions from modifying retained EU law, but the use these powers would be extremely controversial, especially in Scotland, and could spill over into wider constitutional debates.

***June 2020***



# Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

Email: [freucom@parliament.uk](mailto:freucom@parliament.uk) Website: <https://committees.parliament.uk/committee/366/committee-on-the-future-relationship-with-the-european-union/>

14 May 2020

Professor Nicola McEwen  
Professor of Territorial Politics  
University of Edinburgh

Dear Professor McEwen,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

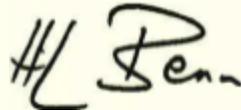
The Committee wishes to gather as much evidence as possible to inform its deliberations and I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our [call for evidence](#), which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

- What are the Devolved Administrations' priorities for the future relationship negotiations? What would be the possible consequences of a deal which does not meet these priorities?
- What might be the economic and social consequences for the devolved nations if no future relationship with the EU is agreed before the end of the Transition Period? Would such an exit also have constitutional implications? What are the Devolved Administrations doing to prepare for this eventuality?
- To what extent do the Devolved Administrations' priorities align with the negotiating aims set out by the UK Government? What are the areas of greatest disagreement?
- To what extent do the Devolved Administrations' priorities for the future relationship align with those set out in the EU's negotiating mandate? What are the areas of greatest disagreement?
- To what extent did the UK Government consult the Devolved Administrations before publishing its negotiating mandate? Were any amendments made as a result? Have they contributed to, or had the opportunity to comment on, any UK draft legal texts?
- To what extent has the UK Government kept the Devolved Administrations informed of developments in the future relationship negotiations? Have they found this satisfactory? If not, what improved means would you propose?
- How would you assess the effectiveness of the Joint Ministerial Committee since the UK left the EU? Is there scope for improvement? If so, how?
- What guidance has UK Government given the Devolved Administrations as to the steps that will need to be taken to prepare for the end of the Transition Period, for example: additional infrastructure or staff? What areas remain unclear?
- What effect has the COVID-19 pandemic had on the Devolved Administrations' preparations for the end of the Transition Period? What has been done and what still needs doing? What is a reasonable timetable for these steps to be taken?

- What steps have the Devolved Administrations taken to prepare businesses, local Government and civil society for the end of the Transition Period? Has there been any coordination with the UK Government about what practical changes businesses will need to make?
- Do you expect common frameworks will be ready by the end of the year? If not, what conversations have the Devolved Administrations had with UK Government about interim arrangements? What happens if some nations have come to agreement with the UK Government, but others haven't? If common frameworks are not agreed, what do you anticipate the implications will be for areas that fall within the Devolved Administrations' legislative competence?
- How do you expect legislative and non-legislative frameworks will be scrutinised? Are there still areas where competence is disputed? What has changed since the NI Executive has been re-established and NI is no longer represented by civil servants?
- How do you expect the trade provisions of the Northern Ireland protocol to operate? What checks will be needed on goods moving from GB to NI to identify those at risk of entering the European Union? What will be the implication of such checks for the operation of ports and airports?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at [freucom@parliament.uk](mailto:freucom@parliament.uk).

Yours,

A handwritten signature in black ink, appearing to read 'Hilary Benn', written in a cursive style.

**Hilary Benn**  
**Chair of the Committee**