Summary

• Withdrawal from the European Union presents significant implications for the distribution of powers and responsibilities for the different governments and legislatures in the UK.

• As EU frameworks for certain areas of public policy cease to apply, new UK frameworks will have to be evolved to replace them. These frameworks will have to deal with serious issues over how integrity of borders and markets can be maintained.

• A more effective system of intergovernmental relations within the UK must be found to facilitate meaningful engagement between governments, to discuss and operate these new arrangements, and to foster closer working on the powers repatriated.

• Decisions on where powers repatriated from the EU should lie must be shaped with the involvement of the devolved legislatures.

• While the UK Supreme Court has ruled that the Sewel Convention is not justiciable, its status as a constitutional principle should not be undervalued. Consent should be sought for legislation that would impact upon devolved matters.

• Brexit will result in an almost unprecedented amount of legislation, which may mean that usual procedures for parliamentary oversight are not possible. It is important, however, that parliament is given a meaningful chance for scrutiny.

• Establishing new frameworks for all of the areas currently covered by EU legislation is a major task and the civil service in Scotland will need to increase the resources devoted to this markedly. It might recruit a substantial number of additional staff and/or build up a group of outside experts to consult.

• International relations are a reserved matter, but there may be scope for the devolved bodies to have a greater role in EU relations on devolved matters in the future. The UK Government could allow Scotland to address this issue either through providing the Scottish Government with powers to enter into agreements with certain EU institutions, or through facilitating international treaties applying to Scotland but not the rest of the UK (as has happened in the past).

• All options pose questions around how a three-way relationship between Scotland, the UK and the European Union would function.
Introduction

1 Following the result of the referendum on the United Kingdom’s membership of the European Union on 23 June 2016, the Royal Society of Edinburgh (RSE) established a European Strategy Group tasked with providing strategic advice on the implications of the UK’s proposed withdrawal.¹

2 Drawing upon the multi-disciplinary expertise of the RSE Fellowship and the membership of the RSE Young Academy of Scotland, working groups have been set up to undertake detailed work in key areas of policy. Given the importance of the issue and the RSE’s position as Scotland’s national academy, one of these working groups is focusing on Constitutional Law and Government. This paper articulates the working group’s initial views on the implications of Brexit and the process around it. The RSE’s EU working groups will closely track Brexit developments with a view to providing further input to help inform the negotiations.

3 Since the establishment of the Scottish Parliament in 1999, the UK constitution has changed and in recent years has been in a near constant state of flux, with more and more powers devolved from Westminster to Holyrood. While the early years of devolution saw the governments in both London and Edinburgh share broadly similar views on the constitution, since the SNP victory in the Scottish Parliamentary elections in 2007 the respective governments in the UK and Scotland have held strongly opposing views on what the constitutional future of Scotland should be.

4 The referendum held in 2014 on whether Scotland should become an independent country resulted in 55% of Scots voting to remain part of the UK. The results of the referendum held in 2016 on the UK’s membership of the EU provided contrasting results north and south of the border with 62% of Scots electing to remain within the European Union and 53% of voters in England choosing to leave. Given the changing constitutional settlement in the UK, the increasing power being devolved to the Scottish Parliament, and the often contrasting views held by the Scottish and UK governments – and Scottish and English voters – on Scotland’s constitutional future, the impact Brexit could have on devolution are an important area of discussion.

Engagement between the Scottish and UK Governments

5 The UK’s withdrawal from the European Union will have significant implications for the distribution of powers and responsibilities for the different governments and legislatures in the UK. Deciding what these implications are is likely to serve as the decisive test of the robustness of the system of intergovernmental relations (IGR) that is in place across the United Kingdom. A Joint Ministerial Committee (EU Negotiations), involving representatives from all three devolved nations, has been established and meets to discuss the talks with Brussels. However, the Scottish Government has been vocal in its frustration with the process, and what it views as a lack of legitimate consideration given to the proposals it put forward in its White Paper, Scotland’s Place in Europe.² ³

6 Following whatever agreement is reached – assuming an agreement is reached – between the UK and the EU, cross-border frameworks between the different governments within the UK will be needed notably to maintain the integrity of the UK single market. EU regulations will have to be replaced by new domestic frameworks, many of which will deal with both reserved and devolved matters. Governments will have to work together on this, but it is not clear that the present intergovernmental relations system is adequate either to manage the change or to sustain effective joint working there after. Genuine consideration must go into finding a workable system that promotes coalition building and gets the best use out of the civil servants responsible. Developing these frameworks will require genuine structural change; we cannot simply assume that goodwill on all sides will prevail.

7 Existing issues with IGR in the United Kingdom must be properly addressed, the system improved, and new arrangements put in place. It may be necessary to implement a more independently-minded secretariat than is the case under current intergovernmental relations structures. The dispute resolution system, for example, has scarcely been tested, but must be fit for the challenges ahead. It is possible that lessons may be learned from the British–Irish Council, the standing secretariat for which was established as part of the St Andrews agreement in 2006.⁴
Repatriation of Powers and the role of Devolved Institutions

8 The UK Supreme Court in the majority judgment of Lord Neuberger in the case concerning the UK Government’s ability to invoke Article 50 of the Treaty on European Union said:

“The removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence.”

9 The two most pressing questions that present themselves are:

- What does Brexit mean for the distribution of powers that are currently held at the EU level?
- What does Brexit mean for powers which are currently distributed to the different levels of government within the United Kingdom?

10 Should the bill to repeal the European Communities Act be passed, as the Queen’s speech on 21 June 2017 confirmed is the intention of the UK Government, much existing European Union law would be transferred across into UK statute. However, this is an imperfect solution as many aspects of the present regulations will not be operative simply by the fact of the UK not being in the EU. Numerous amendments will be needed. In order to make such amendments, the UK Government in its March 2017 White Paper, Legislating for the United Kingdom’s Withdrawal from the European Union, proposed that government will need to be able to alter much of the statute book following the passage of the Bill using secondary legislation.

11 The UK Government and UK Parliament should cooperate with the devolved governments and parliaments/assemblies to ensure that all the Brexit related legislation, including the secondary legislation and the legislation that is likely to follow related to the repatriation of powers from the European Union, is properly scrutinised by Westminster and the devolved legislatures.

12 Brexit will open up issues around the Scotland Act and devolution settlement that have rarely been the focus of political discourse in the past. Various policy areas under the jurisdiction of the Scottish Parliament, for example agriculture, are intrinsically linked to reserved matters, such as international trade. Developing solutions in a meaningful way, through a process shaped with the consent of both the UK and devolved governments is vital to ensuring that constitutional arrangements are not undermined.

Role of Parliaments and other Legislatures

13 The UK Supreme Court, in the same judgment, clarified that the Sewel Convention:

“was adopted as a means of establishing cooperative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences.”

The Court noted that:

“Over time, devolved legislatures have passed legislative consent motions not only when the UK Parliament has legislated on matters which fall within the legislative competence of a devolved legislature, but also when the UK Parliament has enacted provisions that directly alter the legislative competence of a devolved legislature or amend the executive competence of devolved administrations.”

The Court went on to say that:

“The evolving nature of devolution has resulted in the Sewel Convention also receiving statutory recognition through section 2 of the Scotland Act 2016, which inserted sub-section (8) into section 28 of the Scotland Act 1998 (which empowers the Scottish Parliament to make laws). (It says:)”

(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

The Court accepted the argument of the UK Advocate General as to the interpretation of section 2 of the Scotland Act 2016 that:

“the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged..."
by the words (“it is recognised” and “will not normally”), of the relevant subsection. We would have expected the UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.”

The Court acknowledged that the Lord Advocate was correct to accept that the Scottish Parliament does “not have a legal veto on the United Kingdom’s withdrawal from the European Union.”

Finally the Supreme Court said that:

“The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.”

As the UK Supreme Court (UKSC) confirmed, the Sewel Convention, as a political constitutional principle, does not constitute a justiciable law. However, what the Court failed to address was that while such principles may not be laws, constitutional conventions hold a status and significance above mere political arrangements. The Sewel Convention was not devised for the unique circumstances in which Scotland and the UK currently find themselves. Agreement must be sought and discussed in good faith by both sides.

While the RSE considers that it would be inconsistent with reasonable expectations for the UK Government not to seek consent from the Scottish Parliament on Brexit-related legislation that affects the legislative competence of the Scottish Parliament or the executive competence of the Scottish Government, it would be similarly damaging if Holyrood were to reject any proposals made out of hand or without good reason. The Scotland Act 2016 put into statute an acceptance that normally consent should be sought, and speaking in January 2017, the Secretary of State for Scotland, David Mundell, accepted that a bill to repeal the European Communities Act would impact upon the responsibilities of the Scottish Parliament and, as such, considered it “fair to anticipate that it would be the subject of a legislative consent process.”

If the UK Government fails to seek a legislative consent motion from the Scottish Parliament on a Repeal Bill or goes ahead with the Bill without receiving such a consent motion this could have very serious political consequences, although that might depend on the circumstances. However, it is clear from the Supreme Court’s decision that the UK Government is not legally bound to consult the Scottish Parliament before asking the UK Parliament to legislate on a matter which affects the Scottish Parliament’s competence and the UK Parliament has the legal power to enact such legislation when the consent is requested but denied.

The Great Repeal Act as proposed by the UK Government in its March 2017 White Paper will, among other things, confer sweeping subordinate law making powers to ‘correct’ EU-derived law to ensure that that law continues to function properly once the UK has left the EU.

The RSE accepts that withdrawal from the European Union will create the need for an almost unprecedented amount of legislation, not all of which can be passed using primary legislation, and much of which will require significant redesign from its current EU starting point.

While it may be necessary to provide the government of the day with additional powers to successfully complete the considerable task of transferring and suitably amending existing EU law to UK statute, an acceptable level of legislative scrutiny must take place irrespective of whether the legislation is primary or secondary in nature. For such an endeavour, the usual parliamentary oversight may not be feasible. However, some mechanism must be developed to ensure that the UK Government is held to account by the UK Parliament. Similarly, while it is not the function of the devolved legislatures to scrutinise Westminster, it is within their competences to examine relevant legislation and they must be given an opportunity to do so.
Relationship with the EU

20 International relations are a reserved matter, and this has included relations with the EU. But of course international relations can affect domestic policies, and this has been particularly true in relation to EU relations which touch on the huge range of domestic policy issues, in the economic, social, and environmental fields, perhaps most notably in relation to agriculture and fisheries. Many of these domestic policy areas are devolved, in that the implementation of EU obligations falls to the devolved administrations and legislatures. Hence it has been the practice of the UK to involve the devolved administrations in developing the UK’s approach to these areas in EU negotiations, but once the EU decisions are made, implementation is undertaken by the devolved administrations. Other international obligations entered into by the UK may also affect devolved matters, and be implemented by the devolved administrations. Here the legal arrangements are different, but the Scotland Act does contain powers which would enable the UK Government to require the devolved administrations to implement international obligations which the UK has. This has never been problematic in practice, with these powers yet to actually be used.

21 After the UK leaves the EU, it is likely that it will still have continuing agreements with the EU, in a transitional period but also thereafter. These might relate to trade, but are unlikely to be anything like as wide-ranging as the obligations of membership. European Union law will no longer apply, except perhaps in a transitional period or in a defined range of areas. That remains to be seen. It is possible, however, that the devolved legislatures and administrations might themselves wish to enter into arrangements with the European Union in respect of matters within their own competence. European Union law will no longer apply, except perhaps in a transitional period or in a defined range of areas. That remains to be seen. It is possible, however, that the devolved legislatures and administrations might themselves wish to enter into arrangements with the European Union in respect of matters within their own competence. Examples might include reciprocal arrangements in relation to health services, or in relation to university education or even research. A question which arises is whether this should be possible, and if so what mechanisms might be used to make it so. (Of course there is nothing that the UK government can do to oblige the EU to enter into such agreements, but it can make them possible).

22 Two mechanisms might be used. The first would be to give the devolved administrations specific powers to enter into agreements with the institutions of the European Union in respect of devolved matters, perhaps subject to the agreement of the UK Government, or subject to a power for the UK Government to object should it consider that other international obligations or UK interests would be jeopardised by such an agreement. Alternatively, the UK Government could act, in effect, as an agent of the devolved administrations and enter into relevant international treaties which apply only in respect of Scotland (or indeed Wales and Northern Ireland). There are precedents for this.

23 The Hague Protection of Adults Convention,\textsuperscript{15} aims to protect vulnerable adults. In 2003, it was considered that Scotland was the only part of the UK in a suitable position to implement the Convention at the time and thus it was ratified on behalf of Scotland by the UK Government. Fourteen years later, it is still only in force for Scotland within the UK. The flexibility in the UK constitution allows international law obligations to be created by the UK for one of the legal systems within the UK.

24 This example highlights that the devolution settlement can be used in a more nuanced manner. There appears no reason why the UK Government could not facilitate treaty signings on Scotland’s behalf in a similar way. This would not only provide Scotland the opportunity to engage with the European Union and/or its Member States (if EU law were to permit it) in areas related to its devolved powers, but could set a positive example of good intergovernmental relations, and strengthen the working relationship between the Scottish and UK governments.

Capacity

25 Establishing new frameworks for all of the areas currently covered by EU legislation is a major task, particularly as the timing of the transition from the EU frameworks to new Scottish ones will need to be simultaneous across a range of different policy areas. It is a task which is not intrinsically different in nature between the UK Government’s responsibilities in relation to England and the Scottish Government’s responsibilities in relation to Scotland, but the civil service resources available to the Scottish Government are much more limited. The total number of staff employed in the core Directorates of the Scottish Government has remained broadly constant at between 5000 and 5500 for a number of years, despite substantial increases in the responsibilities of the Scottish Government.
The work involved in preparing proposals for new frameworks to replace EU frameworks, consulting and legislating on them, and establishing any necessary implementation arrangements would be very substantial at any time; but the period between now and the likely expiry of the EU frameworks is also one during which the Scottish Government will be absorbing the major tasks associated with increased fiscal and welfare powers. There must be a substantial risk that the capacity of the relatively small numbers of senior staff who will be responsible for leading the work involved will be strained to the point that the quality and sustainability of new frameworks to replace EU frameworks is compromised. The effect of that in relation to, for example, the environment or to the agriculture and fishing sectors of the economy could be a matter of concern.

The scale and urgency of the challenge facing Scotland, and the UK, cannot be overstated. The civil service in Scotland must either look to recruit a substantial number of capable staff in a short period of time, or look to build up a significant group of outside experts to consult or, preferably, do a mixture of both. The option of simply maintaining the status quo is no longer tenable.

EU Laws Post-Brexit

Following the UK’s withdrawal from the European Union, a spectrum of opinions have been expressed on Scotland’s ability to remain within elements of the EU. These span from the Scottish Government’s proposal to remain within the Single Market to selectively opting in to specific areas. Irrespective of which avenue the UK or Scottish governments pursue, and what is achieved through Brexit negotiations, all options pose questions around how a three-way relationship between Scotland, the UK and the European Union would function, as well as serious issues over how integrity of borders and markets could be maintained.

Under the terms of the present devolution settlement Scotland will likely have the opportunity after Brexit to decide how much EU law it wants to keep in place for Scotland in non-reserved matters such as the environment, fisheries, agriculture and private international law. Some of these laws operate on a reciprocal basis and, outside of the EU, Scotland would lose reciprocal benefits. Scotland could, for example, choose to continue to align its rules on jurisdiction in civil and commercial matters with the Brussels Ia Regulation and continue to offer fast track recognition and enforcement of judgments to other EU Member States. However, other EU Member States would not be obliged to recognise and enforce Scottish judgments after Brexit. In order to secure continuing reciprocity with other EU Member States the Brexit deal and/or subsequent international negotiations by the UK would have to negotiate a special arrangement for the whole of the UK and the EU, or perhaps just for Scotland and the EU. Alternatively, reciprocal arrangements can be negotiated multilaterally in the Hague Conference on Private International Law in the current Judgments Project negotiations and the UK can choose to become an independent party to the Hague Choice of Court Agreements Convention with no break in its operation (the UK is currently a party to that Convention because the EU is a party to it) thereby securing its application between the UK and the remaining EU Member States.

If Scotland chooses to mirror EU laws post-Brexit it could make it easier for Scottish firms to continue to offer their services in the rest of the EU, but much would depend on the nature of any UK–EU Brexit deal on trade in services. One problem that could arise is that financial services – a key element of the Scottish economy – is a reserved matter and, therefore, the UK Parliament may choose to regulate financial services in a way that does not conform to EU law (if the regulation of those services is not fully covered by any Brexit trade deal between the UK and the rest of the EU). This would make it harder for Scottish financial services to do business in the EU. The prospect of UK law deviating from EU law in this area creates a difficult dilemma for Scotland. Devolution of financial services and business associations to the Scottish Parliament may enable Scottish businesses to sell their services more effectively in the EU single market, but would also likely make it more difficult to sell those services within the UK single market (a larger market for Scottish financial services than the rest of the EU).
Another issue for Scotland is that there can be international obligations that affect certain areas that were previously within EU competence, but are not reserved (or at least wholly reserved) matters within the UK. Fishing in the Scottish zone is devolved to Scotland by the Scotland Act but the UK Parliament has sole jurisdiction to legislate on fishing matters outside of the Scottish zone. The UK Government still has competence to negotiate internationally on fishing for the UK as a whole. Thus, post-Brexit international negotiations may be important in determining limits on fishing in order to conserve fish stocks which move around the North Sea and Atlantic Ocean. A scenario could present itself where, through concluding international agreements, the UK Government undermines or constrains powers which are devolved to Scotland. The UK Government should, therefore, seek cooperation with, and consent from, the Scottish Government on areas which will impact on devolved matters such as fisheries and agriculture.

**Endnotes**

1 Background information is available from: https://www.rse.org.uk/rse-establishes-working-group-advise-eu-strategy/
3 Letter from UK Secretary for Exiting the European Union, David Davis, to Scottish Minister for UK Negotiations on Scotland’s Place in Europe, Michael Russell: http://www.parliament.scot/85_European/General%20Documents/CTEER_Minister_M.Russell_2017.04.27.pdf
4 http://www.gov.scot/News/Releases/2010/06/25144630
8 Ibid. at para 136
9 Ibid. at para 136
10 Ibid. at para 147
11 Ibid. at para 148
12 Ibid. at para 150
13 Ibid. at para 151. All 11 Supreme Court judges who sat on the case agreed on the interpretation of the Sewel convention in this case although Lord Reed, at para 242, gave a slight hint that he was leaving its exact legal status open in relation to the Scottish Parliament by saying: ‘Nor does a political convention, such as the Sewel Convention plainly is in its application to Northern Ireland, give rise to a legally enforceable obligation.’
14 http://www.bbc.co.uk/news/uk-scotland-scotland-politics-38757264
16 See https://www.hcch.net/en/projects/legislative-projects/judgments
17 See https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court
Apart from Denmark, which is not yet a party to the Choice of Court Convention, although it is believed that it intends to become a party
This Advice Paper has been signed off by the RSE’s EU Strategy Group.

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