The Scottish Parliament
Pàrlamaid na h-Alba

FINANCE AND CONSTITUTION COMMITTEE

AGENDA

27th Meeting, 2017 (Session 5)

Wednesday 15 November 2017

The Committee will meet at 10.00 am in the David Livingstone Room (CR6).

1. **European Union (Withdrawal) Bill (UK Parliament Legislation):** The Committee will take evidence on legislative consent memorandum LCM (S5) 10 from—

   Dr Kirsty Hughes, Director, Scottish Centre on European Relations;

   Professor Alan Page, Professor of Public Law, University of Dundee;

   Professor Rick Rawlings, Professor of Public Law, UCL.

Jim Johnston
Clerk to the Finance and Constitution Committee
Room T3.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5215
Email: James.Johnston@parliament.scot

The papers for this meeting are as follows—

Item 1

Note by the Clerk	FCC/S5/17/27/1
PRIVATE PAPER	FCC/S5/17/27/2 (P)

Finance and Constitution Committee

27th Meeting 2017 (Session 5), Wednesday 15 November 2017

European Union (Withdrawal) Bill: Scottish Government Legislative Consent Memorandum

1. The purpose of this paper is to provide information for the Committee's evidence session in relation to the European Union (Withdrawal) Bill at which it will take evidence from—

- Dr Kirsty Hughes, Director, Scottish Centre on European Relations
- Professor Alan Page, Professor of Public Law, University of Dundee; and
- Professor Rick Rawlings, Professor of Public Law, UCL.

2. Written Briefings have been provided by each of the witnesses. These are attached at Annexe A.

Committee Clerks
November 2017

ANNEXE A: WRITTEN SUBMISSIONS FROM WITNESSES

Dr. Kirsty Hughes, Director, Scottish Centre on European Relations

7th November 2017

1. The EU Withdrawal Bill has put a spotlight on the extraordinary difficulty of disentangling UK law and regulatory structures from EU ones. It has also created major constitutional challenges since much of the devolution settlement was conceived and applied in the context of the UK's membership of the EU. As a result, there are substantial democratic and constitutional concerns around the Bill both in terms of delegated powers, future regulatory structures and the devolution settlement.

A UK Single Market?

2. Scotland and the rest of the UK are currently part of the EU's single market and its four fundamental freedoms – free movement of goods, services, capital and people. In leaving the EU, unless it were to join the European Economic Area, the UK will no longer be part of this single market nor have full access to it. So new, common UK frameworks will be needed.

3. Establishing such common frameworks raises questions of regulatory structures, policy substance and of devolution at the same time – in devolved areas. Leaving the EU means a whole new process needs to be established as to how new common UK frameworks should be set up, agreed, developed and changed over time.

4. The UK government's approach in the EU Withdrawal Bill, where devolved areas are concerned, is to take all these powers back to UK level first and only then to discuss which powers may be further devolved. This centralising approach cuts across the existing devolution settlement. It gives all the power – in determining what powers are finally handed to the devolved administrations – to the UK government.

5. Overall, this raises major questions of regulation, policy development and devolution. Existing consultative structures do not appear adequate to dealing with these major questions. A top-down approach on returning devolved powers and on new common frameworks cannot be the answer – either in constitutional or democratic terms.

6. A further complicating factor is that trade negotiations – with the EU27 and eventually with other third countries – will also impact onto UK common frameworks, and any decision-making processes developed for those, including in devolved areas notably agriculture, fisheries and environment.

'Hard' and 'Soft' Brexit

7. Much of the discussion of the EU Withdrawal Bill takes place with little attention to the nature of the final Brexit outcome. Yet the type of Brexit (assuming it does go ahead on 29 March 2019) is central to many of the issues of concern around the EU Withdrawal Bill.

8. The EU Withdrawal Bill appears essentially to be predicated on a 'hard' Brexit whereby the UK leaves the EU single market and its customs union (as the Prime Minister has said) and agrees a new trading (and wider) relationship with the EU. The Prime Minister has yet to set out what that desired relationship is although in Brussels the talk is of a Canada-style free trade deal.

9. If the UK were to choose a 'soft' Brexit through full membership of the EU's single market by applying to join/stay in the European Economic Area (EEA) many of the issues under debate would be simpler – and the Bill itself could be simpler. The institutional structures whereby the UK implements EU laws would change – and follow the procedures that the 3 existing EEA members (Norway, Iceland and Liechtenstein) have established with the EU28. The UK's compliance with those laws would be through the EFTA court rather than directly through the ECJ – but the EFTA court closely follows ECJ rulings.

10. In this case, there would be much less discretion for the UK in how or whether to keep and implement EU laws and so much less need for extended delegated powers and less need for new regulatory agencies and common frameworks (since the UK could still participate in many of the EU agencies). There would still be three levels of regulatory control and decision-making powers: EEA, UK and Scotland, rather than simply all EU powers coming back to the UK and potentially to Scotland.

11. This raises a fundamental question as to whether the EU Withdrawal Bill in its current form would need amending or replacing if the UK chose to go down an EEA path. As Professor Alan Page has pointed out, the concept of 'retained' law may well be different in the EEA model and require at least amendments to the Bill[1].

12. There would, in a 'soft' Brexit, still be common EEA frameworks and, therefore, much less need for new UK common frameworks (and for appropriate constitutional processes to go with those). The four fundamental freedoms (goods, services, capital and people) would still apply.

Environment, Agriculture and Fisheries in a 'Soft' Brexit:

13. In the EEA, its members agree to follow both horizontal and flanking policies relevant to the single market's functioning beyond simply the four freedoms of

[1] Quoted in Kirsty Hughes (2017) "Soft Brexit, Soft Transition: Myths and Reality" *Scottish Centre on European Relations*

people, goods, services and capital. The main devolved power this would impact on is environment which is included in those horizontal policies.

14. A 'soft' Brexit would mean there is little threat of a 'power grab' in the case of environment. Scotland would be responsible for implementing EU laws agreed through the EEA. The three EFTA/EEA countries are members of the EU Environmental Agency. If the UK remained in the EU Environmental Agency this would further resolve regulatory challenges raised by Brexit in this area.

15. The EEA countries are not part of EU common agriculture and fisheries policies, although the EEA agreement has some provisions on trade and phytosanitary issues. However, if the UK were to ask to join the EEA as an EFTA member not as an EU member, the EU27 might want to agree a number of questions around trade in these two areas, including access to UK waters, before agreeing EEA membership. So some of the key discussions, in an EEA 'soft' Brexit model, concerning the devolved areas of agriculture and fisheries might take place as part of UK-EU27 trade negotiations. They would certainly do so if the UK was also asking to form a customs union with the EU (should the EU27 agree to this request – although no country is currently in the EEA and a customs union with the EU).

16. A 'soft' Brexit would, of course, raise major democratic questions since, if the UK were in the EEA rather than the EU, it would have no vote and little voice in EU legislative and regulatory decisions.

17. Overall, it is clear that if the UK government had clarified its desired model of Brexit (i.e. its goal for the future EU27-UK relationship) before drafting the EU Withdrawal Bill, the implications for the devolution settlement (and for other major issues) would have been clearer. If the EU Withdrawal Bill is not fully compatible in its current form with a 'soft' Brexit, then this would also impact on the feasibility of the Scottish government's policy aim of Scotland staying in the EU single market even if the rest of the UK does not.

Timing

18. There is an interesting timing issue here. If the EU27 do agree at the European Council on 14-15 December this year to start discussing the outline of a future trade and wider relationship with the UK, then they will also issue new EU guidelines on their parameters for such a deal. The UK government will also be expected – finally – to set out its aims for such a deal. The EU27 are likely to indicate that the broad choices facing the EU and UK for a future deal (in terms of trade) are: an EEA/Norway model, a Canada-style trade deal or trading on WTO rules.

19. So if talks do move on to the future relationship by January 2018 (and if they do not, then the Brexit talks will be in some trouble), it is likely to become apparent before the EU Withdrawal Bill completes its passage through Westminster – and potentially before any legislative consent motion – that the goals of the talks are focused on a Canada-style trade deal, which by any definition would represent a

hard Brexit. The EU Withdrawal Bill would then be consistent with this aim – and since the talks were not focused on an EEA option, then the UK government would surely resist any attempts to ensure the Withdrawal Bill is compatible with a soft/EEA Brexit.

20. Any vote for the Withdrawal Bill or to agree legislative consent, even if successful amendments had been agreed on devolved powers, would therefore potentially represent a vote for a hard Brexit process.

A Brexit Transition Phase

21. The UK government has said it wants to agree a transition (or implementation) period with the EU27, possibly for around two years. If there is a Brexit 'divorce' deal agreed by autumn 2018, a transition phase would need to be agreed as part of that (together with an outline framework of a future trade deal).

22. It is highly unlikely that a bespoke transition deal can be agreed in the next 12 months. Consequently, any transition deal is likely to involve an extension of the EU's laws, regulatory and judicial structures as they currently exist. The EU27, and European Parliament, are unlikely to agree any other type of transition.

23. However, it is, so far, unclear how the EU's *acquis* could or would be extended if the UK leaves the EU on 29th March 2019. It might be via some form of temporary EEA membership also linked to some temporary continuing participation in the EU's customs union (though the latter has never been done). Any such transition deal would be time-limited – the EU27 and European Parliament are unlikely to agree any open-ended or long transition. Indeed, some consider that any transition deal agreed under Article 50 would need to be kept short (any longer period might need to be agreed under other treaty articles/a different legal base – requiring unanimity and ratification by national parliaments).

24. This leaves open many key questions including on when the EU Withdrawal Bill would come into force – and whether Westminster or the UK government would decide on that date (the Bill currently gives wide powers to the government to set the exit date). Assuming the EU27 are unlikely to agree (unanimously) to extend Article 50, then any transition would be one where the UK is outside the EU after 29th March 2019 and has no vote or say in EU laws and structures although it would still be bound by them.

25. Current structures for the devolved administrations to input into the UK government negotiating position – on the final UK-EU27 relationship, the 'divorce' deal and on transition – are highly inadequate. Whether the UK government might agree a transition deal that in some way could cut across the existing devolution settlement is for now unclear – given the lack of clarity on the UK government's Brexit negotiating goals. But sensitive issues, such as fishing quotas, would surely come up in any discussion of a 2-3 year transition.

26. A two year transition – whereby the EU's *acquis* continued to apply – might, however, give more time to agree both appropriate constitutional processes for

establishing new UK common frameworks as well as more time to agree the actual substance of those frameworks in devolved (and in other) areas. But it would mean those common frameworks and constitutional issues would still be in the process of being resolved (or not) after the UK had left the EU. So uncertainty abounds.

What Happens if the Bill is Rejected?

27. If the EU Withdrawal Bill is rejected at Westminster, there would be a major political impasse – and, if it was refused legislative consent, a wider constitutional crisis. Whether the minority UK government could stay in power at that point must be an open question.

28. A rejection of the EU Withdrawal Bill would probably throw the Brexit timetable – and negotiations – into some chaos. Could the agreement of a transition period that was essentially 'EU minus' i.e. EU membership minus a vote rescue the UK from the chaos (or impossibility) of leaving the EU without the Withdrawal Bill in place? That might possibly be the case if the transition deal is comprehensive and legally watertight. It would though mean the UK faced a potential domestic 'cliff edge' after two years of transition if it had still not agreed a Withdrawal Bill, as well as the widely discussed potential trade 'cliff edge' if trade talks with the EU27 had not completed by the end of the two years.

29. The alternative would be to withdraw the UK's Article 50 notification and end the Brexit process (if this can be done unilaterally which remains a contested legal question though many think this could be done).

Professor Alan Page, Professor of Public Law, University of Dundee: Brexit, the European Union (Withdrawal) Bill and the devolution settlement

Introduction

1. Brexit has the potential to seriously weaken the UK's territorial constitution and with it the Scottish devolution settlement. I say that for two reasons. First, because it will alter the balance of powers and responsibilities between the UK Parliament and the Scottish Parliament - regardless of the outcome of the current dispute over whether EU competences in the devolved areas should be allowed to lie where they fall under the devolution settlement. That was the conclusion I drew from the analysis I did for the Parliament's Culture, Tourism, Europe and External Relations Committee after the EU referendum which showed that the majority of EU competences are reserved under the Scotland Act 1998 and will therefore fall to London rather than Edinburgh.[1] The Committee's interest understandably was in the powers that would fall to Scottish Parliament in the absence of any amendment to the Scotland Act but for me what was more striking was the extent of powers that would fall to the UK Parliament. The powers that are the subject of the current dispute - in justice and home affairs, agriculture, fisheries and the environment - are only a small proportion of those that will be repatriated.

2. The second reason is because of the weakness of UK intergovernmental relations. One of the purposes of a properly functioning system of intergovernmental relations should be to ensure that the interests of the devolved nations are properly taken into account in the exercise of non-devolved or reserved responsibilities, but that is a role which the current system performs patchily at best.[2]

3. Allied to which there is a sense of a European Union (Withdrawal) Bill (EUWB) which has either been drafted without a proper understanding of devolution law or else with scant regard to the principles on which the devolution settlements are based.

4. Against that background, I concentrate on four issues in this submission: clause 11 of the EUWB and the destination of repatriated competences; the proposed power of UK ministers to legislate in the devolved areas; (Scottish) parliamentary control over subordinate law making in the devolved areas - whether by UK ministers or their Scottish counterparts; and the protection of Scottish interests in relation to reserved matters.

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[1] Alan Page, *The implications of EU withdrawal for the devolution settlement: paper prepared for the Culture, Tourism, Europe and External Relations Committee* (August 2016).
[2] See most recently, Public Administration and Constitutional Affairs Committee, *The Future of the Union, part two: Inter-institutional relations in the UK* (HC 2016-17, 839).

Clause 11 and the destination of repatriated competences

5. Under clause 11 of the EUWB the obligation on the Scottish Parliament and the Scottish Government to act compatibly with EU law will be replaced by an obligation to act compatibly with retained EU law. The justification for the continuation of the existing obligation in a new form, I assume, is the need to ensure legal certainty – the idea that the law should be the same one minute after midnight as it was one minute before midnight on exit day. Because the devolved institutions are bound to act compatibly with EU law at the moment there should be no change in their position.

6. What this justification overlooks - whether by accident or by design – is the fact that the current obligation is rooted in the UK's obligations as a member state. It is about ensuring that action on the part of the devolved administrations does not place the UK in breach of its obligations as a member state. End UK membership and the obligation loses its original justification, prompting the suspicion that clause 11 is not so much about legal certainty as stripping the devolved administrations of the leverage they would otherwise possess when it comes to the negotiation of common frameworks.

7. The Scottish Government also fears that Whitehall departments will find it convenient to hang on to repatriated competences powers rather than pass them on, quite apart from which the grafting of a conferred powers model onto a reserved powers model will reduce the intelligibility of the settlement,[3] as well as make it more difficult for the devolved administration to carry out the responsibilities which in the original scheme of the Scotland Act were regarded as belonging to the Scottish Parliament.[4]

8. It is also important not to exaggerate the threat to the integrity of the UK single market posed by the repatriation of EU competences in the devolved areas. In particular, sight should not be lost of the part played by the reserved matters listed in Schedule 5 to the Scotland Act in maintaining the UK single market -many of which have a single market rationale as I explained in my paper last year. Once allowance is made for the part played by the reserved matters, it seems to me that the UK Government's 'guiding principle' can be more felicitously secured by a combination of the existing reservations and a 'standstill

[3] 'One fears that only lawyers and Civil Servants, but by no means all of them, will be able to work out or give reliable advice on the full meaning of the affirmations as qualified by the negations. Beyond doubt, this complexity and difficulty of comprehension is a defect of the Act. It infringes the principle of intelligibility of law, a principle most to be prized in constitutional enactments': Neil MacCormick quoted in Page, *Constitutional Law of Scotland* (W Green 2015) para 7-05, fn 14. MacCormick was writing about the Scotland Act 1978, but the comment would apply equally to the Scotland Act 1998 as proposed to be amended by the EUWB.

[4] How else to explain, for example, the exception in favour of the movement into and out of Scotland of food, animals, animal products, plants and plant products for the purposes of protecting human, animal or plant health, animal welfare or the environment: Scotland Act 1998, sch 5, pt II, s C5.

9. agreement' whereby the UK Government and the devolved administrations agree not to introduce, in the Prime Minister's words, 'new barriers to living and doing business within our own Union' while the business of common frameworks - and, no less importantly, the necessary revisions to retained EU law - are being worked out. As well as preserving the integrity of the UK single market, reliance on the combination of reserved matters and a standstill agreement would avoid the undeniably damaging consequences of clause 11.

The proposed power of UK ministers to legislate in the devolved areas

10. Under the EUWB UK ministers will gain far-reaching powers to legislate in the devolved areas, powers which are said to justified by the scale of the challenge represented by Brexit and the shortness of the time within which it may have to be completed. To fully appreciate how radical a departure this represents from the principles on which the devolution settlement is based we need to recall that there is no subordinate law making equivalent of the power of the UK Parliament to make laws for Scotland.[5] As a former Lord Advocate explained:

> 'While the UK *Parliament* retains competence to legislate in areas of activity that are not reserved by the Scotland Act, UK *Ministers* – Ministers of the Crown - have no general competence to take action in areas of activity which have not been reserved. The Scotland Act not only prevents Ministers in the Scottish [Government] from purporting to act in areas which are reserved, it also prevents Ministers of the Crown from acting in areas in which ministerial responsibility has been transferred to Scottish Ministers.'[6]

11. UK ministers accordingly have only limited subordinate law making powers in the devolved areas, the principal one being in respect of the implementation of EU obligations, which may be exercised by UK ministers concurrently with their devolved counterparts.[7] Under the EUWB, however, they will gain powers to correct deficiencies in retained EU law, to ensure continued compliance with the UK's international obligations, and to implement a withdrawal agreement in devolved as well as reserved areas, i.e. in areas in which ministerial responsibility has been transferred to the Scottish ministers as well as in areas in which it has been retained. It is contrary to the principles on which the devolution settlement is based therefore for these powers to be exercisable, as is currently proposed, subject only to a non-binding requirement of consultation with Scottish ministers – and with no provision for Scottish parliamentary scrutiny of their exercise (below). Instead, as the Scottish and Welsh governments have proposed, they should be exercisable only with the consent of the Scottish and Welsh ministers.

[5] Scotland Act 1998, s 28(7).
[6] Colin Boyd, 'Ministers and the Law' [2006] *Juridical Review* 179, 182, original emphasis
[7] Scotland Act 1998, s 57(1).

Scottish Parliamentary control over subordinate law making in the devolved areas

12. Not only does the Bill proposes a massive increase in the power of UK ministers to legislate in the devolved areas, it also proposes that their exercise should not be subject to any form of Scottish parliamentary oversight or control. Were the powers which it is proposed to confer on UK ministers to be exercised by UK Act of Parliament, they would require the consent of the Scottish Parliament under the Sewel convention. Under the Bill, however, there is no provision for Scottish parliamentary scrutiny or consent to their exercise. What is proposed therefore is a law-making system fundamentally at odds with two of the key principles on which the devolution settlement is based – that Westminster law making in the devolved areas should normally only be undertaken with the consent of the Scottish Parliament, and that UK ministers should cease to act in areas in which ministerial responsibility has been transferred to Scottish ministers.

13. Assuming the principle of Scottish ministerial consent (above) is conceded, the question then becomes one of Scottish parliamentary scrutiny of:

    a) the grant (or withholding) of Scottish ministerial consent. Where consent is granted it is essential that the Parliament be informed –something which has not always happened with the transposition of EU obligations;[8] and

    b) the UK or GB-wide regulations where Scottish ministerial consent is granted, e.g. by subjecting them to parliamentary procedures in the Scottish as well as the UK Parliament, models for which are to be found in Schedule 7 to the Scotland Act 1998; or

    c) the Scottish regulations where the powers are exercised by the Scottish ministers.

The protection of Scottish interests in relation to reserved matters

14. As I have indicated the policy responsibilities that will fall to Westminster following Brexit will far exceed in importance those that will fall to Holyrood. As well as the four freedoms, they include immigration, competition policy, financial assistance to industry, and the negotiation and conclusion of trade agreements with non-EU countries. Brexit thus raises in a new and acute form the question of the protection of Scottish interests in relation to matters decided at Westminster, a question as old as the (Anglo-Scottish) Union itself.[9] The negotiation and conclusion of trade agreements with non-EU countries, in particular, is likely to be a matter of keen interest to Scotland and the other devolved nations.

[8] Page (n 3) para 20-18.
[9] Page (n 3) para 1-08

15. In the Memorandum of Understanding which governs relations between the UK government and the devolved administrations, the UK Government 'recognises that the devolved administrations will have an interest in *i*nternational and European policy making in relation to devolved matters, notably where implementing action by the devolved administrations may be required', before undertaking to involve them 'as fully as possible in discussions about the formulation of the UK's policy position on all EU and international issues which touch on devolved matters'.[10]

16. But whereas JMC machinery has been put in place for involving the devolved administrations in (UK) decision making on EU matters, no comparable machinery exists for involving the devolved administrations in UK decision-making on international matters. That may be because such machinery has hitherto not been thought necessary, notwithstanding the breach of the Concordat on International Relations revealed by the 2001 Labour Government's 'deal in the desert', but with the UK's intended withdrawal from the EU the lack of such machinery, and with it the overhaul of the 'not fit for purpose' system of intergovernmental relations, will need to be addressed as matters of urgency.

Alan Page

8 November 2017

[10] *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee* (October 2013) paras 18 and 20.

Briefing Paper for Scottish Parliament Finance and Constitution Committee

Professor Rick Rawlings

[The Briefing Paper is an extract, suitably adapted, from my recent report for the Constitution Society: *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations*. The full report is available at: https://consoc.org.uk/publications/]

[As well as giving oral evidence to the House of Commons Welsh Affairs Select Committee on 17 October, I recently gave written evidence to the House of Lords Constitution Committee. Dealing specifically with the so-called 'devolution clauses' (10 and 11) of the European Union (Withdrawal) Bill, the evidence is available at:

http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/71105.pdf]

1. Reregulation - in the general sense of regulating again or anew - is a key part of the Brexit narrative. For business and citizenry alike, and particularly for those concerned to see the UK survive and prosper, there cannot – must not – be a major legal vacuum as the EU epoch in domestic history comes to an end in the wake of the June 2016 referendum vote. As the chief legislative vehicle for ensuring this, the current European Union (Withdrawal) Bill also serves to illustrate different forms and potentials of reregulation. Much is heard under the twin banners of 'continuity' and 'correction' of changes of legal form not substance and of more or less creative approaches to securing proper fit with the domestic statute books. Meanwhile, the promise of further Brexit-related Bills in the Queen's Speech references the functional and/or political demand for separate, policy-laden, forms of reregulation in the functioning economy, as with measures on trade and customs, agriculture and fisheries.

2. Bearing as it does on the future health, perhaps even continued existence, of the UK's so-called 'state of unions', one of the most important and challenging constitutional issues concerns devolution and reregulation. Common EU frameworks have had the effect of providing common UK frameworks, so helping to secure free and smooth trading conditions inside an otherwise increasingly differentiated polity. How then to substitute for EU-based regulation in order to ensure the proper functioning of the domestic market while at the same time respecting representative government systems in Scotland, Wales and Northern Ireland separately grounded through referendums in popular sovereignty?

3. More particularly, how from the standpoint of an enlightened and prudent Union policy, one which puts a premium on effective and collaborative working of state and sub-state political institutions and on mutual respect, should UK ministers

proceed to address the subject-matter of devolution, inter-governmental relations and common frameworks? Legal, political and administrative initiatives all have a significant role to play in this regard, especially with a view to establishing at least a modicum of trust and confidence among the several centres of legislative and executive authority.

4. It is appropriate to focus here on four related aspects: legislative redesign, multilateral intergovernmental relations, ordering principle and policy tools, and internal discipline.

Redesign

5. The sooner clause 11 of the Withdrawal Bill is cast aside, the better. Constitutionally maladroit, it warps the dialogue about the role and place of the domestic market concept post-Brexit. As such, the occupation of legislative and executive space in the Withdrawal Bill appears not only a risky venture but also a lazy one. An unthinking form of 'Greater England' unionism, which assumes only limited territorial difference, would be another way of characterising this.

6. The package of amendments proposed by the Scottish and Welsh Governments is eminently predictable. First and foremost, no diversion of devolved competence to London such that repatriated powers would lie where they fall. Second, a measure of constitutional security: UK Ministers unable unilaterally to change the two devolution settlements. Third, protection of executive space: UK ministers unable unilaterally to make provision within Scottish or Welsh Ministers' executive competence. Fourth, equivalence: whereby the powers of Scottish and Welsh ministers to modify retained EU law would truly 'correspond' to those of UK ministers. Sitting comfortably with an assertion of democratic control and accountability, this would all go in tandem with curbs on the wide Henry VIII clause powers currently proposed by Whitehall.[1] In order to prevent a new form of asymmetry, a similar package of amendments would be required for Northern Ireland.

7. To proceed on the basis of most but significantly not all repatriation of powers to the centre denotes a more balanced set of incentives in the intergovernmental negotiations than does clause 11. If however it is a firm political choice in Whitehall not simply to accept the Scottish and Welsh amendments, another approach is preferable to clause 11 and all its works. Specifically designed to prioritise agreement through partnership working if at all possible, it involves working with the grain of reserved powers, while opening up to close democratic

[1] Scottish and Welsh Governments, *Proposed Amendments to the European Union (Withdrawal) Bill* (September 2017).

scrutiny the possibilities of more or less constraint on devolved competence in different policy domains. The Withdrawal Bill would contain a power to add, remove or modify reservations in the devolved settlement(s) to reflect frameworks agreed with the devolved administration(s) for the realisation of the UK single market, subject to the approval of the relevant legislature(s).[2] Meanwhile formal legal frameworks already agreed would be found in reservations on the face of the statute book where they best belong: perhaps via the Withdrawal Bill itself, perhaps through the other substantive measures heralded by Her Majesty. The devolved institutions would have a significant measure of protection and Whitehall and Westminster should have little to fear. As against the aggressive assertion of central power in advance, Parliamentary Sovereignty would in turn be harnessed to constitutional advantage as a reserve power. Available to exercise in the truly abnormal - hypothetical - case of necessity where terms prove impossible to agree; and so subject, in light of the general principle of devolved legislative consent, to the most rigorous demands for public justification.

Multilateralism

8. There is an urgent need for multilateral forms of intergovernmental relations which are fit for purpose. And the more so, it may be said, the more that UK ministers seek to develop innovative market and trading strategies for a post-Brexit world under the banner of 'a truly global Britain'. A sudden resuscitation of JMC (EN) after months of dormancy is welcome.[3] But this cannot disguise the deeper political and institutional failings, or indeed the damage done to the status and legitimacy of the existing infrastructure (such as it is).

9. Happily, the Memorandum of Understanding between the several administrations provides for review of arrangements, including the JMC machinery.[4] In light of the Brexit process, it is high time this happened – in creative and transparent fashion. Sitting comfortably with the Prime Minister's declared policy lines, reform could sensibly include the establishment of a new and more highly-geared intergovernmental forum, called say 'JMC (Domestic Single Market)'. As a determinedly multilateral arrangement, designed in part as a vehicle for building trust and confidence, such a body would help to fill an emergent institutional gap in the UK's territorial constitution. Indeed, without this type of forum how can the four constituent nations collectively and individually make the best of the many market challenges and opportunities in a post-Brexit world? Further referencing

[2] An approach in line with existing powers to modify the devolution boundary: see for example, Scotland Act 1998, s. 30.
[3] Joint Ministerial Committee (EU Negotiations), Communiqué, 16 October 2017.
[4] Memorandum of Understanding (2013 version), para. 31.

the 'Global Britain' approach, 'JMC (DSM)' could go in tandem with a new 'JMC (International Trade)'.[5]

10. 'JMC (DSM)' would be appropriately tasked with developing and elaborating common frameworks; with sustained shaping and systemic supervision and review of the reregulation; and more generally with promoting cooperation and coordination between the several administrations on the basis in Her Majesty's words of 'the widest possible consensus'. Hence in importing elements of shared governance it would meet a functional market as well as constitutional imperative. In terms of reach, 'JMC (DSM)' would properly take the form of an umbrella covering, and in turn facilitating joined-up policy approaches among, the broad range of reregulatory market domains. Especially in light of the many complexities and nuances of the EU single market concept, various mixes of executive and consultative functions may also be envisaged, based on new and more detailed concordats constructed explicitly in terms of the reregulation. At one with the close interplay between reserved and non-reserved powers or intertwined competence, clear and continuing acceptance of the devolved administrations as legitimate interlocutors in decision-making at the UK level which bears directly on their interests would be a vital element.

11. Early information-sharing, regular meetings, dedicated work streams, and more: it should hardly need saying. As for the further issue of a statutory base, an option clearly taking on added appeal in the light of recent experience, it would be important to avoid too much prescription. Some formal constitutional and institutional guarantees would not go amiss however: for example territorial as well as UK rights to invoke such machinery; a permanent independent secretariat; and interrelated legal duties to consult, whereby the devolved administrations' involvement would be built in. As part of a wider reset, reform along the lines of a new intergovernmental forum must be one in which the fact of Westminster and Whitehall as the chief beneficiaries of repatriation of competence, irrespective of how the issue of devolution and common frameworks plays out, is reflected and not obscured.

Principle

12. An agreed set of considerations for determining, structuring and elaborating common frameworks should have been agreed and published much earlier in the political and administrative process. How otherwise could the intergovernmental negotiations progress effectively and efficiently, representatives in the several legislatures exercise proper scrutiny, and business and civil society clearly and

[5] A forum suggested in light of the Canadian experience by the Institute for Government, T*aking back control of trade policy* (May 2017).

fully contribute? Better late than never, the revived JMC (EN) shows acceptance of the need to pave the way through some general underpinning principles.[6]

13. According to the Communiqué, the parties are agreed on joint working to establish common arrangements in 'some' areas currently governed by EU law but otherwise within devolved competence. There is recognition of the scope for different kinds of common frameworks in different contexts, with mention of common goals and minimum or maximum standards, harmonisation or mutual recognition, as well as hard and soft law techniques for implementation. 'The aim of all parties' in the discussions will be 'to agree where there is a need for common frameworks and the content of them'. A key parameter naturally pressed by UK ministers, outcomes will be 'without prejudice' to the UK's negotiations and future relationship with the EU. Effectively building on the Prime Minister's original speech on the topic at Lancaster House,[7] the communiqué adds to the interlinked policy rationales of domestic market and common resources, and international obligations and trade policy, the safeguarding of UK security and access to justice in cases with a cross-border element. Conversely, the Communiqué speaks briefly and more vaguely of 'close working' between the UK Government and the devolved administrations on non-devolved matters which 'impact significantly' on devolved responsibilities, most obviously in this context trade policy.

14. Frameworks, it is said, will respect the devolution settlements and the democratic accountability of the devolved legislatures and will therefore be based on established conventions and practices, including that devolved competence will not 'normally' be adjusted without consent; maintain, as a minimum, equivalent territorial flexibility for tailoring policies as is afforded by current EU rules; and, echoing the UK Government's White Paper on legislating for withdrawal from the EU,[8] lead to a significant increase in devolved decision-making powers. In particular, frameworks will 'ensure recognition' of the economic and social linkages between Northern Ireland and Ireland, and of the unique fact of their land border, while also adhering to the Belfast Agreement. The very fact of all this is a significant step forward. Yet clearly there is much further to go. Nothing is said about amendments to the devolution clauses.

15. Perhaps it is not surprising that the 'subsidiarity' word goes missing in the UK Government policy documentation in view of the connotations of, and vexed legal history in, EU governance. Domestically in the Brexit context a

[6] Joint Ministerial Committee (EU Negotiations), Communiqué, 16 October 2017.
[7] Theresa May, Lancaster House speech, 17 January 2017.
[8] Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, Cm. 9446, 2017.

constitutional/political presumption of devolution is the better way forward. A case, it may be said, at one level of promoting constitutional legitimacy or territorial sense of 'ownership' in difficult conditions; at another level, of underwriting the twin potentials of devolution as protective instrument and policy laboratory; and at another level again, of tying decision-making responsibility to established territorial sources of knowledge and expertise.

16. It cannot be said too often that London stands to emerge from the Brexit process in a much more powerful position vis-a-vis the devolved nations. Mediating the overbearing effects of Parliamentary Sovereignty coupled with fused UK and England governance structures is a constitutional imperative which the mantra of significant increases in devolved decision-making power must not be allowed to obscure. UK ministers can in a very real sense afford to be generous, not least with a view to a more strategic focus at the centre. Further, the knee-jerk response that because policy responsibilities have been raised to the EU level for reasons of collective interest, they must perforce be for the UK level post-Brexit, has to be guarded against. There will often be convincing reasons for read-across, but it would be odd in the context of Brexit to ignore the distinctive political and administrative drivers of particular EU arrangements.

17. The definitional framework belatedly agreed in JMC (EN) needs much fleshing out. On from the scoping of intersection of EU competences with devolution, some draft listings of areas where UK ministers consider new reregulatory frameworks necessary is next required, followed by some prompt and detailed illustration of possible arrangements, not least for the purpose of informed legislative debate in the several centres of representative government. The good governance principle of transparency in this novel and important form of constitution-making demands nothing less.

18. Let us give matters a hard practical edge. When advising ministers on possible situations where UK-wide approaches and decision-making structures may be considered appropriate, officials should address a series of constitutional design questions concerned with policy justification and the presumption of devolution, and, further, with good governance or rule of law principles of coherence, clarity and accessibility of the law. Reflecting the major role for non-legal forms of 'wiring' in reregulatory governance systems and networks, especially with a view to the three key elements of cooperation, coordination and communication, and also the experience of reserved powers, the questions could usefully include those listed below. Acknowledging the problems of trust on different sides, they effectively constitute a set of policy tools designed to facilitate careful and constructive forms of analysis of possible common frameworks.

1. Is the creation of a common reregulatory framework necessary to support a fully functioning UK single market? Is coordination of controls required to ensure the UK meets international standards?

2. Is a failure to establish a common framework apt to produce major adverse externalities or spill-over effects across territorial boundaries?

3. Is there a close dependency between devolved and non-devolved policy domains? If so, how may discrete territorial interest best be protected?

4. Can the common objectives be sufficiently achieved through soft governance techniques such as concordats and agreed guidelines, benchmarking and peer review?

5. Is there a need for formal legal provision; and, if so, with what parameters and with what level of detail? Can enhanced forms of executive devolution be developed under UK-wide framework legislation? Can concurrent powers be provided?

6. Does the achievement of common objectives require the central allocation of funding? For shared administrative arrangements, are there significant gains in terms of efficiency and expertise?

7. Does creation of a formal legal framework cut against the workability and/or stability of the devolution settlements? Is there a role for mutual recognition? Is there a particular and compelling need for general, transversal legislation?

8. Is the proposed framework expressed in terms that go no further than is necessary to give effect to its purpose and/or that avoid unjustifiable interference with the exercise of devolved functions?

9. Does creation of a common framework make the governance of the UK less clear or comprehensible? Does the proposed design affect the coherence of the package(s) of devolved powers and functions?

10. Does the overall package of common frameworks constitute a coherent, consistent package? Does its overall impact make for effective or ineffective law-making and public administration in a post-Brexit world? Will its coherence make it comprehensible and accessible to lawmakers, business and the public at large?

Discipline

19. The demand for sectoral experience and expertise in the redesign of common frameworks does not obviate the need for a strong central coordinating role: quite the reverse. Maintaining a properly disciplined approach among Whitehall departments both individually and collectively, one which pays due regard to the

constitutional considerations, is of the essence of the political and administrative task in London. Solid arguments for common frameworks must not be an excuse for clunky, opaque and erratic forms of legal restriction in the different policy domains.

20. Perhaps the designated role of the First Secretary of State in 'overseeing devolution consequences of EU exit' heralds some welcome movement in this direction. The smack of a day-to-day supervisory function, with the suitable imprint of the UK Cabinet Office, has yet to be demonstrated however. In the course of democratic scrutiny, most obviously in this instance by the House of Commons Public Administration and Constitutional Affairs Committee, parliamentarians should expect to learn of a high-level and robust system of internal check and peer review at the heart of Whitehall. Reverting to the list of constitutional design questions, such machinery has a discrete role to play in ensuring a suitably coherent, workable and rounded constitutional product from the reregulatory process, so caring for the big picture.

21. Since it is so easily overlooked amid the high political - legislative – disputing, the practical policy aspect deserves a special emphasis. The history of reservations in devolved legislation bears ample testimony to the innate capacities - predilection - of individual Whitehall departments for power-hoarding through hard-edged legal expressions of institutional self-interest. The prospect at the expense of the devolved institutions of central 'gold-plating', or what may appropriately be dubbed 'reregulation creep', is clear and immediate. This too must be guarded against. Firm application of 'better regulation' type concepts of proportionality and targeting will be a vital test of the role and capacities of the UK Governance Group in the UK Cabinet Office in the next period.

Sense and sensitivity

22. In conclusion, the pragmatic and institutional drivers of the European Union (Withdrawal) Bill are very powerful ones. The demands for legal continuity and certainty in general, and for efficient and effective reregulatory frameworks in particular, are real and substantial; meanwhile, the Whitehall machine is self-evidently under huge pressure. Yet the tendency to 'sequencing' - the temptation to treat the devolutionary aspects as if they were some kind of 'second front' best frozen while supranational negotiations proceed, rather than to take them forward in tandem in a spirit of cooperation - should be firmly resisted. The devolution clauses themselves are among the most significant provisions in the Withdrawal Bill, going as they do to the heart of contemporary political and constitutional debates about the very nature and future of the UK. They represent a poor choice of model. Negotiating and elaborating agreed laws, rules and practices for reregulatory purposes may not always be easy. But it does not do to make a

constitutional mountain out of possible political and administrative molehills. Aggressive exercise of Parliamentary Sovereignty should be the last – not the first – resort.

23. Trust among the several governments is evidently in short supply and in view of contemporary political conditions predictably so. At the same time, the chief responsibility of the UK Government and government of England to act constructively and reasonably in an uncodified constitution featuring Parliamentary Sovereignty is magnified in the context of Brexit. Whitehall still has much to do by way of principled, transparent and joined-up proposals on common frameworks, and more generally on the relationship of reserved and non-reserved powers, with a view to (re-)building trust and confidence. However challenging the sea of uncertainty around the Article 50 negotiations appears, short-term exigencies should not crowd out more balanced and longer-term perspectives in a partial and convoluted process of devolving repatriated competence. A clear focus on the general or holistic quality of the constitutional product is essential.

24. Much valuable time has been lost through a failure properly to engage in multilateral forms of intergovernmental relations. This is at one both with a pervasive sense of drift in UK government policy in difficult political circumstances in the wake of the Brexit referendum, and with an established Whitehall preference for seemingly less threatening forms of bilateral workings. By their very nature however, in the case of common frameworks the failure is particularly acute. The policy concern not only of meeting the many challenges presented by Brexit but also, as emphasised by the Prime Minister, of making the most of whatever opportunities are on offer, underscores this. The resuscitation of JMC (EN) and agreed statement on common frameworks should be seen as a start but only a start. Now more than ever the constitutional and political machinery of UK intergovernmental relations needs to be taken seriously by the central powers.

25. Writing in the wake of the hard-fought Scottish independence campaign, I observed that without joined-up constitutional thinking at UK level along the lines of mutual benefit, comity and parity of esteem, the next period of our constitutional futures was even more likely to prove tempestuous.[9] With a view in the Prime Minister's words to preserving and strengthening 'our precious Union', this needs saying more strongly in the context of Brexit. 'Take back control' is no guide to the internal distribution of competence. The UK Government proceeding

[9] Richard Rawlings, 'Riders on the Storm: Wales, the Union, and Territorial Constitutional Crisis' (2015) 42 Journal of Law and Society 471.

as if centralisation is the default position smacks of Unionist folly. The common sense case for reregulatory frameworks is no excuse for constitutionally insensitive approaches to policy choice, institutional design and practical delivery.