

FINANCE AND CONSTITUTION COMMITTEE

COMMON UK FRAMEWORKS – CALL FOR EVIDENCE

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The Brexit Negotiations and the Future EU-UK Relationship: Implications for Common Frameworks

- (1) This written evidence outlines some of the potential impacts of the current trajectory of the [Brexit negotiations](#), and in particular of the future relationship, on the discussion around post-Brexit common UK frameworks. The wider Brexit context is crucial to this discussion, as the future relationship between the EU and the UK – which remains largely uncertain at this stage – will constitute the overarching basis for common frameworks and other post-Brexit, post-transition measures in Scotland and the wider UK.
- (2) The sections of this evidence address the implications for the common frameworks discussion of the following areas: the current state of the Brexit (withdrawal) negotiations; the transition period and the future relationship negotiations; the UK Government's proposals on the future relationship; the EU27's perspective on the future relationship; and devolution and the future relationship. Each section concludes with a highlighted summary point. The circumstances surrounding Brexit are ever-evolving – this evidence reflects the state of affairs as of 31 August 2018.

Section 1: State of the Brexit Negotiations

- (3) Following from the UK's activation of [Article 50 TEU](#), the EU's approach has been to structure the Brexit negotiations through sequencing (withdrawal and transition, then future relationship). Despite the UK Government's initial objection, this order has been largely maintained. Accordingly, the current priority in the negotiations is to conclude the [Withdrawal Agreement](#), which covers issues associated with the UK's departure from the EU and currently includes a 21-month transition period ending on 31 December 2020.
- (4) EU Chief Negotiator Michel Barnier [stated](#) on 29 August 2018 at a press conference in Berlin with German Foreign Minister Heiko Maas that 85% of the work on the Withdrawal Agreement has been completed. The question of Northern Ireland, its relationship with Ireland and the border remains the most significant unresolved point. Other matters, such as geographical indications for products, are also outstanding. The Agreement will need to be finalised by November or December 2018 at the very latest, in order to leave sufficient time for approvals, so that it can be operational for the UK's exit from the EU on 29 March 2019.
- (5) The Withdrawal Agreement will be accompanied by a political declaration on the future relationship between the EU and the UK. This political declaration will be a statement of intent and will give a sense of the direction of travel as the EU27 and the UK see it

at the time. While it will be referenced in the Withdrawal Agreement, the political declaration will have no legal force and will not be binding on the European Union.

- (6) This reality was underlined by Danuta Hübner MEP, Chair of the European Parliament's Constitutional Affairs Committee and member of its Brexit Steering Group, who wrote – in a [commentary](#) for the Scottish Centre on European Relations, published on 27 August 2018 – that ‘the political declaration will only be a statement of principles and a commitment to negotiate after the UK has left the EU – it will not be a guarantee of the UK’s future relationship with the EU or of the outcome of those negotiations.’
- (7) Most of the substance of the future EU-UK relationship will therefore not be developed until after the UK has left the EU. Final agreements may not even be reached before the end of the transition period in December 2020. The longer-term picture of the UK’s relations with the EU could well not emerge until some years after exit. An inevitable consequence of this extended wait will be an absence of clarity on points relevant to common frameworks – including the practical degree of the UK’s future alignment with the EU’s *acquis communautaire*, and the extent and duration of the UK’s future participation in EU programmes, agencies and bodies.
- (8) **Summary Point 1 – The shape of the future EU-UK relationship will not likely become clear for some time – potentially years after the UK has left the EU – prolonging uncertainty and therefore making it difficult to construct the UK’s internal arrangements related to post-Brexit EU matters, including common frameworks.**

Section 2: After Brexit – Transition Period and Continued Negotiations

- (9) Under the terms of Article 50, the UK is scheduled to leave the EU on 29 March 2019 – whether a withdrawal deal is reached or not. Recent months have seen significantly increased talk – virtually entirely the product of internal politics within the UK – of a ‘no-deal’ Brexit. In the event of exit from the EU with no withdrawal agreement, the UK would not be supported by a transition period and would instead be faced with the so-called ‘cliff edge’ of abrupt cessation of relations (both rights and obligations) with the EU.
- (10) Despite the dire circumstances which would certainly result, a no-deal Brexit is currently a genuine possibility, given the volatile nature of UK politics at present. It is important to underline that, in a no-deal outcome, the EU would not discuss future relations with the UK without first returning to and settling the withdrawal issues, beyond any measures it decided to take to protect EU citizens and the EU’s interests. Should a no-deal Brexit come to pass, it seems very likely that the discussion on common frameworks would give way to the crisis response that would be required to cope with the resulting severe legal, political and economic consequences.
- (11) Presuming that the Withdrawal Agreement is in fact secured in time for the UK’s exit from the EU, the [envisaged transition period](#) would begin immediately and run until the end of December 2020. During this period, the UK will continue to apply nearly all of the *acquis* and be part of almost all the structures of the EU, without representation in the EU’s institutions or bodies. Since the UK will principally continue to apply and be

bound by the *acquis* during the transition, it would appear that common frameworks would not necessarily be needed in this period, unless they related to the continued implementation of EU law.

- (12) The combination of the time remaining before Brexit and the transition period gives 28 months to negotiate, ratify and implement the agreement(s) which will constitute the future EU-UK relationship. The UK will at this point be a third country to the EU and negotiations will take place, for the EU's part, under [Article 218 TFEU](#) and engage its procedures for concluding international agreements. This timetable will be extremely challenging – from the EU perspective, that time might be sufficient to adapt an ‘off-the-shelf’ relationship model to the UK (i.e. a ‘Canada deal’ or a ‘Norway deal’), but not to negotiate a completely bespoke arrangement, particularly in terms of trade. Extension of the transition period might be possible, but that option would need to be incorporated into the Withdrawal Agreement, and the aggregate transition could not be too long (perhaps no more than three years), otherwise it would likely exceed the limitations of Article 50.
- (13) The time-limited transition therefore raises the prospect of another variety of ‘no deal’ – that the UK exits the transition period without the future relationship in place, or with only part of it in place, depending on how the relationship is structured in terms of the number and shape of agreements. Under this eventuality, the precipice of the cliff edge would return, with marginally different circumstances but largely the same dire consequences. Similar to the scenario of no withdrawal agreement, no future relationship would undoubtedly overtake the common frameworks discussion, whatever stage of development it had reached by then.
- (14) **Summary Point 2 – A no-deal Brexit – whether no withdrawal agreement in the short term, or no future relationship in the medium term – has become a realistic possibility, and such an outcome would render the common frameworks discussion subordinate to the immediate action required to cope with the consequences of the cliff edge.**

Section 3: The UK Government’s Proposals for the Future Relationship

- (15) Throughout the process of Brexit, a primary source of confusion and frustration for the EU27 has been a lack of clarity and detail from the UK Government on its vision for the future EU-UK relationship. The [Future Relationship White Paper](#), published on 12 July 2018 following the [Chequers statement](#) – however politically tenuous its position might now be – represents the UK’s first substantive proposals on overall future relations with the EU, over two years after the EU referendum. Extensive negotiations will need to follow with the EU, which going forward will want much greater detail than what the White Paper sets out.
- (16) The UK Government proposes in the White Paper a new, bespoke and complex partnership with the EU which incorporates many aspects of EU membership, but in circuitous ways, and omits a number of primary obligations of membership. Under its approach, the EU-UK relationship would be based on multiple separate agreements, most of which would fall under an overarching Association Agreement. The relationship would consist of an Economic Partnership (based on a Free Trade Agreement), a Security Partnership, and Cross-Cutting Cooperation (based on

‘cooperative accords’). It would involve free trade in goods, bespoke services arrangements, no free movement of people and the ‘Facilitated Customs Arrangement’ customs partnership. The UK would follow certain parts of current and future EU law through a ‘common rulebook’, make financial contributions to the EU for participation in specific areas and accept the jurisdiction of the Court of Justice of the EU in certain circumstances. The partnership would be operated by a political-level Governing Body and a technical/official-level Joint Committee.

- (17) The White Paper enumerates a comprehensive listing of areas in which the UK wants to maintain cooperation with the EU, encompassing the large majority of fields covered by the *acquis*. It envisages wide-ranging continued UK participation in EU policies, programmes, agencies and bodies. The suggestion is that the partnership should be operationalised through a complicated patchwork of ‘ongoing harmonisation’, equivalence, mutual recognition, adequacy decisions, regulatory cooperation and consultation. Taken together, these plans appear to have the effect of keeping the UK highly aligned with most EU policies, but without formal EU membership or an existing alternative (principally, EFTA/EEA membership).
- (18) The UK’s proposals on the future relationship are highly unrealistic in a number of respects and contrary to the EU’s main priorities – in particular, maintaining the integrity of its Internal Market and Customs Union, and ensuring the proper functioning of the EU’s institutions and legal order. The EU27 will undoubtedly have concerns on the White Paper’s suggestions of partial participation in the Internal Market, untested and extraterritorial customs cooperation, and governance arrangements which presume a false sense of parity between the EU and the UK. The UK Government’s approach does not seem to recognise that, with the EU’s substantially greater political and economic weight, the EU and the UK will not be equals – and that future relations with the EU will be shaped by this inherent asymmetry. The White Paper’s impractical starting point, combined with the limited amount of time available and the difficult political reception to the paper within UK politics, has heightened the prospect of the future relationship not being concluded before the end of the transition.
- (19) The infeasibility of the UK Government’s proposals notwithstanding, the clear intention from the White Paper is for the UK to remain highly aligned with large parts of EU policies and the *acquis*. Proposed fields of close cooperation include a number of areas devolved to the Scottish Parliament and potentially the subject of common frameworks – including agriculture, fisheries and the environment. The level of the UK’s alignment with the *acquis* will clearly shape the nature of common frameworks. Depending on eventual EU-UK agreements, this alignment would involve both maintaining compliance with existing EU law (i.e. ‘retained EU law’ could not be significantly altered unilaterally) and implementing future developments of EU law. In this context, the objective of common frameworks, to the extent that they would still be deemed necessary, would shift from managing eventual divergence from EU law and ensuring a consistency of approach internally within the UK, to securing ongoing implementation of and compliance with the relevant aspects of the EU *acquis*.
- (20) **Summary Point 3 – The UK Government’s current proposals for the future EU-UK relationship suggest a high level of continued alignment across many areas of EU competence – including those subject to the common frameworks discussion – which would change the role of common frameworks from**

managing or preventing divergence within the UK to ensuring consistency of implementation with EU law.

Section 4: The EU27's Perspective on the Future Relationship

- (21) Evidently, the positions and priorities of the EU27 are co-determinative in the Brexit process. Debate in the UK, consumed as it is by Brexit and party politics, has often neglected the EU side of the negotiations. The European Council (Article 50) – with its latest meeting on 29 June 2018 and the publication of the White Paper on 12 July 2018 – has not formally responded to the UK Government's proposals in written conclusions. Nevertheless, the Union negotiator [has expressed](#) serious concerns about the content of the White Paper and its inherent contradictions. In addition to guaranteeing the integrity of the EU's Internal Market and Customs Union, and autonomy in the EU's own decision making, the EU27 will look to avoid a relationship with the UK which is excessively complicated or fragmented.
- (22) The overriding priority for the EU27, as [underlined](#) at the General Affairs Council (Article 50) meeting on 20 July 2018, is to conclude the Withdrawal Agreement – whatever progress is made on the future relationship will be carried forward in the political declaration. The EU28 heads of state/government will [next meet](#) on 20 September 2018 for an informal summit in Salzburg, and the next European Council is scheduled for 18 October 2018. With the limited progress to date on the remaining withdrawal issues, the mooted extra summit on Brexit in November 2018 and the final European Council of the year on 13-14 December 2018 look to represent the moments at which the EU27 could endorse a final Withdrawal Agreement and political declaration. It is equally worth remembering that Brexit is one of many issues on the EU's agenda, in addition to the upcoming European Parliament elections in May 2019 and the subsequent appointment of a new College of Commissioners for the European Commission.
- (23) The EU27 are open to a comprehensive relationship with the UK – the European Council in its [March 2018 guidelines](#) affirmed 'the Union's determination to have as close as possible a partnership with the UK in the future.' From the EU perspective, the magnitude of that relationship is directly proportional to extent to which the UK will accept the EU's fundamental principles. The UK Government's 'red lines' – including leaving the Internal Market and Customs Union, not accepting free movement of people, limiting/eliminating the jurisdiction of the CJEU and limiting/ending financial contributions to the Union budget – reduce the potential scope for the relationship. In the same guidelines, the European Council reiterated that it must 'take into account the repeatedly stated positions of the UK, which limit the depth of such a future partnership.'
- (24) Based on the UK's current stance, Michel Barnier has set a vision of an '[ambitious partnership](#)' – which at the same time respects the EU's principles. This vision, which he referenced in the latest Brexit negotiations press conference with UK Brexit Secretary Dominic Raab on 31 August 2018, structures the future relationship around four pillars: trade (based on a Free Trade Agreement), cooperation in specific areas, internal security and foreign policy/external security. This trajectory will lead the UK to a Canada-style trade agreement, plus an EU-UK strategic partnership – such an outcome would bring significant economic damage to Scotland and the UK. The EU27

are acutely aware of this fact, but must operate on the basis of the UK Government's stated positions. Nevertheless, the European Council made clear in its March guidelines that 'if these positions were to evolve, the Union will be prepared to reconsider its offer in accordance with [its] principles'.

- (25) Since the Prime Minister's [Lancaster House speech](#) on 17 January 2017, the UK Government has resolutely maintained its 'hard Brexit' course – leaving the EU's Internal Market and Customs Union. The politics of Brexit within the UK are clearly unpredictable and, however unlikely it seems at present, it is possible that at some point – perhaps during the transition period – a shift is made to pursue a 'soft Brexit' of EFTA/EEA membership. The political declaration on the future relationship will not be binding, and the EU27 have expressed their willingness to recalibrate their position should the UK change its mind. A soft Brexit would fundamentally reshape the nature of the future relationship and would likely necessitate a more extensive reassessment of the requisite internal governance arrangements within the UK, including common frameworks, for implementing the EEA-relevant *acquis*.
- (26) **Summary Point 4 – The EU27 will be steadfast in ensuring that any future relationship with the UK protects the integrity of the Internal Market, Customs Union and EU institutions, while if the UK Government's position moves to a soft Brexit – however improbable that currently appears – the UK's internal governance, including common frameworks, would need to adapt to the requirements of EEA membership.**

Section 5: Devolution and the Future Relationship

- (27) The White Paper makes comparatively little mention of devolution or internal arrangements related to Brexit – it [states](#) that the UK Government will 'work with the devolved administrations to ensure that processes are put into place which reflect the devolution settlements and provide for appropriate input from all parts of the UK.' The EU27 of course would have no comment, as these questions are internal UK matters. As this written evidence has set out, fundamental issues surrounding the future relationship – including the difficult state of the negotiations, the unknown degree of the UK's alignment with the EU *acquis* (including its future evolution) and the realistic prospect of a no-deal Brexit – obscure the post-Brexit outlook and as a result hinder to a degree the design of related UK governance arrangements, including common frameworks.
- (28) The profound changes brought by Brexit raise broader questions about the structure of devolution. The collective process of EU withdrawal and the construction of a future relationship will imply thousands of individual decisions on the multitude of areas falling under EU competence. Many of those decisions may ultimately be taken by the UK Government directly. The limited time available and the imperative to address all the issues which Brexit poses, combined with political uncertainty and disagreements on how to proceed (displayed particularly in the debate around the UK Parliament's EU Withdrawal Act and the Scottish Parliament's EU Continuity Bill), have compounded the difficulty of an already exigent situation.
- (29) The role of the Scottish Parliament and Government in the governance of the future relationship is not presently defined – largely because the future relationship itself has

yet to take shape. The White Paper asserts that ‘the UK Government will represent the interests of all parts of the UK’ in the proposed Governing Body and that ‘the devolved administrations and legislatures [will have a role] in shaping the UK Government’s position’ for the Joint Committee. However, the White Paper’s status is tenuous and the UK stance could undergo substantial revision, potentially providing an opportunity to set out a more specific role for Scotland’s institutions.

- (30) Brexit will require the UK to remake hundreds of international agreements with third countries and blocs. Beyond the future EU-UK relationship, the question arises of what role the Scottish Parliament and Government might hold in the negotiation of future international agreements (include those on trade). In other states, internal consultation on external negotiations related to matters of devolved competence is both standard and constructive. Under the Withdrawal Agreement [draft text](#), the UK will be able to negotiate international agreements related to EU competence during the transition, provided that they enter into force after the transition. It is therefore possible that this subject may substantively arise even before the future relationship is established.
- (31) Accordingly, it is essential to situate the discussion on common frameworks in the wider context of the negotiations on the Withdrawal Agreement and the future relationship, as they will determine the direction of EU-UK relations and the requirements for the UK’s related internal arrangements. The future relationship may not be decided for some time and, like the other aspects of Brexit, the challenges are numerous and the outcome is unpredictable. However, one constant will be the EU27’s insistence that any relationship respects the EU’s principles, regardless of the UK Government’s position. These circumstances make it particularly difficult to foresee the shape of future EU-UK relations, and consequently the design of structures – common frameworks or otherwise – that would operationalise those relations in Scotland and the wider UK.
- (32) **Summary Point 5** – In addition to the constitutional debate within the UK, the common frameworks discussion must take account of the evolving negotiations on the future EU-UK relationship – in which the role of Scottish Parliament and Government could still be shaped – as the outcome of these negotiations will impact upon the UK’s relevant internal governance structures.

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