

Legislation, Justice and Constitution Committee

Monitoring Report

20 September 21

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1. Introduction

The Legislation, Justice and Constitution Committee has a broad remit covering a wide range of areas. This monitoring report is intended to provide Members of the Committee with an update on key policy developments related to the Committee's remit.

The Committee will consider these issues and any actions that it wishes to take in response. This report is being published to inform stakeholders of some of the issues currently under consideration by the Committee.

2. UK -EU Agreements

UK-EU relations are mainly governed by two key treaties:

The Withdrawal Agreement sets the terms for the UK's withdrawal from the EU.

The Trade and Cooperation Agreement sets up their new relationship from 1 January 2021.

Both treaties contain devolved matters, which the Welsh Government is responsible for implementing, such as fisheries, health, the economy and the environment.

The areas covered by the two treaties fall across every Welsh Government department. Senedd Research has produced an infographic showing each Minister and where their responsibilities intersect with the agreements.

This section provides an update on how the agreements are working in practice.

2.1. Withdrawal Agreement

Discussions over the implementation of the Withdrawal Agreement and, in particular, the Protocol on Ireland-Northern Ireland ("Northern Ireland Protocol") have continued.

Citizens' rights

The application deadline passed on 30 June 2021 for European citizens who were living in the UK before 1 January 2021 to stay. The matter was discussed on 9 June at the eighth meeting of the UK-EU Joint Committee, which oversees the

Withdrawal Agreement. The UK set out the ‘continued success’ of its scheme, while the EU stressed that its citizens must have legal certainty. According to the EU, both parties agreed to resolve outstanding issues ‘swiftly’.

Further reading

- Senedd Research’s latest article presents the latest available statistics.
- Senedd Research’s article traces the pandemic’s impact on the EUSS.
- What Now? The EU Settlement Scheme after the Deadline, Madeleine Sumption, Migration Observatory at the University of Oxford

Northern Ireland Protocol

The UK and EU discussed the Northern Ireland Protocol at the eighth meeting of the UK-EU Joint Committee. The EU and UK issued statements following the meeting.

In July 2021, the UK Government issued a command paper on the Northern Ireland Protocol. The paper outlines proposals from the UK Government to change the operation of the Protocol in ways which would require re-negotiation of several key elements with the EU. The command paper suggests that if discussions with the EU on its proposed changes are not successful, the UK could invoke Article 16 of the Protocol. Article 16 allows either party to take unilateral safeguarding measures and/or rebalancing measures if the Protocol causes ‘serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade’.

The EU has responded to the command paper stating that technical discussions on how the Protocol is implemented in practice should continue but that it will not re-open negotiation on its terms. Discussions are ongoing.

Latest developments:

- On 4 September, Lord David Frost said that he is concerned that a ‘cold mistrust’ could develop between the UK and EU over the arrangements;
- On 6 September, the UK Government postponed agri-food and feed checks due to be put in place on 1 October indefinitely.
- RTE reported on 8 September that the EU will bring forward a range of proposals by the early October. The BBC reported on 14 September that this is

understood to include unique agri-food arrangements for Northern Ireland and proposals on customs.

- On 8 September, the [Prime Minister told Parliament](#) that “clearly, the protocol, as it is being applied by our friends in the EU, is not, in my view, protecting the Belfast/Good Friday agreement as it should in all its aspects. We must sort it out.”
- On 13 September, [Lord Frost told the House of Lords that it would be a “significant mistake”](#) for the EU to believe the UK would not invoke Article 16 and that the Command Paper “sets out how the tests for Article 16 are, in our view, met.”

How disagreements in relation to the Protocol are resolved will have a significant impact on other issues that fall within this Committee’s remit including the common frameworks programme, the operation of the UK Internal Market Act, the operation of post-Brexit legislation and other external affairs issues within the Committee’s remit. If Article 16 was invoked by either party, it could also have significant knock-on effects for Welsh ports and the wider economy, depending on what safeguarding or rebalancing measures were taken.

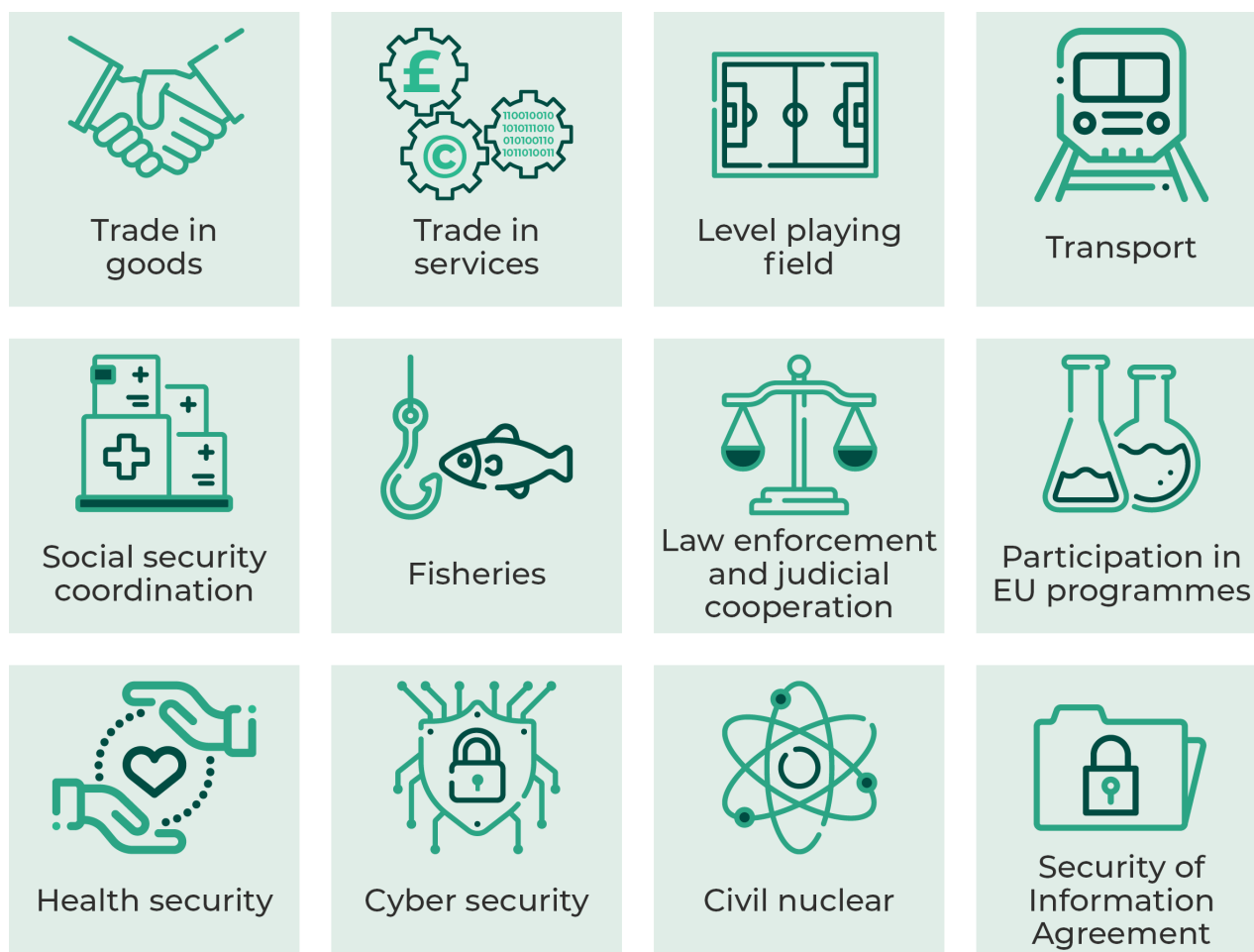
Further reading

The list of articles below provides further analysis of some of the issues raised by the command paper.

- [Protocol on Northern Ireland/Ireland and the new command paper](#), Dr Katy Haywood UK in a Changing Europe
- [Northern Ireland Protocol: ongoing UK-EU disagreements](#), Jess Sargeant, Institute for Government
- [Honesty is such a lonely word...](#), UK Trade Policy Observatory, Professor Michael Gasiorek and Professor Alan Winters

2.2. Trade and Cooperation Agreement

On 1 January 2021, the UK-EU Trade Cooperation Agreement (TCA) entered into force. The TCA establishes the new UK-EU relationship which covers [many areas, including some within devolved competence](#). The below infographic shows the TCA’s areas of UK-EU cooperation:



Governance

On 9 June, the first meeting of the Partnership Council, which oversees the agreement, took place. The meeting was co-chaired by Lord Frost, Minister of State at the Cabinet Office and the European Commission Vice President, Maroš Šefčovič.

The Welsh Government confirmed that the Minister for Economy, Vaughan Gething, had attended the meeting as an observer. Following the meeting, the Minister wrote to Lord Frost describing this arrangement as ‘deeply unsatisfactory’. He explained that:

The Welsh Government must be able to contribute on issues that fall within our devolved competence as active participants at meetings of the UK-EU Partnership Council. Our responsibilities for implementation and the real impact that the TCA is already having on businesses and citizens in Wales make it vital that we fully involved in agreeing UK positions and have the opportunity to represent our direct interests in the meetings.

He added that this ‘cannot be the position as we move forward.’

In addition to the Partnership Council, the TCA establishes over 20 new committees and working groups. On 1 July, the [UK Government](#) confirmed that future UK delegations will vary in number, depending on the agenda. It is not clear whether or how the Welsh Government will be represented in future.

To date, meetings have taken place on social security, energy and fisheries. The [UK delegation included officials from the Welsh Government](#) for the meeting on social security coordination. Attendee information for the remaining meetings is not yet publicly available.

Implementation

Implementation of the TCA has begun. An example is included below:

TCA implementation: fisheries & Welsh waters

The TCA’s new UK-EU fisheries arrangements requires that each Party is required to notify the other Party of new measures that are likely to affect each other’s fishing vessels before those measures are applied, allowing sufficient time for the other Party to provide comments or seek clarification.

The Welsh Government recently gave its consent for the UK Government’s [Common Fisheries Policy \(Amendment\) Regulations 2021](#) to make changes to domestic and foreign licence conditions in the Celtic Sea area of Welsh and English waters.

3. Constitution

3.1. Constitutional convention

The [Labour party’s manifesto](#) for the 2021 Senedd general election pledged to ‘lead Wales in a national civic conversation about [its] constitutional future’ in the sixth Senedd.

The Welsh Government’s [Programme for Government](#), published on 15 June 2021, committed to establishing an independent standing commission to consider the constitutional future of Wales.

A constitutional convention **is a representative body** convened to draw up or propose changes to a country's constitution.

The Counsel General is **responsible** for the constitutional convention and has outlined initial details about the proposed commission in speeches to **Plenary** and the **Wales Governance Centre** in July. The information under the headings below draw directly from these speeches:

Who will be on the Commission?

It will be an independent commission of citizens, representative of the diversity of Wales' societies and communities.

Its membership will represent all ages and include representation from 'a breadth of political and civic backgrounds'. Members will be drawn from 'the widest possible range of sectors in civic society', including public, private, third sector, social partners, civic and grass-root organisations.

The Commission will be supported by a separate panel of experts from within and outside Wales. They will provide expertise, hard data and information, and undertake research and analysis from which the commission can develop ideas and recommendations.

What will the Commission do?

The remit will be designed by the Welsh Government. The Commission will engage with the public 'as widely as possible' and 'examine the governance of Wales, devolution and our future relationship with the UK and the principles on which it should be based'.

It will be tasked with producing a report with its recommendations and conclusions within 18-24 months.

The Counsel General **intends** to announce the formal launch of the commission in the early autumn and has **scheduled a statement** in Plenary on 28 September entitled 'The Constitutional Commission'.

4. The UK Internal Market Act

4.1. Legal challenge

On 19 January 2021, the previous Counsel General, Jeremy Miles MS, issued formal legal proceedings in the Administrative Court challenging the UK Internal Market Act 2020.

The application for judicial review argued that the Act:

- impliedly repeals part of the Government of Wales Act 2006 in a way that diminishes the Senedd’s legislative competence; and
- confers wide powers on the UK Government which could be used by UK Ministers to amend the Government of Wales Act in a way that cuts down the devolution settlement.

The application sought a declaratory judgment that the provisions of the Act do not have the effect of impliedly limiting the legislative competence of the Senedd and that powers conferred on UK Ministers under the Act cannot be exercised in a way which would substantively limit the Senedd’s legislative competence.

The Welsh Government’s application for permission was refused by the Divisional Court, on the ground that it was premature and that the issues raised would best be considered in the context of specific legislative proposals.

The Welsh Government appealed the ruling. This was successful and permission to appeal the Divisional Court’s decision was granted on 23 June 2021. The Court of Appeal notes there are compelling reasons for this appeal to be heard and that the case raises important issues of principle going to the constitutional relationship between the Senedd and the Parliament of the UK.

The Counsel General has confirmed the case is due to be heard in the Court of Appeal in January 2022.

4.2. Office for the Internal Market

Part 4 of the UK Internal Market Act establishes an Office for the Internal Market (‘the Office’). It is located within the Competition and Markets Authority. Under the Act, the Office has responsibility for oversight of the operation of the UK internal market but no arbitration or enforcement functions. It is required to report on the effective operation of the market, it can undertake reviews of the effects of

proposed legislation or legislation that has been passed at the request of the UK Government or devolved governments, gather evidence from stakeholders and report on issues raised by them. Further detail of the operation of the Office and the Act can be found in this Senedd Research [Act summary](#).

Over the summer the Competitions and Markets Authority undertook two consultations relating to how the Office will operate in practice.

In May, it published [draft guidance setting out how the Office for the Internal Market intends to carry out its functions](#). It included guidance on how governments will be able to request advice from the Office and how the Office intends to handle those requests. It sets out the details of the systems it will use to collecting information from businesses and other interested parties on the operation of the market and how it will treat those requests. The consultation closed on 22 July.

In June it consulted on a [draft statement of policy](#) on how it will use its enforcement functions. Under the Act, the Office is provided with information gathering powers that enable it to request information from organisations, public authorities and individuals to help them carry out their review and reporting functions. The Act also provides the Office with powers to impose penalties when requests for information are not complied with. The consultation closed on 22 July.

5. Common frameworks

In 2017, the UK and devolved governments decided that they wanted to manage future divergence in some policy areas previously governed by the rules of the EU single market. To do this, they [agreed to set up 'common frameworks'](#) in certain policy areas.

[Common frameworks typically set processes](#) for the governments to decide when to take the same approaches to law and policy and when to diverge. They may be underpinned by legislation. The Senedd and other UK legislatures will be able to [scrutinise provisional frameworks before they are finalised](#).

The UK and devolved governments have plans for [26 common frameworks for Wales](#). In February, the then Counsel General confirmed that [all but three had been provisionally confirmed](#) and were now in operation. However, [only seven provisional frameworks have been published](#).

The Counsel General gave evidence to the House of Lords Common Frameworks Scrutiny Committee on 6 September and updated the LJC Committee on the progress of frameworks through the programme in a letter on 7 September.

The UK Government has said it aims to finalise common frameworks by the end of 2021. However, the Counsel General said in his letter to the Committee that:

[W]e should not seek to meet deadlines to the detriment of quality.

The UK and devolved governments continue to negotiate on ‘cross-cutting issues’ in the development of common frameworks, including how frameworks should interact with the UK Internal Market Act 2020, international obligations, and the Intergovernmental Relations Review. The Counsel General said that:

Failure to make sufficient progress on all cross-cutting issues would prevent the scrutiny and finalisation of the frameworks.

6. Intergovernmental Relations

In 2018, the Joint Ministerial Committee (Plenary) commissioned a review of intergovernmental relations to ‘ensure they are fit for purpose in light of the UK’s exit from the EU’. In March 2021, the governments published an update on progress with the review. The update set out proposals for changes, including:

- setting up new intergovernmental structures to replace the Joint Ministerial Committee;
- recognising that intergovernmental bodies can make decisions;
- revising the dispute resolution process, to require the governments to take third-party advice on dispute and ensure that meetings are chaired by a person endorsed by all parties;
- allowing locations and chairs of intergovernmental meetings to be rotated; and
- increasing transparency and improving accountability to legislatures.

The update also highlighted some areas of disagreement. On 7 September, the Prime Minister wrote to the First Minister and his counterparts in Scotland and Northern Ireland. In the letter, he said:

[W]e are now in a position to conclude [the review]. The Chancellor of the Duchy of Lancaster will shortly write to you in this regard.

The First Minister is scheduled to make a statement on intergovernmental relations in Plenary on 28 September.

7. Justice

7.1. Senedd

The Senedd's Business Committee considered the remit of the new Legislation, Justice and Constitution Committee on 13 July and agreed that:

high-level justice policy matters, such as the devolution of justice and policing, and any matters which relate to law-making, should be assigned to the LJC Committee. Other matters which relate to the practical application of justice policy should be open to scrutiny by appropriate policy and legislation committees.

7.2. Welsh Government

The last Welsh Government shared its justice transformation work programme with the previous Legislation, Justice and Constitution Committee in October 2020. This outlined the Welsh Government's priorities across five areas. The then Counsel General issued an update on progress in March 2021.

In the new Welsh Government, the Counsel General has taken over responsibility for justice and the response to the Thomas Commission from the First Minister. He will chair the Cabinet Sub-Committee on Justice and is also responsible for liaison with the legal sector and tribunals policy.

The Minister for Social Justice is responsible for relations with the Police and Crime Commissioners, police and other criminal justice agencies; relations with UK Government in respect of the Prisons and the Probation Service; and advice and advocacy services.

The Counsel General gave a public lecture entitled 'Getting Justice for Wales' to Aberystwyth University on 8 July. He confirmed that the Welsh Government would release a report and strategic programme on justice in the autumn.

7.3. UK Government and Parliament

The UK Parliament is currently considering legislation about the operation of the justice system in England and Wales.

- The Police, Crime, Sentencing and Courts Bill would make a wide range of changes to the criminal justice system, including police powers,

sentencing law and offender management. Parts of the Bill require Senedd consent under the legislative consent convention. The Welsh Government is not recommending that the Senedd consent to the Bill.

- The Judicial Review and Courts Bill would allow the courts to suspend quashing orders for unlawful decisions by public bodies. This would apply to judicial review challenges to decisions by devolved Welsh public bodies. The Bill would also restrict judicial review appeals for certain decisions of the Upper Tribunal (known as *Cart*) and make provision about procedure in reserved courts and tribunals. The Bill does not require Senedd consent.
- The Public Services Pensions and Judicial Offices Bill would increase the mandatory retirement age for the judiciary and increase options for retired judges to sit, including in the devolved Welsh Tribunals. It would also make changes to judicial pensions and allowances. The Welsh Government is recommending Senedd consent to the Bill.

The Ministry of Justice is consulting until 31 October on dispute resolution mechanisms.