

A submission to the House of Lords EU Select Committee inquiry on Brexit: devolution.

1. The British Academy, the Royal Society of Edinburgh and the Learned Society of Wales welcome the opportunity to submit evidence to the House of Lords EU Select Committee inquiry on Brexit: devolution. This evidence has been developed with the particular expertise of Professor Christopher McCrudden FBA, Professor Michael Keating FBA FRSE and Sir Emyr Jones Parry GCMG PLSW. The Royal Society of Edinburgh is only commenting on the section pertaining to Scotland and the Learned Society of Wales is only commenting on the section pertaining to Wales in what follows as they are not considering in this submission issues related to other nations in the UK.

Northern Ireland

2. Unlike England and Wales, Northern Ireland voted to remain in the EU in the 23 June referendum. The main nationalist parties (Sinn Fein; SDLP) supported, and continue to support, Remain; the main unionist party (Democratic Unionist Party) supported and continues to support, Leave. The Ulster Unionist Party no longer opposes Brexit. After the UK leaves the EU, the border between the Republic of Ireland (ROI) and Northern Ireland (NI) will also be a border between the EU and a non-EU country. Those born in NI (and some others who have parents born in the island of Ireland) have the right to Irish citizenship, and thus the right to EU citizenship. The ROI is almost certain to remain within the EU and will not want to risk weakening its links with the EU. The major actors (the UK government, the Irish government, the European Commission, and Member States), agree that there is a problem in how to deal with NI in the negotiations, including the avoidance of a “hard border”, and how the Belfast/Good Friday Agreement must be protected.
3. There are several sectors of the economy in NI that have specific problems arising from Brexit that will be, if not unique to NI, at least particularly severely felt in the NI economy. The sector of the economy that has attracted the most attention is agriculture (not least because it combines issues relating to market access and financial support, with the significant effect the introduction of tariffs would have), but there are several other sectors of importance. The First Minister and Deputy First Minister, in their letter to the Prime Minister during last summer, identified several additional areas of particular importance to NI: the energy market (including the issue of the single electricity market), the fishing industry, the position of cross-border workers, and access to migrant labour. In addition, to this list, there are issues concerning cross-border policing and security cooperation, including the European Arrest Warrant, access to public procurement, social and environmental partnerships of a cross-border nature, access to health care, cross-border infrastructure projects, and access to research funding. However whilst many issues may be identified with particular resonance for the NI economy no detailed plan has emerged in public drilling down beyond the surface of these problems, identifying how to deal with them.
4. The issue of the free movement of people is particularly complex. There is currently very significant cross-border traffic both vehicular and on foot. The current border is practically

non-existent for such traffic. There are myriad ways in which to cross, from major motorways, to small paths. The Common Travel Area (CTA), as it currently exists, appears difficult to reconcile with the border becoming a land boundary between the EU and a non-EU state. So far, the CTA has operated only where Ireland and the United Kingdom were both outside (before 1973) or inside (after 1973) the EU. If the UK government retains its initial bargaining position of full control of its borders, and control of immigration into the UK, then an open, porous border that exists at the moment seems unlikely.

5. A relatively little discussed issue publicly, but a pervasive background consideration, is the role that membership of both ROI and the UK has played not only in downgrading the importance of the physical border but more importantly in reducing the significance of sovereignty and national identity. That is not to say that either has disappeared, but to the extent that they were seen as of continuing importance, they were framed in a context which saw both Irish and British identity as parts of a European identity, and which viewed sovereignty as pooled. It is hard to overestimate the extent to which this brought significant conceptual flexibility into discussions in Northern Ireland, and between ROI and the UK. It is difficult to conceive an alternative mechanism that can quite fill the vacuum likely to be caused by the UK's exit, particularly where that exit was brought about by an increased concern with British (better: English) identity, resurgent English nationalism, and a perceived need to strengthen national sovereignty.
6. The implications of all this for the operation of the devolution institutions is complex, and the decision of the UK Supreme Court is a complicating factor in this context. What is clear is that Brexit will affect the distribution of powers of the Northern Ireland institutions of government.
7. One practical effect of this is that a decision will need to be taken in the Great Repeal Bill as to how areas of power devolved to the Assembly but exercised by the Assembly currently in the context of implementation of EU law, should be treated after Brexit. For example, the Assembly currently has issues of anti-discrimination law devolved to it, but much of that law consists of the implementation of EU equality law. On Brexit, will all that EU legislation remain in force in NI by virtue of the Great Repeal Bill, or will the power to decide whether to keep it or not be itself devolved to the Assembly? If the former, the Great Repeal Bill will significantly intrude on devolved powers; if the latter, it will massively increase the political pressures on the Executive because equality issues are still so controversial.
8. The issue of the effect of the Great Repeal Bill on devolved powers raises another thorny issue. The consent of the people of NI to the way they are to be governed was fundamental to the Good Friday Agreement. One of the critically important ways in which that consent is to be given is through the elected representatives of the people of NI in the Northern Ireland Assembly. The UK government recognised that the principle of consent in accepting the Sewel Convention. Parliament at Westminster would normally not legislate in the area of devolved powers without the explicit consent of the Assembly. The way in which that consent is recorded is by way of a legislative consent motion passed by the Assembly.

9. It is the view of the major nationalist parties that a legislative consent motion is required not only when the UK Parliament legislates on matters which fall within the legislative competence of the Assembly, but also when the UK Parliament enacts provisions that directly alter the legislative competence of that Assembly or amend the executive competence of the Northern Ireland Executive. The Supreme Court, in the *Agnew* case, explicitly recognised that triggering Article 50 would affect both the legislative and the executive competences of the Assembly and the Executive. It did not say that there was no Sewel Convention in this form. All it said was that the existing Convention, which it accepted existed, was not legally enforceable. It was the responsibility of politicians to enforce it.
10. In the British constitution, simply because something is not legally enforceable does not mean that it does not exist. The Sewel Convention remains a constitutional principle, even if it is not legally enforceable. It is a constitutional requirement which Parliament should uphold. Indeed, the Supreme Court said explicitly, at para 151: “we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures”.
11. These arguments were made in the House of Commons during the passage of the Article 50 Bill, and amendments submitted to ensure that the Convention was maintained. These amendments were all rejected, which raises an important issue: what is now left of this Convention? But there is a bigger point at stake here. Along with the consent principle, the Good Friday Agreement is based to a significant degree on trust. If the UK Government and Parliament is not seen by parties to the Agreement as able to be trusted to keep its side of the bargain, and uphold the consent principle when it is inconvenient, what is now left of the fundamental premises of that Agreement?
12. There is another issue which has now been added to the complex mix. Whilst it is true that there is no necessary connection between leaving the EU, and the United Kingdom’s continued membership in the Council of Europe and continued obligations under the European Convention on Human Rights (ECHR), there is a plausible contingent connection between the two. The Brexit vote leaves the UK’s relationship with the ECHR more at risk. The UK’s continued membership in the EU, including the effect of the EU Charter of Fundamental Rights, meant that ECHR standards and norms would be applied in some contexts in any event. More important still, ECHR membership is a condition to join and (possibly) to remain in the EU. Remove that constraint, and exit from the ECHR becomes more likely. Should that occur, a major problem for the continued operation of the Belfast/Good Friday Agreement arises, given the ECHR’s central place in the Agreement. Indeed, problems arise even if the UK remains in the ECHR but replaces the Human Rights Act 1998, as the UK government is pledged to do.
13. Simply retaining the status quo, with the UK remaining in the EU, seems increasingly unlikely, but how close can one get to the status quo relating to NI, whilst at the same time

the UK leaves the EU? The key question appears to revolve around the issue of a “special status” for NI. What if any “special status” for NI is legally possible and politically feasible? The UK government appears to have ruled out only “special status” of the “reverse Greenland” kind, but not other types. So, leaving aside the possibility of a “reverse Greenland”, where Northern Ireland (and Scotland) would remain in the EU, effectively becoming “the UK” for the purposes of EU membership, several other options are possible, which fall into two alternative strategies. In the first strategy, an off-the-peg “solution” is adopted, such as Northern Ireland’s membership of the EEA. The broad benefits of this strategy are that the issues identified above would be set in an already existing legal structure, although that agreement would not deal with customs, agriculture, and several other key issues, and additional agreements would therefore be necessary to supplement EEA membership. In the second strategy, a bespoke “solution” is attempted, in which each of the issues identified above are (laboriously) negotiated from scratch, with NI allowed different rules from the rest of the UK. A central question in both, however, is whether it is possible to convince the UK government and EU Member States that the island of Ireland is sufficiently different to allow significant variations in both UK and EU constitutional and legal arrangements in order to cater for these differences.

Scotland

14. There is wide cross-party agreement in Scotland that, if Brexit must happen, it should be a ‘soft’ Brexit, which means keeping as much of the single market as possible. Successive Scottish governments have been pro-migration and there is broad support for freedom of movement of workers. In its policy paper, *Scotland’s Place in Europe*, the Scottish Government argues for the UK to stay within both the single market and the customs union, keeping freedom of movement. This, however, would have required a cross-party coalition in the House of Commons, which has not been forthcoming.
15. The Scottish Government’s second option is for a differentiated arrangement that would allow Scotland to retain as much as possible of EU membership, even if full membership is not possible. The centrepiece of the proposals is that Scotland would remain in the Single Market even as England and Wales leave. This would give it a status analogous to that of the European Economic Area (EEA); indeed, Scotland might formally become part of the EEA. As with the EEA, agriculture and fisheries would be excluded. As the Scottish Government recognises, it is not party to the Brexit negotiations and so unable to put these proposals on the table. It is the UK Government that would have to incorporate them into its own Brexit agenda but it has not shown willingness to do so.
16. The UK Government has now declared that it will leave the Customs Union, although it has indicated that it might wish to keep elements of it, if that is negotiable. Scotland would therefore leave the EU Customs Union. Being in a Customs Union with the UK and a single market with the EU could be complex.
17. Some of the issues that this would raise include:

- The need for rules governing the treatment of goods entering the UK from EU Member States, depending on whether they were destined for Scotland or for England and Wales.
 - The need for certification at the final point of sale of such goods.
 - The need for rules of origin if intermediate goods were passing through England and Wales en route for Scotland.
 - The likely existence of a virtual border in services to the degree that EU and UK rules diverged after Brexit. This could be potentially ameliorated by double compliance rules to ensure that Scottish services were compliant with both UK and EU regulations. The problem would be reduced to the extent that the UK itself retains EU regulations and succeeds in gaining access to the EU services marketing and passporting rights for financial services.
 - The need for controls to ensure that EU workers did not come into Scotland in order to cross the border to work in England. This is not an insuperable problem since a similar mechanism operates in the Schengen area for third-country nationals with the right to work in one member state but not in another. It could be monitored at the place of work rather than at the border.
 - The need for provision to define a Scottish worker, for the purposes of rights to work in member states of the EEA. In order for Scotland to remain compliant with single market regulations, the Scottish Parliament and Government would require new competences across a wide range of Single Market matters that are currently reserved to Westminster.
18. In addition, several key policy fields are both devolved to Scotland and exist at EU level. They include agriculture, fisheries, environment policy, regional development and aspects of justice and home affairs. It will need to be worked out how these policy fields sit in the UK when it is no longer part of the EU. The UK Government has promised that no decisions currently taken by the devolved bodies will be removed from them. It could be argued, however, that decisions in these fields that are currently taken at EU level are only implemented by devolved bodies.
19. Disentangling this will not be straightforward. First, the external dimension of these policies, including agricultural trade and international environmental agreements, will remain reserved and closely linked to domestic policy. Agricultural support regimes are inseparable from trading rules. Second, the removal of the EU framework will mean that there are no common rules to deal with competition issues and externalities and secure the UK single market. Third, funding previously received from the EU will revert to the Treasury. This might be redistributed according to common policy objectives, be rolled into the Barnett Formula, or allocated in some other way. If there are to be common policies, these could be mandated from the UK level, or negotiated horizontally among the four nations. The Welsh

Government has argued for common policies negotiated horizontally while Scottish interests have tended to emphasise the scope for policy autonomy.

Wales

20. What will replace EU membership in the UK remains currently unknown and is still to be negotiated. All parts of the UK, must be involved in consideration of how the complicated issues for negotiation are treated.
21. The four administrations need to work closely together to develop coherent policy options where all relevant governments are involved through the Whitehall process in deciding which variants should be implemented. The need for successor regimes to the Common Agricultural Policy is a prime example of the scale of the bureaucratic challenge and relative lack of capacities that require cooperation.
22. As regards the drafting of the Great Repeal Act, this will not only rescind the European Communities Act, but also consolidate in UK law those provisions of EU law which currently have direct effect and which would otherwise not apply after Brexit. Many of those provisions apply in devolved areas. The closest cooperation and consultation between the UK and the devolved governments is needed to achieve appropriate post-Brexit arrangements for the different nations of the UK and to prevent major disputes.
23. The referendum result has profound implications for Wales as a substantial recipient of EU expenditure, totalling at least £600 million per year. This is particularly important as EU policies are based on needs. Outside the EU, structural fund expenditure will cease despite the continuing needs of poorer parts of Wales. Early engagement and cooperation between the administrations would be welcome over future expenditure commitments to avoid counterproductive contestation.
24. Some 18% of EU expenditure in the UK is currently spent on research. Welsh universities benefit from this investment which can represent up to 5% of the income of a Welsh university. In addition to receipts from competitive EU research programmes, structural funding has been a key contribution to the capital and revenue of some Welsh institutions, and those receipts have for the most part not been accompanied by grants from the Welsh Government. In the absence of these benefits from EU funding, the sector would suffer a severe blow. Continued participation in EU programmes would be the preferred way forward; in its absence the sector would need an equivalent level of support from UK expenditure.
25. The European Charter of Regional or Minority Languages, a Council of Europe Convention, has long supported these languages across Europe. It has subsequently been taken up by the EU, both politically and financially. The Welsh language has benefitted significantly, and its lost access to funding risks having an adverse effect on the status and condition of the Welsh



language and culture. After Brexit, the European Charter will still be binding on Council of Europe member states, including the United Kingdom.