

UCL Constitution Unit Briefing Paper

Brexit: Its Consequences for Devolution and the Union

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This is the third in a series of Constitution Unit [briefing papers](#) on the constitutional consequences of Brexit. The series examines the impact that UK withdrawal from the European Union would have upon structures of power and administration in the UK and the EU. Our [first briefing paper](#) assessed the impact of Brexit on Whitehall and Westminster; our [second](#) the consequences for the EU's political system. The papers are intended to inform debate ahead of the UK referendum on EU membership on 23 June. They do not take sides in that debate.

The paper is based on a Constitution Unit seminar on the consequences of Brexit for Devolution and the Union. Our panellists, who have contributed significantly to this paper, were: Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary University of London, and author of *Constitutional Law of the European Union*; Professor Jim Gallagher, former Director General of Devolution Strategy at the Cabinet Office and now Visiting Professor at the University of Glasgow and Associate Member of Nuffield College, Oxford; Professor Cathy Gormley-Heenan, Professor of Politics, University of Ulster; and Dr Rachel Minto, Research Associate, Wales Governance Centre, Cardiff University.

The paper focuses on the potential impact of Brexit upon Devolution and the Union. The evidence suggests that:

- **Public opinion** is much more pro-EU in Scotland and Northern Ireland than in England and Wales, creating the possibility of a divided – and divisive – referendum result.
- The **process of withdrawal** could be complicated by devolution and could have profound constitutional implications for Scotland, Northern Ireland, and the future of the Union.
- In the long term **after withdrawal**, Brexit could somewhat increase scope for policy differentiation between the nations. There are also possibilities for differentiated future relationships with the EU.

Opinion on Brexit across the nations of the UK

There are large differences in support for the EU among the different nations of the UK. If the referendum result is close, this could create major stresses for the Union, because it could mean some nations imposing their will against the wishes of other nations. This could happen if the overall vote in the UK is to leave, but a majority of the people in Scotland, Wales or Northern Ireland vote to remain. Or it could happen if the UK votes to remain, but a majority in England vote to leave. In either case, there is a risk that those who find the UK vote has gone against the majority will in their nation will reject the result as illegitimate. But, as Sionaidh Douglas-Scott pointed out, amendments to require each nation to vote in favour for the referendum to be carried were rejected by Parliament during the passage of the EU Referendum Bill.



Public opinion

The [national polls](#) (which in fact cover only Great Britain, not the UK as a whole) have shown no consistent pattern of change over the course of the campaign to date: online polls show opinion more-or-less evenly split between the Remain and Leave options, while telephone polls show a consistent pro-Remain majority. Taking account of this difference, support for Remain (excluding 'don't knows') stands around [53 per cent](#).

These figures are dominated by responses in England. Opinion in Scotland and Northern Ireland is markedly more pro-EU. Data collated by the National Centre for Social Research suggest that average support for staying in the EU, excluding 'don't knows', has been 65 per cent in Scotland ([ten polls](#) since early April) and 63 per cent in Northern Ireland ([four polls](#) since February).

Opinion in Wales, meanwhile, is closer to that in England, with 50 per cent support for remaining in the EU across [four polls](#) (all online) since February. This is also reflected in the results of the Welsh Assembly elections, where UKIP gained a 13 per cent share of the vote, and seven seats.

In a close result, therefore, the stronger pro-EU sentiment in the devolved nations could tip the balance in favour of Remain.

Opinion among politicians

The Scottish political elite mirrors public opinion. The leaders of all five parties with seats in the Holyrood parliament strongly favour staying in the EU, though there are [some pro-Brexit MSPs](#), and UKIP has one Scottish MEP.

In Wales, despite the public ambivalence about the benefits of membership, the political elite is again strongly pro-EU, although the leader of the Welsh Conservatives (Andrew R.T. Davies) provides a notable exception and UKIP are now represented in the Welsh Assembly. Rachel Minto ascribed this to economic, political and cultural reasons. Wales has been a [net recipient](#) of EU funding, through the EU's Structural Funds and the Common Agricultural Policy; and the Single Market has a particular significance to Wales as a small nation to secure direct inward investment. Beyond this, the EU has also enabled Wales to raise its international profile, as it provides a stage upon which Wales can assert itself as a distinct, European nation.

The political elite in Northern Ireland is divided. Cathy Gormley-Heenan explained that the DUP and its leader, First Minister Arlene Foster, favour Brexit, while Sinn Féin and Deputy First Minister Martin McGuinness support staying in the EU. But, as [Christine Bell](#) puts it, 'neither party is unequivocally confident in its position'. The DUP has a core rural constituency of farmers who are attached to EU grants and funding schemes, and its rival the UUP has come out in favour of Remain. So Foster has softened her stance, [saying](#) 'we will *on balance* recommend a vote to leave the EU'. There is also nuance in the position of Sinn Féin, which historically has opposed the EU as a capitalist club, but has since moved to more critical engagement with the EU.

The process of withdrawal, and medium term consequences of Brexit

Relations with the European Union are often treated as a matter solely for the Westminster authorities. In the event of a vote for Brexit, however, the process of withdrawal from the EU would be affected by and have strong effects upon the devolved nations and the structure of the Union as a whole.



How would the devolved nations be represented during the Brexit negotiations?

The devolved administrations were marginalised during the renegotiation of the terms of the UK's membership which preceded the EU referendum. Whitehall made it clear that EU membership is a matter of foreign policy and therefore a reserved matter, for the UK government to determine exclusively. David Lidington, the Minister for Europe, refused invitations from the devolved assemblies to discuss the agenda for reform of the UK's membership, even though there is significant overlap between devolved policy areas and fields of EU activity. So the precedents are not hopeful for the devolved nations to gain meaningful representation during the Brexit negotiations. It is unlikely that they would be allowed direct representation at any of the negotiations with the EU.


Nevertheless, all of our speakers emphasised that the devolved nations would want to exert influence – partly to protect the interests of their populations and partly to assert their capacity for action. The main interests which the devolved governments would want to protect would be in agriculture, fisheries (in Scotland and Wales), the environment, state aid to industry, and any other sector of the economy which has received significant amounts of EU funding. The First Ministers could be expected to respond vigorously to a Brexit vote, seeking assurances from the UK government that equivalent levels of funding will be provided to compensate for the loss of EU funds. They may also seek stronger powers to ensure that Brexit results in greater autonomy for the devolved nations in all those policy areas which are within EU competence. As the next subsection of this briefing paper suggests, they may be able to exert substantial leverage in pursuing these goals.

In formal terms, the present mechanism through which they would exercise this influence would be by making their views known in the JMC (Europe), a sub-committee of the Joint Ministerial Committee on Devolution through which the UK government seeks the views of the devolved governments before every important EU meeting. The significance of this forum would however be greatly heightened and its role might be supplanted by other intergovernmental groups.

Would the devolution statutes be amended to remove the requirement to comply with EU law?

The devolution statutes – the laws establishing the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly – all include strict requirements to comply with EU law: legislation passed by the devolved assemblies which is incompatible with EU law is invalid. As part of the huge cleansing operation required to purge the UK statute book of the requirement to comply with EU law, Westminster would want to remove this requirement from the devolution statutes.

Under the [Sewel Convention](#), however, the UK government has said that it will not normally legislate on a devolved matter without the consent of the devolved legislature, and similarly always sought the consent of the devolved legislatures, before extending their powers. This convention is now partly codified in section 2 of the Scotland Act 2016, though with no reference to changes in devolved powers. Sionaidh Douglas-Scott suggested that if they wished to express their opposition to Brexit, or to increase their leverage during the Brexit negotiations, the devolved assemblies might be reluctant to grant legislative consent to the widening of their powers implied in removing the EU law constraint. This would take us into uncharted constitutional territory. So far, Westminster has never legislated on devolved matters in the absence of consent and has always acted as if the Sewel Convention applied to changes in devolved competence (but Westminster legislation [has been disputed](#) in Wales).



Our speakers differed slightly in their views on what would happen if Westminster changed the powers of the devolved governments by removing their obligation to comply with EU law without their consent. Jim Gallagher emphasised that a key word in the Sewel convention is ‘normally’ and suggested that the circumstances of Brexit and its aftermath would be anything but normal. Sionadh Douglas-Scott, on the other hand, said that to act contrary to the convention on such a high-profile issue would be unconstitutional and could provoke a constitutional crisis.

Would a vote for Brexit trigger a second independence referendum in Scotland?

It is often suggested that a vote for Brexit against the wishes of Scotland would immediately trigger a second Scottish referendum on independence, and lead to the break-up of the UK. But there are several steps along the way, and Jim Gallagher queried whether this would in fact happen. The SNP leader Nicola Sturgeon [has said](#) that a vote to leave the EU against Scotland’s wishes would be a material change which could justify a second referendum; but she [has also said](#) that she would only hold a second referendum if there is clear and sustained evidence that the majority of people in Scotland want independence. She would also be most unlikely to hold a second referendum unless she was confident that it could be won.

In practice this might require clear opinion polling evidence for at least six months showing that the Scots have changed their minds, and are willing to take the plunge and vote for independence. Until there is such evidence, Nicola Sturgeon will temporise, give a guarded response, and say that she needs first to listen to the wishes of the people of Scotland. If a decisive majority of the Scots clearly and consistently press for independence, they will eventually achieve it: the UK government would not stand in their way. But Scottish opinion may feel conflicted, if Scots are forced to choose between being European and being British. A vote for Brexit would change the terms of independence: if Scotland has to re-apply to join the EU, it might be required to join the euro; and if Scotland is inside the EU, but the rest of the UK is outside, there could for the first time be a hard land border between Scotland and England. A decision about independence would be hard to take without knowing the nature of the UK’s relationship with the EU.

How would Brexit affect Northern Ireland?

If the vote is for Brexit, Sinn Féin would immediately [call for a border poll](#), seeking to re-unite Northern Ireland with the Republic. The Northern Ireland Secretary Theresa Villiers (who [supports Brexit](#)) has already indicated that she will reject any such call.

More broadly, there are huge concerns about a vote to leave in the Republic, which could have [destabilising effects](#) on north and south. Membership of the EU and commitment to the ECHR were a [vital part](#) of the Northern Ireland peace process and were written into the [Belfast Agreement](#) of 1998. EU funding has greatly helped the peace process, with four PEACE programmes contributing over €1.5bn. EU funding coming to Northern Ireland from seven different EU programmes [will total](#) some €3.5bn from 2014 to 2020.

Brexit could require reinstatement of a [hard border](#) between north and south: preventing immigration to the UK of EU nationals with freedom of movement to Ireland would only be possible by re-introducing border controls, if not on the border then at UK ports. To retain their right to freedom of movement within the EU, unionists in the north might, in increasing numbers, [apply for Irish passports](#), as they are entitled to under the terms of the Belfast Agreement. There could also be a negative impact on trade: Ireland is the [UK’s fifth largest export market](#), and cross-border trade is worth an estimated £65bn annually.



Long term consequences for the UK as a multi-national state

Brexit could have long-term policy consequences in terms both of the scope for greater policy differentiation between the different nations of the UK and of the scope for the devolved nations to develop different relationships with the EU.

Policy differentiation between the nations

Although there could be scope for greater policy differentiation once the various governments within the UK have been freed from the constraints of EU harmonisation, this would depend on the nature of the post-Brexit deal. If it was a Norwegian model there would be very little scope, because of the regulatory requirements of access to the European single market, whereas the Canadian model (for example) would offer much greater scope.

Another constraint would be finance: if the UK attached conditions or its own regulatory requirements to replacement funding, there could be less scope for policy differentiation. But the [greater fiscal powers](#) being granted to the devolved governments (unconnected to Brexit) could be a spur to developing new policies.

Nevertheless, Jim Gallagher was doubtful about this, and also doubtful whether there would be an upsurge of new policy ideas, even if the devolved governments had greater freedom. It is, he argued, one of the disappointments of devolution that there has been so little policy innovation by the devolved governments: devolution has not so far provided the policy laboratories which are a strong feature of some federal systems.

Could the devolved nations develop different relationships with the EU?

The scope for the devolved nations to develop different relationships with the EU would also depend on the nature of the post-Brexit deal. The devolved nations would want the UK to negotiate continuing access to the single European market, and to retain free movement within the EU. To the extent that the UK government was unwilling or unable to achieve this, the devolved nations might want to explore whether they could have closer relations with the EU while remaining members of a state which was outside the EU.

Sionaidh Douglas-Scott highlighted several precedents for such differentiated relationships. The Channel Islands and the Isle of Man are not in the EU, while Gibraltar is. Greenland (which is an autonomous territory of Denmark) [left the EU](#) in 1985, following a referendum held in 1982, while Denmark remained a member state. Sweden and Norway have no border controls, although Sweden is inside and Norway outside the EU (but both are part of the Schengen common travel area). So there are precedents for different parts of a state having different relationships with the EU, which has shown flexibility in accommodating different preferences.

It would be up to the devolved nations to come up with proposals, and then to persuade the UK government and the EU that they could be accommodated without damage to the founding principles of the EU, or the fundamental interests of the UK.

This UCL Constitution Unit briefing paper is part of a project on the Constitutional Consequences of Brexit for the UK and EU, which is funded by the 'UK in a Changing Europe' initiative based at King's College London and organised in collaboration with the UCL European Institute. The project consists of a series of four seminars, each accompanied by a briefing paper and video. Much of the material in this paper is adapted from the third seminar, on 19 May 2016. Professor Jim Gallagher, Professor Sionaidh Douglas-Scott, Professor Cathy Gormley-Heenan and Dr Rachel Minto were our panellists, and, without their contributions, this paper would not have been possible. The series is convened by Dr Christine Reh, Dr Alan Renwick and Professor Meg Russell. Valuable research assistance was provided by Oliver Patel.

Details about the remaining events in the series can be found [here](#).