The updates will provide information on the UK Government’s approach to leaving the EU including the domestic legislation necessary to ensure a smooth transition in terms of the UK statute book, along with details of the Scottish Government and the other Devolved Administrations’ positions. The updates will also provide information on developments within the EU with regard to the UK’s departure. Finally the update will provide information on the key issues likely to be at play during the negotiations and in developing the UK’s future relationship with the European Union.

As was clear during the referendum campaign and since the decision to leave the EU was taken, there is an abundance of information and analysis available, and this SPICe paper will try to cover the key issues by drawing on that information and analysis.

This week’s update focuses on two articles commissioned by SPICe examining progress in the Article 50 negotiations.
Progress in the Article 50 negotiations

Following the December European Council decision that sufficient progress had been made on phase one of the withdrawal this week’s update features two briefings commissioned by SPICe. The briefings by Fabian Zuleeg and Kirsty Hughes set out their views on progress in the Article 50 negotiations, discussions on transitional arrangements and the future relationship.

Fabian Zuleeg, the Chief Executive of the European Policy Centre focusses on the view from Brussels and the EU27 as the Brexit negotiations move on to phase two whilst Kirsty Hughes, Director, Scottish Centre on European Relations focuses on the progress made so far and examines the implications for Scotland as the negotiations move on to phase two.

Phase 2 of the Brexit negotiations: towards a withdrawal agreement?

Fabian Zuleeg1, 5 January 2018

1. The European Council of 14-15 December 20172 finally concluded that sufficient progress had been reached to move on to Phase 2 of the Brexit negotiations after the UK made the required significant commitments with regard to the rights of EU citizens in the UK, financial obligations and the Northern Ireland/Ireland border, as well as appropriate governance arrangements, including a role for the European Court of Justice (ECJ) post Brexit.

2. The European Council guidelines of 15 December 20173 state clearly that this agreement has to be made legally binding for the UK. Unless the UK wants to risk stalling Phase 2 or ending up with no agreement at all it will have to find legal mechanisms to safeguard this agreement.

3. Achieving sufficient progress on these issues had been stipulated as a necessary condition by the EU27 (‘sequencing’) before starting the broader negotiation envisaged in Article 50 of the Lisbon Treaty that aims at concluding a Withdrawal Agreement with the State leaving the EU, “setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.”

4. Without a Withdrawal Agreement4, the UK will leave the EU on 29 March 2019 without any agreement (no deal scenario). Even if there is such an agreement that is no guarantee that there will be a successful conclusion to the negotiations on the future

1 The arguments made here represent the author’s personal opinion and should not be seen as being representative of any organisation.
4 Unless there is a unanimous decision by the European Council to extend the negotiation period or if the UK withdraws its intention to leave the European Union in a legally accepted way.
relationship within the agreed transition period. Any substantive deals\(^5\) have to be agreed and ratified within the transition period; without agreement, any transition simply defers the cliff edge no deal scenario to the end of the transition period.

### The political mood

5. In the run up to the European Council meeting, there was considerable concern that Prime Minister May would not have sufficient political backing at home to conclude a Phase 1 agreement. This concern was further aggravated by the last minute intervention of the DUP which derailed the initial compromise.

6. For this reason, there was relief that the Prime Minister managed to get sufficient backing and the general reception was positive. However, the EU27 also observed that the UK’s political system is in turmoil and that the political commitment to any agreement might change with domestic political developments. Comments from some Brexiteers that the deal reached was conditional on reaching agreement on the future relationship further undermined trust in the UK, necessitating the condition that the Phase 1 agreement would have to be made legally binding.

7. In the next phase of the negotiations there will be a continuation of the asymmetric power relationship already evident in Phase 1. The EU27, represented by Michel Barnier, hold all the cards: the damage of no deal is far greater for the UK than for the EU27, there is a cut-off point which results in no deal unless the UK agrees, businesses will start implementing much deeper and broader contingency measures unless there is agreement to minimise divergence and disintegration\(^6\) and the EU27 are politically and economically the more significant/weighty partner.

8. There has been an argument that significant divisions within the EU27\(^7\) would help the UK in the negotiations. However, the UK siding with isolated EU27 governments will most likely strengthen the resolve of the remaining EU27 rather than weaken it\(^8\). Even more crucially, the default position of these negotiations, as with any trade negotiations, is ‘no deal’. Divergence within the EU27 increases the likelihood of such a default rather than reducing it.

### Phase 2

9. The Phase 2 negotiations will focus on the framework for the future relationship with a heavy emphasis on the economic relationship, as well as possible transition arrangements. The agreed measures leading to the conclusion of sufficient progress will form part of the Withdrawal Agreement but they do not constitute that Agreement itself, which will still need to be agreed and ratified by 29 March 2019 in its entirety.

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\(^5\) Most likely, there will be separate negotiations on a number of different areas, potentially including the economic relationship, defence and security, counter-terrorism and crime fighting, cooperation agreements with third countries, cooperation in particular sectors such as research and higher education.

\(^6\) Which can only be achieved by the UK staying in the Customs Union (CU) and Single Market (SM), which the UK Government has ruled out. This also seems to be the only way of guaranteeing a frictionless Ireland/Northern Ireland border unless Northern Ireland remains in CU and SM even if the rest of the UK leaves.

\(^7\) As for example implied by the Polish Government during Theresa May’s recent pre-Christmas visit.

\(^8\) This also applies to the UK’s relationship with third countries, where questionable new ‘friendships’ might imply limitations on what can be achieved in the EU-UK relationship.
10. Phase 2 only speaks of a framework, not an agreement on the future EU-UK relationship. As such, it is not a trade deal. Time is too short to agree anything like a detailed trade deal. Most likely the Withdrawal Agreement will simply contain a broad and general declaration of intent with regard to the final destination of the negotiations.

11. Phase 2 negotiations will be more tricky than Phase 1 as they are more open ended and the trade-off between political objectives and economic costs will be more apparent. Chancellor Merkel noted that Brexit trade talks will be more complicated than the first phase.9

**Transition**

12. If the UK wants a transition period, the UK Government will have to accept the EU27’s conditions. These are, essentially, full membership obligations (including the four freedoms) without any political rights, not an implementation period or a period in which policy divergence will be permitted. This is stipulated clearly in the European Council guidelines of 15 December 2017.

13. The same guidelines state that the transition period will be around 2 years. From an EU27 perspective, it is unlikely that this period could be extended for any significant period of time for legal reasons and for political reasons, as a time-limited transition period puts maximum pressure on the UK while also guaranteeing that a country does not have the economic benefits of membership for a lengthy period while already being a third country10.

14. In addition, the transition period has implications for the EU27’s relationship with the rest of the world. Countries that have special trade deals with the EU must benefit from the same access and privileges the UK will enjoy during the transition period. Remaining temporarily in the Customs Union also implies that the UK will not be able to conclude trade deals during this transition period but the EU27 might accept the start of negotiations on such deals. However, legally they could not come into force until after the end of the transition period. It is questionable how attractive this would be for third countries, especially if there is uncertainty with regard to the future EU-UK relationship.

**Future relationship**

15. Regarding the future UK-EU economic relationship, the UK government still faces a critical choice. Minimising economic harm [staying in the Customs Union (CU) and Single Market (SM)] breaks the Brexiteers red lines (on European Court of Justice jurisdiction, free movement of people, financial payments to the EU, the UK as a rule taker etc.), risking to split the Conservative Party. But leaving SM and CU implies significantly greater economic harm, as well as having broad negative political implications not least for the Northern Ireland situation. While transition buys some time, this fundamental dilemma remains unresolved and might thus still lead to a no deal outcome.

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10 Third countries are those outside the EU. After Brexit, the UK becomes a third country, even if there is a Withdrawal Agreement with a transition period.
16. The options for the future relationship are limited\(^{11}\) and do not include having the benefits of the SM and CU without all the associated obligations. Essentially, it comes down to choosing between staying in the SM (EEA/Norway) or a trade deal (Canada/Ukraine). The following diagram\(^{12}\) illustrates these choices for the UK:

![Diagram showing options for the future relationship between the UK and the EU](image.png)

17. The European Council guidelines of 15 December 2017 take the intent of the UK to leave the CU and SM as a given, stipulating that this will mean calibrating the trade and economic cooperation to ensure a balance of rights and obligations, while preserving the integrity and proper functioning of the SM.

18. Given the short time available (two years) as well as this overall framework (outside CU and SM), the implication is that the best outcome available is a rather limited trade deal, probably broadly excluding services\(^{13}\). The idea of a Canada+++ is possible if the additions refer to other political deals, for example on security. In terms of the economic relationship, any trade deal will not go much further than the Canada deal as there will be no cherry picking, with the integrity of the SM paramount for the EU27. Any trade deal is economically significantly inferior to SM and CU membership.

19. Even a limited trade deal will be difficult to negotiate. Time is short, such a deal has to meet the demands of all EU27 and it is an atypical deal, as it essentially involves disintegrating markets rather than accumulating gains from trade. The final outcome is thus uncertain, leading back to the possibility of a ‘no deal’ outcome.


Briefing Paper on the State of Play in Brexit Talks and Implications for Scotland

Kirsty Hughes, Director, Scottish Centre on European Relations, 4th January 2018

Introduction

1. At the European Council summit in Brussels on 15th December 2017, the EU27 agreed that "sufficient progress" had been made in the stage one Brexit talks between the UK and the EU27 for talks to move onto the second stage. This followed on from a recommendation to this effect from the European Commission.

2. However, several elements of so-called ‘stage one’ issues still remain to be resolved. The overall agreement so far, set out in a joint report by the UK and European Commission also needs to be put into a draft legal agreement. The UK, on its side, will eventually need to pass a Withdrawal and Implementation Bill to implement the deal, including these phase one aspects, in UK law.

3. In January, the EU Council of Ministers is expected to agree new guidelines on transition arrangements building on and amending draft guidelines published by the European Commission in December. This will allow talks to take place between the UK and EU27 on the details of a potential transition period after the UK formally leaves the EU on 29th March 2019. Any transition arrangements will be concluded as part of the overarching Withdrawal Agreement under Article 50 (Treaty on European Union).

4. By late January or February, UK Prime Minister Theresa May is expected to set out in more detail, probably in a speech, the sort of future UK-EU27 relationship her government would like to see. The EU27 are then expected to agree their position, and guidelines, for talks on a future trade and wider relationship with the UK at their summit on 22-23 March. Once they have done this, talks on a future trade deal, and a wider security relationship can get underway.

5. The aim, on the EU27 side, as set out in Article 50, is to agree an outline framework of the future UK-EU27 agreement. This would be adopted on both sides as a political declaration which would be referred to in the Withdrawal Agreement. This declaration would set out key goals and aspects of a future trade and wider security relationship but will not be a complete or full trade deal. A full trade deal can only be negotiated once the UK has left the EU and becomes a third country and is likely to take several years.

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14 European Council (Art 50) meeting (15 December 2017) – Guidelines, General Secretariat of the Council EUCO XT 20011/17
15 Communication from the Commission to the European Council (Article 50) “The state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union” COM (2017) 784 final
16 "Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during Phase 1 of Negotiations under Article 50 TEU on the United Kingdom’s Orderly Withdrawal from the European Union" 8th December 2017
6. Since the aim is to complete talks by autumn 2018, both on the Withdrawal Agreement and on the outline framework of the future relationship – so allowing time for ratification on both sides – time is very tight indeed.

7. The Scottish government welcomed the first stage agreement reflected in the joint report. The Scottish government has clear policy positions on the transition period and the future relationship. The above timetable makes it clear that there is a very limited window in which to attempt to influence the UK government’s stance on these issues.

8. This short paper first considers the deal struck in the stage one talks as set out in the joint report. Then it considers the issues likely to arise in negotiating a transition period and some of the key issues likely to arise in the negotiations over the future UK-EU27 relationship.

The ‘Stage One’ Brexit Deal

9. The ‘stage one’ Brexit deal, as set out in the UK-EC joint report, covers in particular the three issues prioritised by the EU27: rights of EU citizens in the UK and UK citizens elsewhere in the EU, Northern Ireland, and financial issues.

Rights of Citizens

10. EU citizens in the UK will be entitled to a ‘special status’ which will enable them to continue to live, work or study in the UK – and this will also apply to family members including children, parents, grandparents, spouses, registered partners and ‘a person in a durable relationship’. The Commission, and the European Parliament, would like this agreement to also cover future spouses or partners and this will be discussed more in the second stage of talks. EU citizens residing in the UK before the ‘specified date’, taken to be the 29th March 2019, will be entitled to ‘special status’ as will UK citizens in other EU countries. However, the question of the cut-off date will come up again in negotiations over transition arrangements.

11. In the current agreement, UK citizens living in other EU member states will not have a right to free movement across the EU27, although the European Parliament in its 13th December 2017 resolution argues that this should be allowed. The overall agreement on citizens’ rights will be monitored by the European Commission and by a new independent national authority to be set up by the UK.

12. The Scottish government has expressed its deep concern at the negative impact on Scotland of ending free movement of people. It will want to focus in particular on the UK’s proposed new migration policy when it is published but it should also pay detailed attention to how the UK intends to fulfil its commitments to EU citizens in Scotland and the rest of the UK, including ensuring acquiring ‘special status’ is not burdensome, and that the new independent national authority has sufficient powers.

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18 European Parliament resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom
Northern Ireland

13. In the run-up to the EU summit in December, the issue that looked as if it could block progress in talks turned out to be the question of the Republic of Ireland/Northern Ireland border – rather than the question of finances (as some had expected). In the event, the joint report dealt with this question – for now – by setting out three possible routes to ensure there is no hard border on the island of Ireland (defined to exclude the presence of “any physical infrastructure or related checks and controls”).

14. Both in the joint report, and in the European Council summit conclusions, the ‘unique’ and ‘special’ nature of the “island of Ireland” situation is repeatedly emphasised together with the UK’s and EU27’s full support for the Good Friday Agreement, and the UK’s full respect for the Republic of Ireland’s status as a full EU member state.

15. The first route, which the UK government aspires to, is that the future UK-EU27 relationship, once agreed, will ensure an open border between Northern Ireland and the Republic of Ireland. In its communication to the European Council, the Commission drily comments on this hope that it “seems hard to reconcile with the United Kingdom’s communicated desire to leave the internal market and the Customs Union”.

16. The second route, if the first doesn’t succeed, is for the UK to propose “specific solutions to address the unique circumstances of the island of Ireland”. This suggests, possibly, some sort of differentiated approach, although it may perhaps also include, or be interpreted as, use of technology, ‘trusted trader’ schemes and other proposals.

17. Finally, if that doesn’t work, the third solution is for the UK to maintain “full alignment with those rules of the Internal Market and the Customs Union which now, or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement”.

18. On its side, the UK commits to upholding the integrity of the UK’s internal market. It also commits to ensuring there are no new regulatory barriers between Northern Ireland and the rest of the UK – but with a crucial proviso unless the Northern Ireland Executive and Assembly “agree that distinct arrangements are appropriate”. So a differentiated approach is not entirely ruled out.

19. A separate strand of talks on Northern Ireland will continue as Brexit talks move forward in 2018. While some interpreted the joint report’s three options as meaning the UK was highly likely to stay in the EU’s customs union and single market, this does not square with the UK’s declared aims to leave both (also stated in the joint report).

20. Given the Scottish government’s proposals for Scotland to stay in the EU single market even if the rest of the UK leaves it, the Scottish government will doubtless watch closely how the talks develop and whether and what sort of specific solutions for Northern Ireland are proposed. However, the emphasis on the ‘unique’ situation on the island of Ireland, and the fact that Northern Ireland shares a land border with an EU member state – the Republic of Ireland – are differences that have to be borne in mind in making any comparisons to Scotland.
21. There are clearly differences of interpretation in some of the key words used in the joint report’s third potential route. What ‘full alignment’ means, the scope of the areas covered by the ‘full alignment’ commitment, and what a soft border would look like, all remain open to debate.

22. The EU may try to pin down the meaning of these terms as it drafts the Withdrawal Agreement. But it is most likely that the different meanings and proposals – and disagreements on these – will burst back into view once talks start in April on the future UK-EU27 relationship. The dry-sounding ‘regulatory divergence’ issue will be central both to the type of future trade deal the UK and EU negotiate and to the Ireland/Northern Ireland border issue.

23. However, if the UK leaves the single market and the customs union, and there is an open border on the island of Ireland, that would imply some harder internal border between Northern Ireland and the rest of the UK. While the Scottish government is likely to watch for any arrangements in Northern Ireland that could be relevant to Scotland, the joint report as it stands does not resolve how to combine the UK leaving the single market and customs union, with no borders or barriers between Northern Ireland and the Republic of Ireland and no barriers or border between Northern Ireland and the rest of the UK. Consequently, it does not imply or indicate a simple route map for Scotland to stay in the EU’s single market (if the UK government and EU27 were open to that) while keeping an open border with the rest of the UK.

Financial Settlement

24. The EU27 and UK have agreed an approach to settle the financial consequences of the UK’s departure from the EU – often referred to as the ‘divorce bill’. A methodology for calculating the financial payments due (and any reimbursements) together with an approach to the timing of payments has been agreed. Prime Minister Theresa May has said in her report to the House of Commons on the EU December summit that the net amount will be about £35-39 billion.

25. The payments by the UK include what would, anyway, have been paid until the end of 2020 if the UK were still an EU member state. It has also been agreed that UK entities can continue to participate in relevant EU programmes until the end of 2020. Separately, the UK will also continue its payments into the European Development Fund’s 11th programme (this is separate to the overall EU budget but also concludes at the end of 2020).

26. Whether, and which, EU programmes the UK may remain in once it has left the EU (and after the transition period) is open to negotiation. The Scottish government has expressed concern at Scotland being excluded from research and educational programmes such as Erasmus and Horizon 2020. Consequently, it may, on the one hand, welcome the possibility to continue to participate in programmes until the end of 2020 and also, on the other hand, attempt urgently to influence the UK government to stay in various key EU programmes as part of its negotiations on the future relationship.

27. There are numerous other elements of the stage one talks that have yet to be completely finalised and where disagreements still exist. This ranges from substantive specific issues such as EU approval of exports of fissile materials to the UK, EU compliance procedures on imports of all animal-derived products, to the crucial
question of the overall governance of the Withdrawal Agreement including dispute settlement procedures. According to the Commission’s 8th December communication, there has so far been no discussion at all of ‘customs-related matters needed for an orderly withdrawal from the Union’.

Transition Arrangements and the Future UK-EU27 Deal

Transition

28. At their December 2017 summit, the EU27 stated that they are open to transitional arrangements that are in the EU’s interests that are “clearly defined and precisely limited in time”. The EU27 see the transition as one where the EU’s full ‘acquis’ will apply – including laws, financing, and judicial oversight by the Court of Justice of the EU.

29. The EU27 see the UK as remaining in the EU’s single market, customs union and trade policy – and applying all four freedoms, including free movement of people. However, the UK would no longer have a right to participate in meetings and would lose its seat at EU summits, its vote in the Council and its MEPs in the European Parliament.

30. The Commission’s draft transition guidelines spell this out in more detail. In its draft guidelines, the Commission suggests that “exceptional attendance” at some meetings might be allowed so the UK could take part (without a vote) in some EU or Commission expert group meetings, including where fishing quotas are set.

31. The draft guidelines also make it clear that transition may not apply to overseas countries and territories including European territories “for whose external relations the UK is responsible” i.e. Gibraltar. This will rapidly become a neuralgic and difficult issue in talks on transition even before the future relationship talks start.

32. In contrast to the EU27 summit conclusions, in her post-summit report to the House of Commons, Theresa May stated19 that, while access to each other’s markets would continue during what she terms the ‘implementation’ period, the UK would have left the EU and so would not be in its single market or customs union. These may be only semantic differences but they may also suggest some serious stumbling blocks lie ahead. May also referred to her intention to register new arrivals from the EU during transition – while the Commission, in its communication and in its draft guidelines, insists free movement must continue during the transition as if the UK was still a member state.

33. Given the Scottish government’s concern both to have a sufficiently lengthy transition period within the EU’s single market and customs union and to maintain free movement of people, the government will want to pay particular attention to how talks unfold in the coming weeks on this issue. The Scottish government has also suggested that a transition longer than two years may be desirable.

34. However, the EU27 and the UK government are both currently focused on a shorter transition. In its draft guidelines, the Commission proposes ending the transition period when the current EU budgetary period ends in December 2020. Michel Barnier,
the EU’s chief negotiator, has also made clear that he considers a long transition period is not legally feasible.

35. Neither the EU summit conclusions nor the Commission’s draft transition guidelines mention any possibility of extending or renewing the transition period. This would need to be included in the Withdrawal Agreement if it is to be possible – and if a future trade deal has not been agreed in that short time it may be vital. Given the views of the Scottish government on a lengthy transition, then this would be an important issue to push for. Without such a provision, the UK would face a potential new ‘cliff edge’ after a two year transition period. It also means the UK would have much less bargaining power in EU-UK trade talks as a new cliff edge loomed.

36. The UK would be part of the EU’s common commercial policy during transition, according to the EU27, so it could not conclude any new trade deals (though potentially it could start to negotiate them – this will have to be ensured in the transition talks). However, the UK, once it leaves the EU, will no longer be part of existing EU international agreements including the EU’s trade deals with almost 60 countries around the world. In its draft transition guidelines, the Commission suggests the EU might try to help on “whether and how” such arrangements could continue during transition. The UK government should welcome this olive branch.

37. This is a crucial issue for Scottish companies exporting to third countries covered by EU trade deals. It is not clear that the UK government has given much attention to how or whether such trade deals can be maintained during transition. The Scottish government will surely have an interest in pursuing questions on this.

**Future UK-EU27 Relationship**

38. In their December summit conclusions, the EU27 note the UK’s intention to leave the single market and customs union. Consequently, the EU27 state that they will “calibrate” their approach to a future UK-EU27 trade deal to protect the EU single market, not to upset relations with other third countries and ensure a level-playing field (i.e. on regulatory structures and laws). They re-emphasise their 29th April 2017 guidelines which underline that there can be no ‘cherry-picking’ of the single market – either by sector or by its four fundamental freedoms.

39. The EU27 also indicate their readiness to negotiate future cooperation on security, foreign and defence and anti-terrorism policies. They urge the UK to clarify its own views on the future relationship. And they emphasise that stage two talks can only continue if stage one commitments are respected and translated into legal form.

40. The EU’s chief negotiator, Michel Barnier, has made clear his view that since the UK does not want a ‘Norway-style’ future relationship then the most likely template is a Canada-style deal – which would mean little access (beyond WTO level) to the EU single market for services, and less access than now (and more non-tariff barriers) for goods trade. According to some estimates this could lead to a 61% drop in UK-EU services trade and a 35% drop in UK-EU goods trade. Scotland’s EU trade would be equally badly affected.
41. The UK government, which only discussed the future relationship in full cabinet in mid-December, appears to want an approach based on gradual regulatory divergence – where some sectors may essentially continue to follow EU regulations while others diverge to varying degrees (as also spelled out in Theresa May’s Florence speech in October). This would appear to be in contradiction to the EU’s ‘no cherry-picking’ stance. This approach would also make it hard or impossible to ensure an open border on the island of Ireland.

42. The Scottish government has said that if the UK does go ahead with Brexit that its preferred outcome would be for the UK to stay in both the EU’s single market and customs union. This would mean continuity for the UK’s businesses, economy and other sectors. But it would also mean the UK would no longer have any real say and no vote on future EU laws, regulations and trade deals. Despite the commitments on Northern Ireland, this is not the direction of travel of the UK government.

43. The coming weeks and months are the crucial time-period where the UK government will formulate its positions and open talks with the EU27 both on transition and then on the future relationship. The Joint Ministerial Committee (EU negotiations) provides a forum for the Scottish government to input its views. However, given the extremely short timescale for formulation of positions, decisions and negotiations, the Scottish government should consider requesting a series of urgent, in-depth, high-level pan-UK meetings on the UK government negotiating strategy in the coming weeks. The Scottish Parliament may also vote on the final Withdrawal Agreement in the autumn. But the crucial time for influencing how that Agreement may unfold is the coming weeks and all avenues should be explored to do so.

**Finance and Constitution Committee will not recommend consent to the EU Withdrawal Bill in its current form**

On 9 January, the Scottish Parliament's Finance and Constitution published its interim report on the European Union (Withdrawal) Bill Legislative Consent Memorandum in which it concluded it is not in a position to recommend legislative consent to the Bill. The Committee also indicated it will produce a final report on the LCM prior to the final amending stage in the House of Lords.

Publishing the Committee’s interim report, the Convenor of the Committee, Bruce Crawford MSP said:

“The whole committee is of the view that Clause 11, as currently drafted, is incompatible with the devolution settlement in Scotland.

“This view was shared by the vast majority of expert evidence we received on Clause 11 as it represents a fundamental shift in the structure of devolution in Scotland.

“The Committee also believes that a resolution to Clause 11 is required regardless of whether a way forward on Common Frameworks can be arrived at.”

On the use of ‘common frameworks’ to bring about regulatory convergence and policy harmonisation across the UK, Mr Crawford added:
“We welcome the commitment from the UK Government that common frameworks will not be imposed. Our committee strongly believes that both the process for agreeing common frameworks and the actual content must be arrived at through agreement, not imposition. We also believe that this process is not solely a matter for governments and must be transparent and inclusive.”

The Withdrawal Bill proposes that competences which are currently exercised at EU level should be exercised by the UK Parliament and Government following the UK’s departure from the European Union. To enable this, the Bill proposes amendments to the devolved settlements to ensure current EU competences do not become devolved competences upon Brexit. These provisions are set out in clause 11 which proposes amending the devolution legislation to remove the requirement that Acts of the Scottish Parliament are compatible with EU law and replace it with a requirement of compatibility with ‘retained EU law’. The Bill also provides that new powers may be transferred to the Scottish Parliament in the future by Orders in Council following the joint agreement of the UK and Scottish Governments.

On clause 11, the Finance and Constitution Committee reached a number of conclusions which are reproduced below:

**Committee View on Clause 11**

36. The Committee welcomes the recent progress which has taken place in negotiations between the Scottish and UK governments and notes the recent statement, on 6 December, by the Secretary of State for Scotland that the UK Government intends to table amendments to Clause 11.

37. The Committee concurs with the vast majority of the expert evidence it has received that Clause 11 represents a fundamental shift in the structure of devolution in Scotland. Regardless of whether the Scottish Parliament obtains additional powers or not the effect of Clause 11 will be to adversely impact upon the intelligibility and integrity of the devolution settlement in Scotland.

38. The Committee does not agree that Clause 11 is necessary to enable the agreement of common frameworks. The Committee notes that there are no provisions in the Bill that guarantee that Clause 11 is a temporary measure.

39. The Committee is of the view that Clause 11, as currently drafted, is incompatible with the devolution settlement in Scotland. The Committee considers further that even if Clause 11 is designed to be a transitional measure it fails to fully respect the devolution settlement. The Committee therefore will not be in a position to recommend legislative consent for the Bill unless Clause 11 is replaced or removed.

40. In the event that the Scottish Government is unable to recommend legislative consent and decides to introduce a Continuity Bill then it is highly likely that there would be a reduced timetable for parliamentary scrutiny of such legislation. In such a situation the Committee recommends that the Scottish Government engages in early discussions with the Scottish Parliament regarding what mechanisms can be used to maximise the scope and time available for scrutiny of such legislation.
The Committee’s report also examined the proposal to establish common UK frameworks following the UK’s departure from the EU. On common frameworks, the Deputy Convenor of the Committee, Adam Tomkins MSP said:

“All of the committee welcomes the progress that has been made between the UK Government and the devolved governments in developing an approach to agreeing common UK frameworks and notes that this work is on-going.

“In particular, members welcome the UK Government’s commitment to respect the devolution settlement.”

The Committee’s conclusions on common frameworks are reproduced below:

99. The Committee welcomes the progress which has been made between the UK Government and the devolved governments in developing an approach to agreeing common UK frameworks and notes that this work is on-going. In particular, the Committee welcomes the commitment to respect the devolution settlement.

100. The Committee also welcomes the commitment from the UK Government that common frameworks will not be imposed. The Committee strongly believes that both the process for agreeing common frameworks and the actual content must be arrived at through agreement and not imposed. The Committee also strongly believes that this process is not solely a matter for governments but must be transparent and inclusive. The Committee therefore recommends the following—

- The Scottish Parliament must have the opportunity to consider the approach to common frameworks currently being negotiated at governmental level prior to being asked to give consent to the Bill;
- The Bill should be amended to include the approach to agreeing common UK frameworks, including the need for parliamentary consent and consultation with stakeholders;
- Where non-statutory arrangements are appropriate, such as Memorandums of Understanding and Concordats between governments, there must be opportunities for parliamentary oversight;
- Common frameworks, if binding, must apply equally to both UK and devolved governments;
- Clarity is required around which frameworks will be bilateral and which are multilateral and if the latter which are UK wide and which are GB wide.

101. The Committee also recognises that significant further work is required in relation to the scrutiny of developing and agreeing common frameworks. In particular, the Committee heard evidence on the application of the general principles of EU law to common frameworks including the principles of subsidiarity and proportionality. The Committee believes that this is a critically important area of work and will consider it further. The Committee will also be writing to relevant subject committees inviting them to begin considering what common UK frameworks may look like in areas covered by their respective remits.
The Committee also reached conclusions in relation to the powers provided to Devolved and UK Ministers in the Withdrawal Bill and on inter-governmental relations.

**UK Government agriculture policy after Brexit**

On 4 January 2018 the Secretary of State for Environment, Food and Rural Affairs, Michael Gove gave a speech at the Oxford Farming Conference. Some information was provided in the Q and A at the end which is not included in the text of the speech. He discussed the following -

**Trade and Migration**

- The Government seeks tariff-free access for agri-food goods across each other’s (EU/UK) borders
- The Government seeks a flexible migration policy overall, ensuring access to seasonal agricultural labour.

**The Secretary of State discussed a coherent policy on food, which**

- looks at whole the food-chain (farm to fork) with fairness along it
- uses new approaches to food labelling, including a basket of indicators to show environmental, welfare and other standards
- recognises the economic, health and environmental forces shaping the future of food
Timeline for Agriculture in relation to Brexit

- Spring 2018 - a Command Paper published
- March of 2019 - formally leave the EU
- up to end 2020 - an implementation period or around two years (or 21 months to end 2020) when UK will comply with CAP rules
- until the end of this Parliament in 2022 - Funding for "farming support" (in cash terms) will be protected. Countryside Stewardship agreements (All pillar 2 schemes?) entered into before March 2019 will be honoured.
- 2019 BPS scheme paid on the same basis as now in England
- From 2020 there will be a transition period to a new agricultural policy in England

The transition period for Agriculture policy in England

- the transition period will be for 5 years from 2019- 2024
- Basic Payments Scheme (BPS) payments will continue to be made…
- but capped or reduced for the largest recipients first and then (presumably) for others
- English farmers will NOT have to comply with existing EU rules and procedures after the implementation period (2020)
- Farm inspections will be streamlined and risk-based
- Support will be available for farmers who wish to leave the industry

Principles of new policy appear to be:

- In 2024 the BPS will be replaced with a system of public money for public goods
- a natural capital approach will be used
- simpler schemes and applications will be developed
- a risk-based, focused inspection regime will be implemented
- animal welfare and environmental standards will remain high

Public money for public goods. Schemes will support -

1. any farmer or land manager who wishes to enhance the environment
2. those who wish to collaborate to secure environmental improvements collectively at landscape scale
3. investment in technology and innovation - including super-fast broadband and reliable 5G coverage
4. public access
5. rural resilience, where smaller farm and rural businesses which help keep communities coherent and ensure the culture in agriculture is kept healthy may be supported (eg. Prince’s Countryside Fund). Crofters were specifically mentioned
A report by Marine Scotland “Employment in Scotland’s Seafood Processing Sector: UK, European Economic Area and Non-European Economic Area Nationals”, was published on January 4, 2018. It reports on a sample of 18 seafood processing businesses, which employed 37% of the sector’s workforce in Scotland in 2016. The survey found that 41% of people working in the surveyed processors in 2016 were from the UK, 58% were from other EEA counties and 1% were from non-EEA countries. Businesses identified a range of impacts on the UK’s exit from the EU on the seafood processing labour market. This ranged from no impact as some were not dependent on non-UK EEA workers, medium impacts due to a drop in the quality of the workforce, and significant changes in the way the businesses operate which in some cases is a direct threat to business’ survival.

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