REVIEW OF IMPLICATIONS OF BREXIT-RELATED UK LEGISLATION FOR DEVOLVED COMPETENCE

Professor Tom Mullen, School of Law, University of Glasgow
Professor Jo Hunt, Wales Governance Centre, Cardiff School of Law and Politics, Cardiff University

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This paper provides analysis of how the legislation being enacted to implement the United Kingdom’s departure (‘Brexit’) from the European Union (EU) is affecting the powers of the devolved institutions in Scotland and Wales. It is in three parts:

• Scotland
• Wales
• Conclusions

The principal drivers of proposals to change the scope of devolved legislative and executive competence have been concerns about the consequences of removal of the constraints that EU law currently places on devolved policy-making. The first concern is that there may be substantial divergence between policy in different parts of the UK in policy areas in which the law is currently (relatively) uniform, such as agricultural subsidies, and this could have adverse economic and social effects by creating barriers to trade and other interchange between the nations of the UK which do not currently exist. This concern has been expressed as the need to preserve the UK’s internal market and the UK Government has proposed the creation of common frameworks in many of the areas currently governed by EU law order to preserve the internal market.1 This concern is significant because the EU law constraint currently applies to a wide range of devolved competences. The second concern is that the UK Government may wish to conclude trade deals with other nations after the UK leaves the EU. Insofar as there is a need for implementing legislation in devolved areas of competence, there is a risk that the devolved institutions might refuse to enact the necessary legislation because they disagreed with the substance of trade deals, for example, if a new trade deal were to relax existing animal welfare standards for imports of meat. This concern is also significant because of the wide range of topics which might be included in trade agreements which would require implementation in currently devolved areas.

The Scottish and Welsh Governments have stated that they accept the need for common frameworks in some areas but think that these should be negotiated between the devolved and the UK governments rather than simply imposed by the latter. That is the background. We can now look in detail at the measures enacted or proposed thus far that affect the devolution settlements in Scotland and Wales.

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A BREXIT AND DEVOLUTION TO SCOTLAND

1 The Constitutional Context

The devolution settlement for Scotland is expressed both in legislation and in constitutional conventions. The key features of that settlement are:

- Scottish devolution follows the ‘retaining model’ under which all power is reserved other than powers which are specifically reserved to the centre.
- Neither the existence of the Scottish Parliament and Scottish Government nor their powers are legally entrenched because of the doctrine of the unlimited sovereignty of the UK Parliament.
- The UK Parliament retains power to legislate for both reserved and devolved matters (SA, section 28(7)).
- However, the UK Parliament is constrained by the convention (‘Sewel convention’), that the UK Parliament will not normally legislate on a matter within the competence of the Scottish Parliament without the consent of the Scottish Parliament. As a convention, this rule is politically (as opposed to legally) binding.

The key reserved powers include many aspects of the constitution, defence & foreign affairs, financial and economic matters, home affairs, trade and industry, energy and transport. Key devolved policy areas include health, education and training, housing, social work and community care, economic development, aspects of transport, local government, agriculture, forestry and fishing, the environment, civil law, criminal law, the justice system and police. Legislative and executive competence are co-extensive, i.e. devolved executive power has the same scope as devolved executive legislative power (SA, section 54).

The UK’s membership of the European Union is reflected in a number of ways in the devolution settlement. Thus, the Scottish Parliament has no power to legislate incompatibly with EU law (SA, section 29(2)(d)), and the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law (SA, section 57(2)). The effect of the EU law constraint is severely to limit the freedom of action of both the Scottish Parliament and the Scottish Government in a number of devolved policy areas, for example agriculture, fisheries and the environment. When the devolution legislation was enacted, it was widely assumed that the UK would remain a member of the European Union for the foreseeable future. It is doubtful if much thought was given to what the implications for devolution of the UK leaving the EU might be.

Devolution has developed significantly since its inception in 1999 and the general trend has been to confer more power on the devolved institutions. The Scotland Act 2012 conferred additional powers over taxation and some substantive policy areas. The Scotland Act 2016, which was designed to implement the recommendations of the all-party Smith Commission, expanded competence more dramatically by conferring further powers over taxation and extensive powers over social security benefits. The Scotland Act 2016 also emphasised the permanence of the devolved institution (SA, section 63A) and ‘recognised’ the Sewel convention (See SA, section 28(8)), suggesting that the main features of devolution were regarded as politically entrenched. At that point, it is doubtful if many people envisaged that
devolved competence might be reduced in the foreseeable future. However, the majority vote in favour of leaving the EU in the 2016 EU referendum has led to a number of UK legislative measures and proposals which may in future reduce devolved competence and proposals to legislate on devolved matters without the consent of the Scottish Parliament.

2 Brexit Legislation Affecting Devolved Competence: Primary Legislation

As yet, the basic statements of legislative and executive competence of the Scottish Parliament and Scottish Government have not been amended but the European Union (Withdrawal) Act 2018 (EUWA) provides a mechanism whereby devolved competence may be altered and other primary legislation and several Bills currently before Parliament will, if enacted in their current form, affect devolved competence. This section of the paper examines the EUWA, the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 and three Bills: the Trade Bill, Agriculture Bill and Fisheries Bill.

The European Union (Withdrawal) Act 2018

The UK’s departure from the EU and EUWA affect devolved competence in different ways. First, the legal freedom of the Scottish Parliament and Scottish Government to make policy will effectively be enlarged. On ceasing to be a Member State of the EU, the UK will no longer be bound EU treaties and EU secondary legislation and the legal obligations arising from them. EUWA also repeals the European Communities Act 1972 and amends the basic definition of devolved competence by removing the general limitation based on EU law. The existing body of EU-derived law in the UK will be continued in effect by EUWA and will be known as ‘retained EU law.’ However, the Scottish Parliament will in general have the power to change retained EU law.

Executive power is also extended. Sections 8 of EUWA confers power on UK ministers to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law arising from the withdrawal of the UK from the EU and section 9 confers power on UK Ministers to implement any withdrawal agreement reached with the EU. Section 11 and Schedule 2 of EUWA confer analogous powers on Scottish Ministers to make regulations.

However, this effective enlargement of policy-making power is accompanied by a new limitation of devolved competence. EUWA adds a new section 30A to the SA which states that, “An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.” In effect, this allows UK Ministers to make orders which ‘freeze’ devolved competence in specified areas which up to now have been governed by EU law. The purpose of this limitation of competence is to ensure that certain matters which are currently both devolved and governed by EU law will be governed by common UK legal frameworks after Brexit. The Scottish Parliament did not consent to the inclusion of these provisions in EUWA but they were included anyway. As yet, no such orders have been made and the UK Government has stated a preference for proceeding by agreement wherever possible but, importantly, it has not ruled out legislating without the consent of the Scottish Parliament. If there is disagreement in future over particular proposals to adopt common frameworks, the UK government will have the legal power to impose them without the consent of the Scottish Parliament or the agreement of Scottish Ministers. Even if the power
is never exercised, its enactment represents a significant change to the devolution settlement. However, the extent of its practical impact in restricting devolved competence remains to be seen.

The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019

This legislation gives the Secretary of State power to fund and arrange healthcare outside the UK, to give effect to healthcare agreements between the UK and other countries, territories or international organisations, such as the European Union (EU), and make the necessary provision for data processing to underpin these arrangements and agreements. It is necessary because departure from the EU may require replacing existing with new reciprocal healthcare agreements.

Section 2 of the 2019 Act confers power on the Secretary of State to make regulations implementing healthcare agreements with other countries and international organisations. Such regulations may not amend Acts of the Scottish Parliament but they may change the law on matters within devolved competence in any other way, e.g. by revoking or amending devolved subordinate legislation. Before making provision by regulations that falls within the legislative competence of a devolved legislature, the Secretary of State must consult the relevant devolved authority. The UK Government took the view that Clauses 1, 2 and 4 of the Bill required the consent of the devolved administrations. The Scottish Government has stated that it does not believe it should currently seek consent to provisions in UK legislation related to withdrawal from the EU except in exceptional circumstances. But it considered that there were exceptional circumstances in the case of this Bill that justified seeking the Scottish Parliament’s formal legislative consent to the Bill.² It is worth noting that, although UK Ministers must consult the devolved governments before making regulations this is a procedural constraint. A refusal to consent would not prevent UK Ministers from making regulations and, as the Sewel convention does not apply to secondary legislation, there is no rule that regulations will not normally be made without the consent of the Scottish Parliament or Scottish Government. The 2019 Act will be discussed further below in relation to Wales.

In addition, to primary legislation affecting devolved competence, there are several Bills currently going through the UK Parliament which will have a direct or indirect legal effect on devolved competence if enacted in their current form.

The Trade Bill

The Trade Bill has been considered by both the Commons and the Lords but no date has yet been set for be consideration of Lords amendments. The Trade Bill is intended to enable the UK to build a future trade policy after leaving the EU. It confers power on Ministers to make regulations implementing the Agreement on Government Procurement (GPA) and to make regulations implementing non-tariff obligations in any international trade agreements that the UK reaches in future provided the countries concerned have signed a corresponding agreement with the EU before exit day. Clauses 1 and 2 confer power to make regulations on both UK Ministers and devolved governments for the implementation of the relevant international agreements. However, Schedule 7, which is activated by clause 7, restricts the regulation making power of the Scottish Ministers and other devolved governments. This is a restriction

of the general power that the Scottish Parliament has to legislate on topics which are not reserved under the SA.

Clause 7 of the Bill states that the Scottish Ministers may make regulations to implement the relevant international agreements only within devolved competence. When read together with EUWA, this means that the Scottish Ministers will have no power to make regulations on any matter which has been ‘frozen’ by regulations made under section 12 of EUWA in order to create common frameworks after Brexit. Also, Scottish Ministers will have no power to make regulations which modify retained direct EU legislation or retained EU law (even where that would otherwise have been within devolved competence) although UK Ministers may do this. Further restrictions are that in certain circumstances Scottish Ministers may not make regulations without first consulting a UK Minister, or without the consent of a UK Minister or that the power can only be exercised jointly with a UK Minister.

As noted above, no orders under section 12 EUWA have yet been made and it may be some time before any new trade deals are concluded, so it will be some time before we see any restrictions on devolved competence arising from trade deals taking effect. For the time being the extent of the future practical impact of the Trade Bill in restricting devolved competence remains unclear but, depending on the content of future trade deals, they could be significant.

The Agriculture Bill

The principal purpose of the Agriculture Bill is to provide stability for farmers after the UK leaves the EU and, therefore, ceases to participate in the EU’s Common Agricultural Policy (CAP) and the UK ceases also to be bound by the World Trade Organisation Agreement on Agriculture to which the Member States are party by virtue of EU Membership. It provides a new legal basis for farming support and for other aspects of agriculture. It is worth noting that the UK Government has promised to continue to provide financial support for farming at the same level as is currently funded under the CAP until 2022. But the Bill will also enable changes in the way that farming support is provided in future.

There are no specifically Scottish provisions in the Bill. Scotland is however covered by the UK-wide provisions in the Bill, for example, those relating to the World Trade Organisation. Although the majority of the Bill’s provisions do not apply to Scotland, some significant provisions do.

The UK Government considers that none of the Bill’s provisions require a legislative consent motion. By contrast, the Scottish Government considers that legislative consent is required for clauses 22 to 26, clause 29 (apart from paragraphs (2), (6)(b) and (c), and (7)(b) and (c)); 30; 32; 34; 35 and 36. Clauses 29, 30, 32 and 34-36 do not require discussion as they are ancillary to the other provisions.

The UK Government’s position appears to be that these are in, one way or another, aspects of competition law which is a reserved matter. Clauses 22 to 24 require legislative consent because they powers relating to the official recognition of producer and interbranch organisations, and associated exemptions from competition law. The Scottish Government argues that these powers will be used for devolved purposes, namely the promotion of an

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effective agricultural market in Scotland and, therefore, require legislative consent. Clause 25 covers powers relating to Fair dealing obligations of first purchasers of agricultural products. The Scottish Government argues that these also require consent because these are powers to regulate of unfair contractual terms in commercial contracts by agricultural producers in Scotland, a devolved purpose. Clause 26 covers powers to introduce regulations in relation to the WTO Agreement on Agriculture. The Scottish Government argues that these powers may be used to implement international obligations as regards matters which are not reserved, i.e. agriculture support. As such they would affect the executive competence of the Scottish Ministers in exercising their functions concerning agriculture support in Scotland and so require consent. The Legislative Consent Memorandum stated that the Scottish Government did not intend to lodge a legislative consent motion in relation to the Bill.\(^4\)

The terms of the reservation (Head C3 in Part II of Schedule 5, SA) are as follows:

“Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers.”

If these provisions are for the purpose of, and will have the effect of, exempting agricultural producers from the normal requirements of competition law they do appear to relate to reserved matters. Clause 25 can also be understood as dealing with abuse of a dominant position, i.e. the use of unfair agreements by more powerful market actors to exploit less powerful market actors, and therefore relates to a reserved matter. Clause 26 rests on less firm ground. The Scottish Parliament has competence to implement international agreements the subject matter of which is within devolved competence. The WTO Agreement on Agriculture consists of three pillars— domestic agricultural support, market access, and export subsidies. It is not plausible to argue that all measures that might be required to implement the WTO Agreement on Agriculture be for the purpose of regulating anti-competitive practices and agreements or preventing abuse of dominant position. Therefore, at least some of the measures required to ensure compliance with the WTO Agreement would be within devolved competence. Therefore, the Sewel convention does appear to apply to clause 26.

**Fisheries Bill**

Fisheries is in general a devolved matter and the devolved governments regulate both fisheries in their waters and their own fishing boats wherever they fish. Currently, the ability to exercise fisheries powers is heavily constrained by the EU Common Fisheries Policy (CFP). The UK has a fishing quota under the CFP which is allocated between the four UK fisheries administrations (England, Scotland, Wales and Northern Ireland) based on landings between 1994 – 1996. The four fisheries administrations then allocate the quota to the fishing industry in each part of the UK. The 2018 UK White Paper, *Sustainable fisheries for future generations: consultation document*\(^5\) (October 2018) stated that, after leaving the EU, the existing quota will be divided between the four fisheries administrations as it is now.

The Fisheries Bill is intended to provide the legal framework for the United Kingdom to operate

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as an independent coastal state under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) after the UK has left the European Union (EU) and is no longer bound by the Common Fisheries Policy (the CFP). The Bill creates common approaches to fisheries management between the UK government and the Devolved Administrations, known collectively as the Fisheries Administrations, and makes reforms to fisheries management in England. The Bill sets out fisheries objectives for the period after the UK leaves the CFP. These are largely the same as the current objectives in Article 2 of the CFP.

As UK boats fish throughout UK waters, the UK Fisheries Administrations have until now worked together to ensure a common approach to fisheries management so far as that was thought necessary or appropriate. Subject to certain exceptions, the Devolved Administrations have devolved competence in relation to marine licensing (including fishing vessel licensing) in their inshore area (out to 12 nautical miles) and the Scottish Ministers and the Welsh Ministers have executive competence in relation to marine licensing (including fishing vessel licensing) in respect of their offshore area (12-200 nm). The Devolved Administrations have executive competence in relation to marine planning in their offshore area as well as competence over marine planning in their inshore area. The only explicit reservation in schedule 5 of the Scotland Act 1998 is “Regulation of sea fishing outside the Scottish zone (except in relation to Scottish fishing boats). The regulation of sea fishing inside the Scottish zone and the regulation of Scottish fishing boats outside the Scottish zone are, therefore, clearly devolved matters.

Issues for the future after Brexit include how policy on sustainable fisheries develops, what access to Scottish waters if any will be given to foreign fishing boats whether from the EU or elsewhere as a result of future trade deals and the extent of any funding for the fishing industry.

The UK Government accepts that many of the Bill’s provision require legislative consent but that Clauses 18-20 do not as these cover the setting and distribution of UK fishing opportunities. Clause 18 replaces the current provision under the CFP by conferring on the Secretary of State power to set the maximum quantity of sea fish caught by British fishing boats and days that British fishing boats may spend at sea in a calendar year. Clause 20 replaces Article 17 of the EU Common Fisheries Policy Regulation with a revised provision. These provisions, therefore, set out the Secretary of State’s reserved function of determining the UK’s fishing opportunities, in accordance with the UK’s international obligations. This is essentially the same argument as was made by the UK Government above in relation to implementation of the WTO Agreement on Agriculture.

However, as the Scottish Government pointed out whilst the United Kingdom is responsible in international law for compliance with its international obligations, it does not follow that it is the UK Government alone which is responsible for the measures required to implement and comply with those obligations in domestic law. It is perfectly competent for the Scottish Government to take the necessary implementing measures where that can be done within devolved competence. Therefore, as the powers in Clause 18 are to be exercised within devolved competence, legislative consent is required. The Scottish Government makes a similar argument about Clause 20 and the manner in which it revised Article 17 of the Common Fisheries Policy Regulation to make it operable in UK law.
3 Brexit Legislation Affecting Devolved Competence: Secondary legislation

A large volume of secondary legislation has already been enacted in preparation for the UK leaving the EU. This legislation has been made by UK, Scottish and Welsh Ministers principally in exercise of the powers to legislate conferred by EUWA. The vast majority of these instruments have not raised issues affecting devolved competence but one notable exception is the draft State Aid (EU Exit) Regulations 2019.

State Aid

The draft regulations are currently before Parliament. They have been made under the power conferred by section 8(1) of EUWA and will not become law unless approved by a resolution of each House of Parliament.

These Regulations make amendments to legislation in the field of state aid which will operate after the UK leaves the EU including transferring the state aid regulatory functions of the European Commission to the Competition and Markets Authority (CMA); replacing certain references to the European Commission in legislation with references to the CMA; replacing the test of whether state aid affects trade between Member States with a test of whether state aid affects trade between the United Kingdom and the European Union; and restating parts of current EU procedural and enforcement provisions with appropriate corrections. The regulations broadly maintain the current system of UK competition law.

In the short term, these regulations will have little impact on either the competence of the Scottish Parliament or the exercise of functions of the Scottish Government in the field of state aid as the principal purpose and effect of the regulations is to ensure continuity of domestic law after Brexit. However, there could be important long-term consequences. The UK Government’s view is that state aid is a reserved matter. If the UK Government’s view is accepted, then the Scottish Parliament will be unable to legislate on state aid yet it is entirely possible that the Scottish Parliament might want to do that. Also, although the immediate effect of the regulations is to ensure continuity, the UK Parliament might change the law in future and such changes would simply have to be accepted even if they were opposed by the Scottish Parliament and the Scottish Government. Areas that might be affected include public transport, e.g. subsidies to ferries serving the Highlands and Islands and transport infrastructure.

The UK Government contends that the legal regulation of state aid is a reserved matter in terms of the devolution legislation, but the Scottish and Welsh Governments disagree, considering state aid to be a devolved matter. The Scottish Government proposes to make its own regulations on post-Brexit State Aid to ensure continuity of law after Brexit and says if it were asked to consent to the new UK State Aid regulations it would not do so. The UK Government has not set out in any detail legal arguments as to why state aid is a reserved matter.

The relevant reservation is Head C3 of part II of Schedule 5,SA which was quoted above. State aid is not specifically mentioned in Head C3 and in our view none of the key phrases in Head C3 can reasonably be interpreted as relating to state aid. The regulation of state aid would not come under the regulation of “anti-competitive agreements”, or “abuse of dominant position” or “monopolies and mergers.” On a purely literal reading of the statute, state aid could be considered as a type of “anti-competitive practice” as “practice” is a word with many possible meanings. However, a purely literal argument seems inappropriate here. Whilst there may be an overlap of the general purposes of state aid and of competition law, when viewed in the light...
of the history of UK legislation on competition it seems clear that the regulation of state aid is a distinct activity from ordinary competition law. Therefore, state aid is not a reserved matter and to change the law on state aid within devolved competence would require legislative consent.

B BREXIT AND DEVOLUTION TO WALES

1 Legislative and Executive Competence under the Government of Wales Act 2006

With the coming into force of the Wales Act 2017, the devolution settlement for Wales has come closer to that for Scotland – though significant differences remain. Primary legislative competence for the National Assembly (to be renamed Senedd Cymru/Welsh Parliament) is now allocated according to a reserved powers model, intended to bring about a ‘clearer, fairer and stronger devolution settlement’.6

This move to a reserved powers model however came with concerns that it rolled back the previous scope of devolved legislative competence under the conferred powers model, which provided for a more flexible, expansive reading of the limits of competence. A 2016 Report from the Assembly’s Constitutional and Legislative Affairs Committee on the move to the reserved model observed that a roll-back on competence, ‘could arise intentionally or through the unintended consequence of poorly drafted rushed, or inadequately scrutinised legislation’.7

Initially, the conferred competence model operated under a piecemeal, ad hoc scheme, which required transfers of competence over ‘matters’ within broader pre-defined ‘fields’ to take place either by Act of Parliament, or by way of the LCO (Legislative Competence Order) system defined in the GOWA 2006 (Part III, section 95). From 2011, the system moved to a pre-determined conferral of primary legislative competence (Part IV, Schedule 7), which subsequently expanded to include areas not previously devolved, including some tax raising powers (Wales Act 2014).

The expansive potential of competence allocation under the conferred model can be seen in the confirmation by the Supreme Court in the Agricultural Wages case ([2014] UKSC 43), that as long as an Act of the Assembly ‘fairly and realistically’ related to a devolved matter, it would not be outside competence if it also related to a subject which has not been devolved. In this way, legislation retaining the Agricultural Wages Board in Wales was held to be within competence as it fairly and realistically related to conferred competence over agriculture, though competence over employment law was not explicitly conferred. Similarly, this approach lay behind the adoption of the 2016 Trade Union Act for Wales, which takes a less restrictive approach to lawful trade union activities than seen in England following the 2015 Trade Union Act, with the Assembly using powers conferred on it in the health and education public sectors.

The move to a reservation-based model removes the expansive elasticity of the conferred model approach. Previously ‘silent’ subjects, such as employment relations, were recast as explicit

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reservations. The list of reservations is extensive (some 200, see GOWA 2006, Schedule 7A) and includes matters ranging from international relations; fiscal, economic and monetary policy; policing; the legal profession and legal services; to private security, the sale and supply of alcohol, and hovercraft. The approach to reservation has been widely criticised as lacking principle and creating unnecessary complexity (see 2016 CLAC Report above, and evidence listed therein).

In addition to the express reservations, a set of general restrictions on primary and secondary law making are set out in Schedule 7B, which include restrictions on: measures which modify the law on reserved matters, unless ancillary and with no greater effect than necessary; measures which are incompatible with EU or ECHR law; measures which modify the private law, unless the purpose is unrelated to a reserved matter; measures which create or modify listed criminal offences or criminal capacity; measures which modify protected enactments; measures which confer functions or modify the constitution of reserved authorities without UK Government consent; measures which remove or modify public authority functions without UK Government consent; and measures which remove or modify Minister of the Crown functions without consultation with, or in certain cases, consent of UK Government. Previous Supreme Court case law had, conversely, confirmed that Ministerial consents could be removed or modified in an incidental or consequential way, without consent (Local Government Byelaws (Wales) Bill judgment). Section 109 GOWA provides a dedicated Order in Council procedure for amendments to competence under Schedule 7A and 7B, which requires an affirmative approval in both Houses and in the Assembly.

No area of legislative competence is exclusively held by the Assembly, with Westminster reserving the right to legislate on devolved matters, subject to the convention that this will not normally be done without the consent of the devolved legislature. The Wales Act 2017 matched the earlier move for Scotland in placing the Sewel Convention on a statutory footing. The Legislative Consent Memorandum /Motion procedure is set out in Standing Order 29, applying to Westminster Bills within devolved legislative competence, or which amend legislative competence. Standing Order 30A has, since October 2013, provided a procedure for Assembly consent to be sought to the use of Statutory Instruments by UK Ministers which amend primary legislation within devolved competence – the Statutory Instrument Consent Memorandum/Motion (recognised in the Devolution Guidance note, at part 5)8. This procedure supplements any statutory requirement existing under other UK Acts of Parliament (e.g. Public Bodies Act).

As to Executive competence, unlike the Scottish model, there is no alignment under the primary devolution statute of legislative and executive competence. There has been no general statutory transfer of ministerial functions from UK to Welsh Ministers applying within the scope of devolved legislative competence. Instead, Welsh Ministerial competence in relation to specified matters is established by Transfer of Functions Orders, made under s. 58 GOWA – requiring consent from both Houses of Parliament, the Assembly, and Welsh Government. Ministerial functions have been transferred within and outwith devolved legislative competence. A number of ministerial functions are exercisable concurrently or jointly by Welsh and UK Government ministers, these are listed at Schedule 3A GOWA 2006, some, when exercised by Welsh ministers, requiring consultation with, or the consent of UK Gov. Modifications and conferral of ministerial functions may also be made through primary

Westminster legislation, secondary legislation, and Acts of the Assembly. The opacity and complexity of this approach has long been a source of concern. Standing Order 30 requires the Assembly to be notified by the Welsh government of any UK Bill proposing amendment to the scope of Welsh ministerial or Counsel General powers.

2 The EU (Withdrawal) Act 2018 and the Intergovernmental Agreement

The Welsh Government and Assembly both opposed the approach originally foreseen under clause 11 of the EU (Withdrawal) Bill, which returned control over retained EU law to Westminster, subject to subsequent decision whether to release law making powers over these matters to the devolved legislatures. As a pre-emptive move, in Wales, legislation was adopted (and later received royal assent) which provided for an alternative route for EU law to be converted into domestic law in devolved areas, and thus circumvent the ‘retained EU law’ controls- The Law Derived from the European Union (Wales) Act 2018. In April 2018, an agreement9 was reached between the UK and Welsh governments which included, on the UK side, a commitment to make amendments on the face of the Withdrawal Bill, and on the Welsh side, a commitment to recommend the removal of the continuity legislation. The LDEU Act was subsequently repealed in December 2018.

The EUWA and IGA foresee the temporary preservation of EU law across a number of areas where the need for common frameworks are foreseen, secured for Wales through ‘freezing’ regulations adopted by the UK Government under section 12, EUWA, and for England by a commitment by UK Government not to introduce legislation in those areas. Section 12 freezing regulations will ‘not normally’ be approved by the UK Parliament unless the consent of the devolved legislature has been secured. This is not an absolute bar to the Parliament approving the regulations – though both the relevant UK and Welsh Government Ministers must provide Parliament with statement about why consent is not forthcoming. The power to make these regulations is time limited to 2 years from exit day, and regulations last for a maximum of 5 years. The restrictions that would arise on competence from regulations adopted under this process are now found in section 109, GOWA. Standing Order 30B sets out the procedure for Assembly involvement in the consent decision process.

Sections 8 and 9 EUWA provide UK ministers with regulation-making powers to correct deficiencies and to introduce the Withdrawal Agreement. Under the terms of the IGA, where UK ministers act in devolved areas using powers under 8 and 9, it is agreed that these will not normally be adopted without consent of the Welsh government. Further, the MoU provides (at para. 8) that these powers will not be used to enact new policy in devolved areas but are primarily to be used for administrative efficiency. Under new Standing Order 30C, Welsh government must lay a statement notifying the Assembly of relevant statutory instruments made under this process, which must include a statement of any impact the statutory instrument may have on the Assembly’s legislative competence and/or the Welsh Ministers’ executive competence, and, if relevant, why Government consent was given. If the regulation also involves an amendment of primary legislation, then, additionally, a Statutory Instrument Consent Memorandum will be required under SO 30A, and a subsequent Motion may be tabled. The regulation making powers under s 8 and S 9 are held concurrently with Welsh ministers (s11, Schedule 2), though provisions in Schedule 2 specify the situations where particular

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restrictions and conditions (including consultation or consent requirements) exist on Welsh ministerial action.

Finally, EU (Withdrawal) Act s. 23 provides a power for UK ministers to make regulations in relation to consequential and transitional provisions. There is no explicit reference to this regulation-making power, or its potential significance for devolved competence, in the IGA/Memorandum. At a minimum, if regulations adopted under this section amend primary legislation within devolved competence, then the SICM procedure will apply.

As of August 2019, there have been no regulations made under section 12 EUWA so the implications for Welsh devolved competence remain to be seen. However, extensive use has been made by UK ministers of the s. 8 regulation-making power, (and to a lesser extent, by Welsh ministers under s.11/Schedule 2), amending domestic legislation in devolved areas. A review of the use of this power is provided in part 4 of this section of the paper below.

3 Other Brexit-related Primary Legislation

Of the Brexit-related primary legislation either already adopted or in preparation, four pieces stand out in terms of their potential impact for the exercise of devolved competence in Wales. These are the Healthcare Act; and the Agriculture, Fisheries and Trade Bills. The remaining pieces of Brexit legislation do not directly engage fields of devolved competence (unlike in Scotland, there has been no devolution of powers over social security, as covered by the Immigration and Social Security Coordination (EU Withdrawal) Bill, though there are intersections here with a range of devolved policy areas, including health, social care, and higher education).

Healthcare (European Economic Area and Switzerland Arrangements) Act 2019

The general purpose and effect of the 2019 Act was described in section A above. When the Bill was introduced in October 2018, Concerns were expressed by the Welsh Health Minister, as well as the two reporting Committees (Constitutional and Legislative Affairs, and Health, Social Care and Sport) in particular about the lack of involvement of the devolved administrations in the creation of new healthcare arrangements, the absence of any requirement for devolved consultation or consent in the Bill where the UK minister exercises functions within the scope of devolved competence, as well as concerns about the power for UK ministers to make changes to devolved primary legislation.

The final version of the legislation shows greater respect towards the devolved administrations by the UK legislature, and a more consensual approach across a number of elements. As noted above, section 5 of the Act now contains a requirement that the Secretary of State should consult with the devolved authorities before making regulations under section 2 that are within the legislative competence of the devolved legislatures, and there is no longer a power to make regulations which amend devolved primary legislation.

Accompanying the legislation is a Memorandum of Understanding between the UK and Welsh Governments ¹⁰, which covers commitments about the involvement of devolved administrations in the process of creating new reciprocal international arrangements, including

discussing the strategic direction of policy, and seeking the devolved administrations’ input on its negotiating positions for new healthcare agreements insofar as they relate to matters within devolved competence. Further, on the use of regulation making powers in devolved areas, a commitment is made by UK Government not normally to do so without devolved consent. If no consent is forthcoming, there should be an exchange of letters, made available to UK Parliament, which ultimately will have to decide whether to allow the regulations. The changes made to the legislation, and the MoU resulted in the Assembly giving its support to the legislation (Supplementary LCM, 12 March 2019).

Agriculture Bill

The Agriculture Bill makes provision for a replacement agricultural policy for England, as the UK departs the EU’s Common Agricultural Policy. The Welsh Government intends to introduce its own Agriculture legislation for Wales and has been consulting on the basis of the Brexit and Our Land11 paper. However, this legislation will not be introduced during the current Assembly term. In the interim, powers are required to ensure that Welsh ministers can continue to make direct payments to farmers beyond the period foreseen in the applicable EU Regulation (which will be incorporated as retained direct EU law). Such powers are conferred on the Welsh Government by clause 30 (previously clause 27) and Schedule 3. These were the only aspects of the Bill that were originally held out by UK Government to be within devolved competence, and thus requiring legislative consent. The Welsh Government has argued strongly that certain other provisions are within devolved competence – most notably clause 28 (formerly clause 26), which provides powers for UK Secretary of State to pass regulations to ensure compliance with the WTO Agreement on Agriculture. Both the Welsh12 and Scottish Governments (as noted above) have emphasised that the observation and implementation of international agreements is explicitly exempted from the international relations reservation. As WTO rules themselves set no limits to certain types of support (blue and green box), the inclusion of a power for the Secretary of State to determine the classification of agricultural support schemes, and to set ceilings for support, not just for England but for the UK as a whole, goes beyond what may be legally defensible. Prospectively, this may constrain the policy choices open to the devolved nations in the determination of their future funding schemes.

Following changes to the Bill made at Commons Committee stage, the Welsh Government laid a supplementary Legislative Consent Memorandum on 26 March 2019 (following a first LCM in October 2018). The Minister indicated that further LCMs may be necessary as the legislation proceeds through the Lords, though to date there was support for the proposals, on the understanding that a Memorandum of Understanding between the Welsh and UK governments will be formalised. This MoU reflects commitments about devolved involvement in the making of regulations under the WTO clause. These include a commitment from the UK Government to consult with the Welsh Government, and to proceed by agreement. Under the proposed MoU, the Welsh Ministers are recognised as being responsible for proposing the initial classification of support schemes, and should any disagreement arise, independent advice will ‘normally’ be sought. In the event of a dispute, relevant material will be made available to both Houses of Parliament before they approve the regulations. In the view of CCERA, however, the Bill remains problematic as the UK Government will have the final say on the draft regulations, and ultimately, the decision to approve the regulations will rest with the UK

Parliament. It considered this inappropriate given Welsh Government’s view that the WTO provisions are within the Assembly’s legislative competence, and the potential for these provisions to restrict the Welsh Government in a key area of devolved competence.

Fisheries Bill

The Fisheries Bill, introduced 25 October 2018, provides primary legislative elements for the UK’s replacement common framework for fisheries management and support. As with the Agriculture Bill, the Welsh Government has indicated its intention to bring forward its own complementary legislation (and has launched a consultation, *Brexit and Our Seas*), but in the interim will use the vehicle of the UK-wide piece of legislation.

The Bill was discussed in detail in section A above but we note here that the Bill extends the legislative competence of the Assembly, which has not previously had competence over the Welsh zone (the area beyond 12 nautical miles from shore), though executive powers over this zone had previously been transferred to the Welsh ministers. Legislative and executive competence will thus be brought into line, facilitating the creation of future Wales-specific fisheries legislation.

The Welsh Government has expressed similar concerns to the Scottish Government and does not accept that the purpose of ensuring compliance with the UK’s international obligations makes the setting of fishing opportunities a reserved matter.

Trade Bill

The Trade Bill, originally introduced in November 2017, provides regulatory powers for the implementation of international trade agreements, and for the establishment of a trade remedies authority. It has been discussed in relation to Scotland in section A above. Powers to implement trade agreements are held concurrently by UK ministers and devolved administrations. The Bill has been through a series of significant amendments, and three Legislative Consent Memoranda (and one Motion) from the Welsh Government,13 which have seen it become progressively more consensual and less centralising in its approach. The original version of the Bill contained extensive restrictions and controls over the use of devolved powers to implement trade agreements, with no corresponding controls over the use of UK ministerial powers in devolved areas.

As it currently stands, whilst some controls remain on devolved authorities’ exercise of their regulation making powers, these have been loosened and removed in some respects, reflecting the evolution of the EU (Withdrawal) Act 2018: a blanket restriction on the modification of directly applicable retained EU law has been removed, and the requirement under the original version of the Bill for the devolved ministers to consult UK Government before making regulations has been disapplied, but only in the circumstances that the same thing could be done by Welsh Ministers in regulations under an Assembly Act or Measure without the need to consult the UK Government. Additionally, concerns about the ability of UK Ministers to adopt measures in devolved areas of competence without any controls have been met by a commitment that powers under the Bill will not normally be used by UK Ministers in devolved areas without consent and will not be used for the creation of new policy. These changes reflect

4 Brexit-related Secondary Legislation

As noted above, UK ministers are able to ‘freeze’ devolved competence through secondary legislation, using the regulation making power in section 12 EUWA. No use has yet been made of this provision. Meanwhile, as of August 2019, some 150 regulations have been laid by UK ministers in areas of competence devolved to Wales, using the power in section 8 of EUWA. The Constitutional and Legislative Affairs Committee is responsible for scrutiny of Welsh ministerial consent decisions relating to section 8 SIs, under SO 30C. Where regulations also amend primary legislation, a SI Consent Memorandum is required, though whilst a number of memoranda have been lodged, the Welsh Government has not felt it necessary to table any motions.

The regulation making power has to date resulted in some extension to devolved powers, as restrictions previously resulting from the requirement to comply with EU law is removed, and new powers are transferred to Welsh Ministers (as noted in relation to e.g., The Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019; The Common Fisheries Policy (Amendment etc.) (EU Exit) (No. 2) Regulations 2019; The Zoonotic Disease Eradication and Control (Amendment) (EU Exit) Regulations 2019). As to legislative competence, some restrictions are created where there is a transfer of functions in devolved areas to public authorities or UK Ministers of the Crown, as any future attempt to legislate which seeks to remove or amend these functions may, under Schedule 7B GOWA 2006, only be done with the consent of the UK Government (e.g. Plant Breeders’ Rights (Amendment etc.) (EU Exit) Regulations 2018; The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019).

Disputes have emerged over whether particular matters are reserved or devolved, and a number of SIs have been tabled where consent has not been requested, where the Welsh Ministers have considered that it should have been. Particular areas of disagreement include the field of State Aid (as discussed above), and protected food names and geographical indication of food schemes (see e.g. The Food and Drink, Veterinary Medicines and Residues (Amendments etc) (EU Exit) Regulations 2019; The Environment, Food and Rural Affairs (Amendment) (EU Exit) Regulations 2019 and The Food and Farming (Amendment) (EU Exit) Regulations 2019). Whilst the Welsh Government maintains its position that these areas are devolved, it has also, as with its approach to Brexit-related primary legislation, placed significant reliance on the potential for intergovernmental agreements to reconcile disagreement, and provide assurances that policy will be made in a consensual way in the future. This has not been seen as satisfactory by CLAC, the Committee responsible for scrutiny of Welsh ministerial decisions relating to section 8 SIs. In March 2019, the Committee Chair wrote to the Chair of the House of Lords Constitution Committee that ‘we understand the UK Government has given the Welsh Government written assurances that the Welsh Government will have a role in the operation of the schemes relating to State aid and geographical indication of food etc. However, while it seems that such assurances have been given by the UK Government, and received by the Welsh Government, in good faith, we do not believe that disputes over the boundaries of devolution should be resolved in this way’.
C IMPLICATIONS OF BREXIT LEGISLATION AFFECTING DEVOLVED COMPETENCE

In this section we briefly discuss the implications for devolved competence and the devolution settlements of Brexit-related legislation affecting devolved competence. Space does not permit a full discussion of these issues and we anticipate that they will be explored during the discussion with the Committee.

As we described above, significant changes to devolved competence in both Scotland and Wales have been made or are under consideration by EUWA, by other primary legislation and Bills before the UK Parliament and by secondary legislation made or potentially to be made by UK Ministers. Two key issues of devolved competence arise from the recent Brexit-related legislation.

The first concerns the scope of competence. There has been an attempt in some of the recent legislation by the UK government to define particular areas as being outside devolved competence on the basis that the matter is covered by the international relations reservation. This attempt at exclusionary reservation has been contested by the devolved institutions in both Scotland and Wales. The legal basis for the UK Government’s stance is weak. As the Supreme Court confirmed in the Scottish Continuity Bill case, the reservation does not extend to the implementation and observation of international agreements by the devolved administrations within devolved areas. It appears that the international relations argument is being used to bypass the requirement for devolved consent thus undermining the legislative consent convention which is fundamental to the devolved settlements. It would be more constitutionally appropriate to have a degree of ‘shared’ governance in the implementation of international obligations, particularly as the terms of future international agreements entered into by the UK may have consequence for existing devolved competence.

The second key issue has been the inclusion in primary legislation of regulation-making powers for UK Ministers in devolved areas, and the potential for the future use of these powers to restrict policy options open to the devolved law-making bodies. A series of commitments as to the use of these powers, guarantees about the involvement of the devolved administrations in their exercise, and mechanisms for dispute resolution have been made by the UK government. To some extent this is seen on the face of the legislation, but particularly with regard to Wales, a heavy emphasis has been placed on the role of intergovernmental agreements and memoranda of understanding accompanying the legislation to take these commitments forward. This soft form of policy instrument has facilitated breakthroughs in enabling support to be forthcoming for UK legislation in the case of Wales, but at the same time comes with concerns about its robustness and the strength of its guarantees.

Taken together, these two developments suggest that a fundamental constitutional value, namely respect for devolved competence, is consistently being subordinated to UK Government policy objectives for the post-Brexit environment, notably avoiding barriers to trade and other interchange between the nations of the UK and ensuring that it can guarantee consistent implementation of future trade agreements across the UK. These are valid political objectives but in our view they do not by themselves provide sufficient constitutional reasons for non-consensual changes to devolved competence.
Neither existing statements of principle, nor existing institutional frameworks and procedures seem adequate to the task of resolving the disputes around competence between the UK Government and Parliament and the devolved institutions that have been a feature of the period since the EU referendum. There is a need to develop more adequate statements of principle and better intergovernmental institutional frameworks and procedures.

Whilst the brief for this paper was principally to address questions of devolved competence, we think it is worth bringing up another issue related to devolved government which arises from our review of Brexit-related legislation. Concerns repeatedly been raised, particularly by Welsh Assembly committees, about the extent to which Welsh ministers have been empowered under primary legislation in ways that affect scrutiny and accountability of executive government. There is a need to reconsider the transparency of existing processes whereby the UK and devolved governments reach agreement on issues affecting the scope and exercise of devolved powers and the procedures for ensuring timely and effective input from the devolved assemblies.