

# DESTRUCTION OF THE UNION: TOO HIGH A PRICE TO PAY FOR A US TRADE AGREEMENT

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## KEY POINTS

- A UK-US trade agreement would likely require changes to UK domestic legislation in very sensitive areas, including drug pricing and food safety regulation, which Scotland, with its large Remain-voting majority and stated desire to maintain alignment with EU regulation, would strenuously oppose.
- Leaving the EU creates a legal and policy vacuum regarding the relationship between devolved nations, and the extent to which they can influence UK trade negotiations.
- By not taking Scotland's interests sufficiently into consideration, the UK risks fuelling the Scottish independence movement and/or introducing internal trade barriers between England, Wales and Scotland (Northern Ireland will be subject to separate arrangements anyway).
- The UK Government may be forced to choose between facilitating trade with the US or holding on to the UK's fragile national identity. The destruction of the UK internal market – and potentially the Union itself – seems too high a price to pay for a US Free Trade Agreement.
- Devolved nations should have a formal role in the setting of UK negotiating objectives, to ensure, among other things, that external trade agreements do not lead to internal trade barriers.
- The most straightforward path for the UK is, as far as possible, to replicate the EU's balance between devolution and harmonisation with respect to UK-specific rules and bodies.
- The UK Government could also introduce increased legislative assurances that it will not weaken current levels of protection.

## INTRODUCTION

The importance of EU rules to maintaining open borders within Ireland has been at the centre of UK and EU negotiations. Yet what is less appreciated is the significance of those rules for achieving frictionless trade between England, Scotland and Wales. In the words of the House of Lords EU Committee, *'The European Union has been...part of the glue holding the United Kingdom together since 1997... In practice, the UK internal market has been upheld by the rules of the EU internal market.'*<sup>1</sup>

As well as the possibility of new border trade barriers inside the UK, leaving the EU also opens up questions about how – and whether – the devolved nations will unite with England on external trade agreements.<sup>2</sup> In particular, a US trade negotiation poses a serious threat to the unity of the United Kingdom.

<sup>1</sup> House of Lords European Union Committee 4th Report of Session 2017–19 HL Paper 9 Brexit: devolution: <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/9/9.pdf>

<sup>2</sup> UKTPO Briefing Paper 37 'Brexit food safety legislation and potential implications for UK trade: The devil in the details': <http://blogs.sussex.ac.uk/uktpo/files/2019/10/UKTPO-Briefing-Paper-37.pdf>

This is especially true with respect to the relationship between England and Scotland, for two reasons. First, a US trade negotiation would likely require changes to UK domestic legislation that Scotland, with its desire to maintain alignment with EU regulation, would oppose. Second, there is no overarching legal framework in place to preserve the UK internal market, and negotiations to achieve this have stalled. Thus a renewed effort is badly needed to establish effective collaboration between the administrations of the four nations, which includes at a minimum giving them a stronger role in trade negotiations, strengthening ongoing cooperation and providing legislative guarantees that environmental and consumer protections won't be reduced if and when the UK leaves the EU.

## THE CURRENT STATE OF AFFAIRS

The Brexit process has highlighted the fragility of decision-making arrangements between the four nations. Unlike the EU, whose treaties and case law set out the rules and principles supporting the free movement of goods and services, there is no overarching legal or constitutional provision requiring an open internal UK market. Instead, there are complex arrangements in which some powers are exercised at the EU level and others are shared between the devolved nations and Westminster or the EU. The UK Parliament will not normally legislate on devolved matters without the consent of the devolved administrations, but this political convention is not legally binding. Ultimately the UK Parliament can legislate on any and all issues.<sup>3</sup>

<sup>3</sup> Scotland Act 2016, section 2; Wales Act 2017, section 2. See also *R (Miller) v Secretary of State for Exiting the European Union*, paras 136-151. As summarised in a House of Commons Library Briefing Paper: 'Although legislative consent has developed significantly since 1999, two key areas of contention have persisted:

- the range of potential Bills that should be covered by the legislative consent process; and
- the circumstances in which ... UK Parliament [can] legislate in the absence of devolved consent.

Disagreement on these issues has already had, and will likely continue to have, a significant impact on the relationship between the UK Government and the devolved authorities. In the context of key Brexit legislation, both of these questions are relevant, as two devolved legislatures intend, as things stand, to withhold legislative consent from at least two key Brexit Bills (the European Union (Withdrawal) Bill (2017-19) and the Trade Bill (2017-19).” Graeme Cowie, 'Brexit: Devolution and legislative consent', House of Commons Library Briefing Paper Number O8274 (29 March 2018), p 11.

However, these so-called 'devolution settlements'<sup>4</sup> do require the devolved administrations to legislate in a way that is compatible with EU law. The EU also maintains the cohesion of its Single Market through centralised control or 'exclusive competence' over trade negotiations – though subject to an EU-level democratically-accountable process.<sup>5</sup> Member States only exert individual controls – through, for example, national parliaments voting to accept or reject international treaties – on a narrow range of topics.<sup>6</sup>

Reclaiming UK control over trade agreements is a celebrated element of the rationale for Brexit, but Brexit will also provoke new questions: to what extent will these newly reclaimed powers be extended to devolved nations, and in which particular devolved areas? And: what happens if the nations disagree? That question is not merely theoretical. The US negotiating objectives include changes in UK agriculture and environment regulation – a devolved area – in which Scotland proposes to maintain full alignment with the EU.<sup>7</sup>

## WHAT WILL REPLACE THE EU AND ALLOW FOR A UK 'SINGLE MARKET'?

The short answer is, nobody knows. In preparation for Brexit, the EU Withdrawal Act 2018, the signature legislation designed to avoid a legal vacuum when the UK leaves the EU, establishes a new power for UK Ministers post-Brexit to redefine the powers of the devolved administrations.<sup>8</sup> This controversial provision allows the UK Government to legislate for the UK as a whole in areas previously devolved, subject to the consent of the devolved nations and certain time limits.

Clearly, this threatens devolved powers, but it is unclear whether the UK Government will ever invoke its new powers. Indeed, in practice, post-Brexit secondary legislation seems to be going in the opposite direction by allocating powers previously exercised at the EU level to the UK's devolved

<sup>4</sup> The devolution settlements distinguish between 'reserved' and 'devolved' powers with the presumption that the devolved administrations may legislate on matters not reserved. The Scotland Act 1998; the Government of Wales Act 1998; the Northern Ireland Act 1998.

<sup>5</sup> European Commission, Negotiating EU trade agreements. Who does what and how we reach a final deal: [https://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149616.pdf](https://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf)

<sup>6</sup> The Opinion of the European Court of Justice on the EU-Singapore Trade Agreement and the Division of Competences in Trade Policy Factsheet September 2017: [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156035.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156035.pdf)

<sup>7</sup> Scottish Government, Continuity Bill update (April 2019): <https://news.gov.scot/news/continuity-bill-update>

<sup>8</sup> European Union (Withdrawal) Act 2018, section 12.

nations. For example, our recent analysis of post-Brexit food safety legislation showed that regulatory processes undertaken at the EU level, such as approving new active substances for pesticides and new GMOs will, post-Brexit, be done by devolved nations.<sup>9</sup> This suggests that, rather than uniformity, the UK Government is gearing up for increased domestic regulatory divergence. It is unclear how the UK will prevent the need for internal regulatory checks and border barriers. For example, EU rules would have prevented a Member State from approving chlorinated chicken, or pesticides or GMOs that were banned at the EU level; in the new UK legislation, those controls have been removed at the national level.

Unfortunately, conversations between the devolved nations aiming to prevent these types of problems have stalled. In principle, the UK Government and devolved administrations agreed in October 2017 that it will be necessary to establish UK-wide ‘common frameworks’.<sup>10</sup> The UK Government’s latest assessment identifies 160 areas where common frameworks may be required.<sup>11</sup> However, it is well known that there have been significant disagreements between the UK Government and the Scottish Government on the direction of travel in the Brexit process.

Those disagreements are currently simmering, but a US trade negotiation could ultimately act as the dynamite to blow the UK internal market – and potentially even the UK itself – apart. The reason for this is that a successful trade negotiation would likely require changes to UK domestic legislation in very sensitive areas, including drug pricing and food safety regulation, which Scotland, with its large Remain-voting majority and stated desire to maintain alignment with EU regulation, would strenuously oppose.<sup>12</sup> EU departure creates a legal and policy vacuum.

A role for the devolved nations is not provided for in the negotiation or scrutiny of international trade agreements. There is a Memorandum of

Understanding (or MoU) between the UK and the devolved administrations, which has been supplemented with separate concordats on international relations for each devolved nation. The MoU confirms that consultation with the devolved nations on trade negotiations will occur; however, it is clear that the MoU and its supplementary agreements do not constitute legally binding arrangements.<sup>13</sup> While the Constitutional Reform and Governance Act 2010 provides for limited scrutiny of treaties by Parliament, it does not require any involvement of the devolved administrations.<sup>14</sup> A recent report by the House of Lord’s Constitution Committee recommends the devolved governments should be ‘effectively involved’ in treaty negotiations in order to ensure their competences are respected, proper reflection of their interests and in acknowledgement of their role in implementing international obligations.<sup>15</sup>

The Trade Bill introduced in November 2017 and the two Withdrawal Agreements had significant and differing impact on devolved powers, but these have now fallen with the dissolution of Parliament for the General Election. If elected, the Conservatives suggest they would take forward the latest Withdrawal Agreement. This provides that Northern Ireland would remain aligned with EU law in many areas, including for example food safety law. How this will be implemented is unclear.<sup>16</sup>

<sup>9</sup> UKTPO Briefing Paper 37 ‘Brexit food safety legislation and potential implications for UK trade: The devil in the details’: <http://blogs.sussex.ac.uk/uktpo/files/2019/10/UKTPO-Briefing-Paper-37.pdf>

<sup>10</sup> Joint Ministerial Committee (EU Negotiations) Communique (16 October 2017) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652285/Joint\\_Ministerial\\_Committee\\_communique.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf)

<sup>11</sup> Cabinet Office, *Revised frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* (April 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/792738/20190404-FrameworksAnalysis.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf)

<sup>12</sup> Jeremy Corbyn reveals dossier ‘proving NHS up for sale’, *The Guardian* (27 Nov 2019) <https://www.theguardian.com/society/2019/nov/27/jeremy-corbyn-reveals-dossier-proving-nhs-up-for-sale>

<sup>13</sup> *Ibid* p3; p5; A3.3; B1.2; B2.2; B3.2; D1.2; D2.2; D3.2. Para 14 states: “The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.” D4.11 further states that “The UK Government will, under normal circumstances, not ask the UK Parliament to legislate in any area for which legislative competence has been devolved except with the agreement of the devolved legislature. But instances may arise, for reasons such as urgency, where full consultation and agreement is impractical.”

<sup>14</sup> House of Commons Library, Parliament’s role in ratifying treaties: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855>

<sup>15</sup> Select Committee on the Constitution, *Parliamentary scrutiny of treaties* (House of Lords April 2019) HL Paper 345, para 141.

<sup>16</sup> General election 2019: Johnson ‘misrepresenting’ Brexit deal, says Corbyn (06.12.19) <https://www.bbc.co.uk/news/election-2019-50684881>

In the context of this uncertainty, a US trade negotiation risks at least two potential undesirable outcomes.

- The first is that the UK Government manages the different positions between Scotland and England by allowing Scotland to, effectively, ignore concessions made by the rest of the UK and maintain EU alignment. In other words, after complex negotiations within the UK concerning the border between Northern Ireland and Great Britain, we would encounter a sequel: similar disputes between the UK and Scotland.
- The second is that the central UK Westminster Government concludes a trade deal with the US, which it imposes on Scotland, fuelling the campaign for Scottish Independence.

## THE UK'S ALTERNATIVE FUTURES

The interesting thing about what we describe above as a 'vacuum' in terms of devolution arrangements is that there is an existing model in place namely: the EU. Over time, the EU has evolved a multi-level governance framework to enable the functioning of its fully-integrated Single Market. The EU possesses the powers conferred upon it by the treaties agreed by the Member States in legally-framed processes that are democratic and subject to scrutiny. Some powers are deemed 'exclusive' to the EU (eg the Customs Union or the negotiation of international trade agreements); in some areas there is 'shared competence' between the EU and Member States (eg regulation of the internal market, environment, agriculture and fisheries).

Clearly, the most straightforward path for the UK outside the EU would be, as far as possible, to replicate that balance between devolution and harmonisation with respect to UK-specific rules and bodies. The fact that this has not been accomplished reveals the lack of trust and diverging objectives between devolved nations, in particular between England and Scotland. The differences in popular support for the EU between the nations makes cooperation especially difficult. Together with the absence of a functioning executive in Northern Ireland, a straightforward 'solution' to the relations amongst the UK nations is not forthcoming. However, if the UK Government wants to make continued cohesion of the UK more likely, there are several actions that it could take to enhance trust.

## POLICY RECOMMENDATIONS

The most important way of ensuring a unified UK is to give devolved nations a strong and formal role in UK trade negotiations. The authors of this paper are not economists, but surely the destruction of the UK's own internal market is a high price to pay for a UK-US trade agreement. Devolved nations should, therefore, have a formal role in the setting of UK negotiating objectives, for the very pragmatic reason of ensuring that external trade agreements do not lead to internal trade barriers. The political question of whether a UK-US trade agreement merits the dissolution of the Union is one that should be explicitly addressed.

Secondly, current arrangements for collaboration between the four UK nations are well-recognised to be ineffective and underdeveloped. The Joint Ministerial Committee (JMC), established under the Memorandum of Understanding (MoU) between the UK Government and devolved administrations in 2013, provides for the 'central coordination' of reserved and devolved responsibilities.<sup>17</sup> The Westminster government must strengthen the JMC process or establish a more effective model, to ensure closer and more effective cooperation on regulatory issues.

Finally, to address Scotland's desire to maintain alignment with the EU law, the UK Government could provide legal assurances that it will not lower standards below those of the EU, for example in consumer and environmental protection. There are a number of legislative contexts in which such commitments could be introduced, including the Environment Bill, the Agriculture Bill and the Trade Bill. Putting such commitments on a legislative footing would allow for proper parliamentary process on new policies and provide more legal certainty in these areas.

The UK Government may be forced to choose between facilitating trade with the US or holding on to the UK's fragile national coherence. The above reforms are likely to be necessary conditions for ensuring the UK's continued coherence – but they may not be sufficient.

<sup>17</sup> Devolution Memorandum of Understanding and Supplementary Agreements (October 2013) <https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>

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## FURTHER INFORMATION

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The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

- 1) initiates, comments on and analyses trade policy proposals for the UK; and
- 2) trains British policy makers, negotiators and other interested parties through tailored training packages.

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