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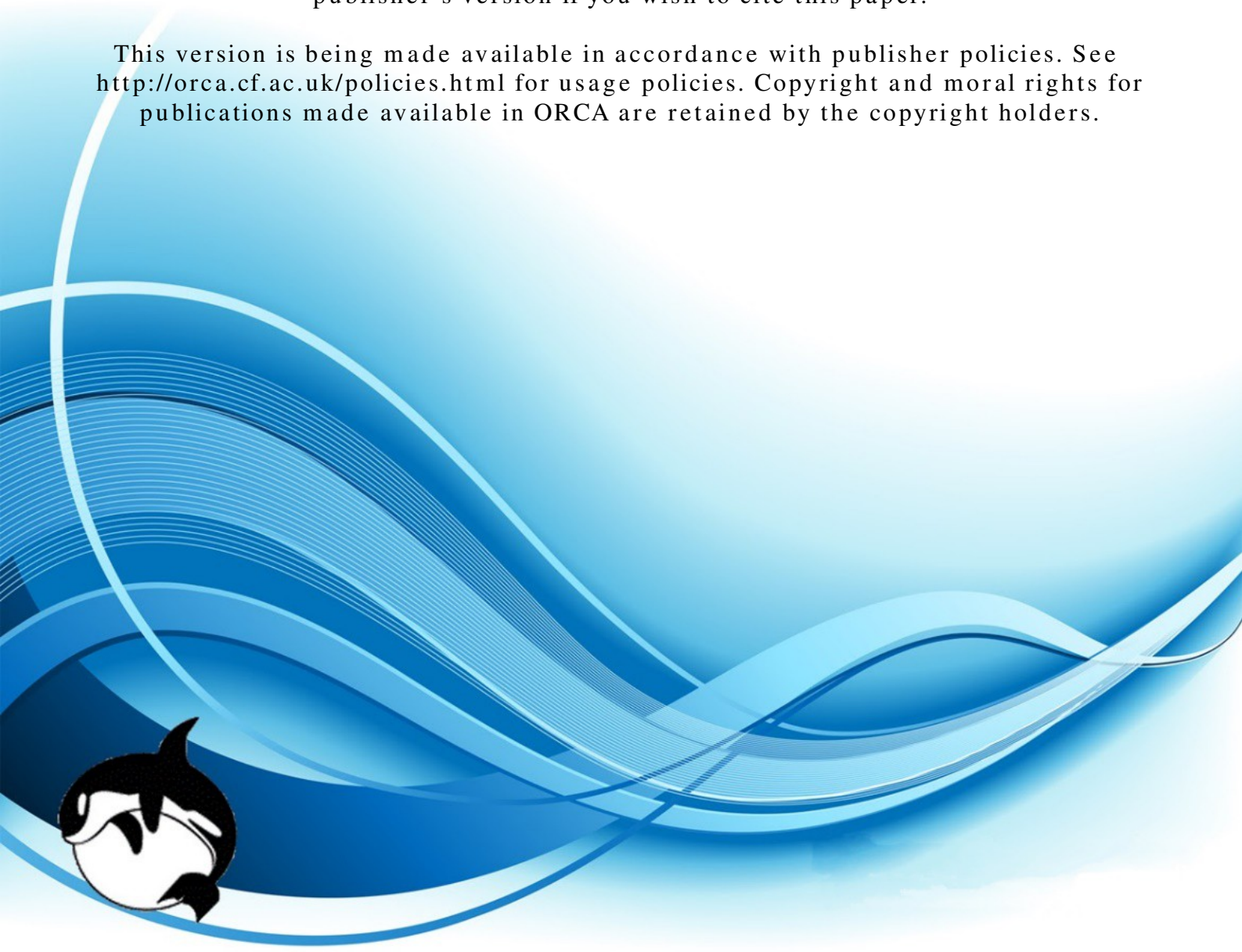

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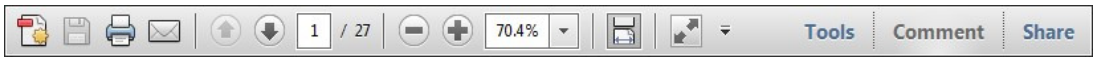

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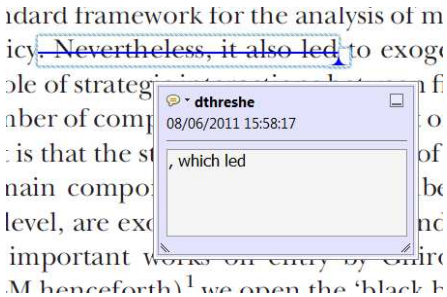

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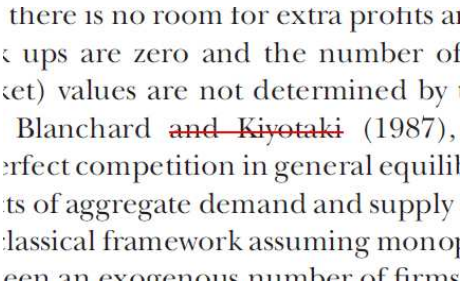

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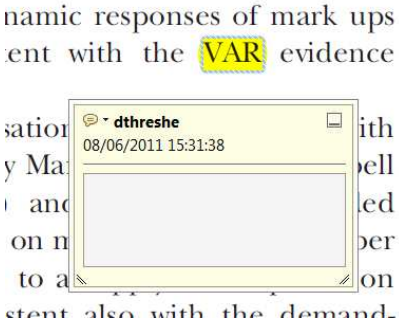

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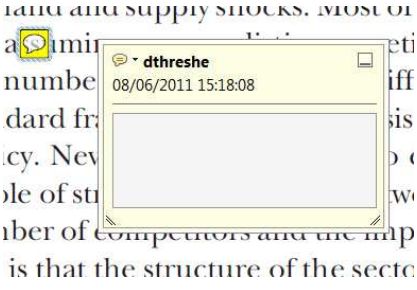

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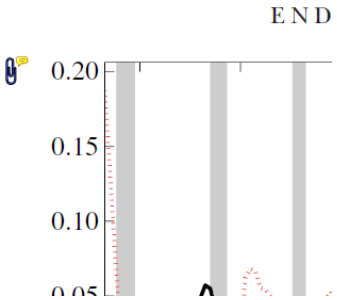

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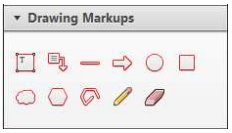

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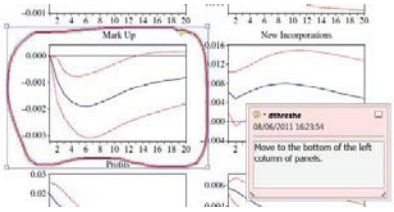

A Changing UK in a Changing Europe: The UK State between European Union and Devolution

RACHEL MINTO, JO HUNT, MICHAEL KEATING AND LEE MCGOWAN

Abstract

Two issues currently dominate the UK's constitutional landscape: the UK's membership of the European Union (EU) on the one hand; and the unsettled constitutional settlements between the UK and the devolved administrations of Scotland, Wales and Northern Ireland on the other. This article considers these two issues in concert. It stresses the distinct relationships between the EU and the devolved territories within the UK—concerning both devolved and non-devolved policy areas—highlighting the salience of a devolved perspective in any consideration of UK–EU relations. Despite its importance, sensitivity to this has been lacking. The article explores the implications of a 'Leave' or 'Remain' outcome on the future of the internal territorial dynamics within the UK. While there are too many unknowns to be certain of anything, that there will be knock-on effects is, however, beyond doubt.

Keywords: European Union, United Kingdom, devolution, constitutional settlements, EU referendum

Introduction

There are two constitutional stories playing out in the UK. The first is the UK's membership of the European Union (EU). The second concerns the unstable constitutional settlements between the UK and the devolved administrations of Scotland, Wales and Northern Ireland. Although these two issues have largely been addressed in isolation from one another, there is a close connection between them. When the electorate goes to the ballot boxes this year, it is not only the UK–EU relationship that will be at stake. Indeed, the future shape of two unions will be hanging in the balance: the EU on the one hand; the UK on the other. The EU referendum result will feed into both of these, whether a 'Leave' or 'Remain' result is returned.

Despite the Westminster doctrine of parliamentary sovereignty, the UK is not a unitary state. Like the EU itself, it is a union of distinct territories. Since the late 1990s, this territorial differentiation has been expressed more assertively through evolving legislative and jurisdictional infrastructures, providing for varying levels of political, legal and judicial autonomy for Scotland, Wales and Northern Ireland. However, the distinctiveness of the four nations goes far beyond the institutional architecture established as part of the devolution process. Indeed, the devolution settlements are but one articulation of difference that is also expressed through language, culture and religion, and shaped by different historical legacies that date back centuries. So, while the UK joined the European Economic Community (EEC) in 1973 as a single member state, this unitary status masks a complex and evolving constitutional configuration within the UK that has only become more pronounced over time.

As well as having a distinct status within the UK, Scotland, Wales and Northern Ireland have distinct relationships with the EU. These affect both devolved competences and non-devolved areas where EU policy and activity have a particular impact on them. Institutional mechanisms have developed to deal with these. So the impact of the EU referendum will vary across the four nations and the Union itself, whether the UK votes to 'Leave' or 'Remain'.

This article explores the different relationships between the EU and the devolved territories within the UK. It analyses the renegotiation process with particular

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reference to the political priorities of the devolved administrations, and then unpacks the implications of a 'Leave' or 'Remain' outcome on the future of the internal territorial dynamics within the UK.

A changing UK and the UK's multidimensional relationship with Europe

Devolution in 1999 represented a step-change in the relationship of the component territories to the United Kingdom, but it was not a once-and-for-all-time event. Rather, relationships have continued to develop as the devolved bodies have gained more powers and political alignments have shifted. At present, Westminster and the devolved territories all have governments of different political complexions, reflected in distinct attitudes to Europe. This cross-territory distinction is seen between the attitudes of both the political elite and the public (see Jeffery et al., this issue). Interestingly, however, in any one territory, there is not a consistent correlation between these groups in their support for the EU.

The strongest support for Europe is found in Scotland, where the two largest parties, the Scottish National Party (SNP) and the Labour party, both switched to pro-European positions in the 1980s. Even among Conservatives, euroscepticism is muted. Business, trades unions and civil society tend to support Europe. Public attitudes are less europhile but polls have suggested a persistent gap between Scotland and England, with Scottish voters of all parties less likely to back Brexit. As of March 2016, the only elected UKIP representative in Scotland was a Member of the European Parliament (MEP), who gained the sixth seat in 2014. So the old 'permissive consensus' on Europe has so far held up. Scottish governments of both political colours (Labour–Liberal coalition and SNP) have been active on the European scene and the Scottish Parliament has a statutory European and External Affairs Committee. Well in advance of the referendum, the Scottish government made an unequivocal choice to support 'Remain'. The Scottish Parliament elections of May 2016 did not provide a distraction, since it was widely assumed that the SNP would win these comfortably without needing to trim its pro-European stance.

The Northern Ireland situation is very different. Until January 2016 the issue of Brexit within Northern Ireland was scarcely visible in political debate (and especially among unionist politicians) as attention was more focused on the May 2016 elections for the Northern Ireland Assembly. The interest here centred on whether the Democratic Unionist Party (DUP) or Sinn Fein would emerge as the largest political party and lay claim to the title of First Minister. David Cameron's deal in February 2016, however, forced all political parties and the media in Northern Ireland to engage with the EU referendum. The possibilities of a Brexit raise truly fundamental issues for Northern Ireland, as it is the only part of the UK to share a land border (some 300 miles) with another EU member state. A Brexit would in theory see the creation of a hard border between Northern Ireland and the Republic of Ireland, which would raise particular economic and political challenges. Particular concerns lie in the impact on cross-border trade and travel, issues of policing (including extradition and access to the Schengen information System [SIS]) and the future of financial support for the agricultural sector. The referendum proved to be a challenge for politicians and the regional media.

The three largest political parties, namely the ~~Democratic Unionist Party (~~DUP~~)~~, Sinn Fein ~~(SF)~~ and the Ulster Unionist Party (UUP), are historically eurosceptic. Internal party tensions and frictions over the EU ensured that both the DUP and the UUP did not seek to engage the public in any Brexit debate before the details of Cameron's negotiations became public. However, while the DUP encouraged their members to vote to leave the EU, the UUP came out in favour of the UK remaining in the EU. Sinn Fein, as the largest nationalist party, had also avoided public discussion until December 2015, before advocating support for the UK's continued EU membership to avoid further 'partitioning' the island were the UK to leave the EU. Only the Social Democratic and Labour Party (SDLP), with some smaller forces such as the Green party, have consistently favoured EU membership. UKIP has a

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presence in the region but remains a very minor force, with only one Member of the Northern Ireland Assembly and two councillors. In retrospect, the political architecture provided for under the devolution settlement—which created a mandatory coalition involving the main parties—prevented the development of a consistent and purposeful approach to the EU arena. In contrast to the Scottish model, a European committee was not established and instead EU issues became one of over a dozen areas falling under the responsibility of the Office of First Minister and Deputy First Minister. Ultimately, the different visions of EU engagement explain the inability of the Northern Ireland executive to express its view on the referendum.

Visiting officials and ministers from both Dublin and London have often been surprised at the scant interest in the EU arena so often displayed within the Northern Ireland executive and the Assembly. Ultimately, this lack of proactive engagement on EU issues prevented any meaningful interchanges between the Northern Ireland executive and the British government over the latter's negotiations with Brussels. Mostly engagement was more reactive where the Northern Ireland Assembly was responding to others, for example as part of the House of Lords EU Select Committee. Concerns about Brexit have been considerably stronger in the Republic of Ireland, where both government and most other political parties never concealed their desire for the UK to remain a member of the EU.

The Welsh case provides yet another perspective. Political and media attention has been more engaged with the ongoing saga of further devolution as proposed under the most recent Wales Bill, along with the upcoming 2016 National Assembly for Wales elections, than with the EU question. However, the EU theme is attracting growing interest and increasingly statements are being made about the benefits of the UK's EU membership for Wales and implications of a British exit from the EU. In particular, the possible consequences for funding and for the farming community have been stressed, and as with both Northern Ireland and Scotland, there is an emerging farming lobby that supports membership. In contrast to Northern Ireland, there is a much stronger European awareness among the political elite, and the political executive—headed by the First Minister Carwyn Jones (Labour)—has clearly made the case for EU membership and articulated that there would be 'devastating consequences' in the case of Brexit. Jones contributed to the House of Lords enquiry, arguing strongly in favour of the UK's continued EU membership. Strong support for EU membership is also reflected among Liberal Democrat and Plaid Cymru Assembly members, with a majority of the sixty members of the National Assembly for Wales supporting continued membership. Notable exceptions include the leader of the Conservative party in Wales, Andrew R. T. Davies.

The National Assembly for Wales initiated an inquiry into the UK government's EU reform agenda, what impact it might have on devolved competences in Wales and how far the UK government was involving the devolved administrations. One outcome of this inquiry is a letter from the Chair of the Constitutional and Legislative Affairs Committee, David Melding, to the UK Europe Minister. This expresses disappointment with the UK government's lack of consultation and engagement with the devolved legislatures during the reform agenda negotiations; similar complaints have come from Scotland and Northern Ireland. More effective engagement post-referendum is requested, whether in the context of exit negotiations or, in the case of a 'Remain' vote, decision-making under the new settlement. Despite the investment in and awareness of the EU question among the political elite, opinion polls have shown euroscepticism in Wales approaching English levels (in contrast to Scotland), with UKIP presenting a credible challenge in the May 2016 elections for the National Assembly for Wales.

Relations with the EU

The multinational character of the UK has resulted in the establishment of distinct relationships between the EU and Scotland, Wales and Northern Ireland respectively. These relationships pre-date the devolution process and extend beyond the areas of devolved competence, to include centrally

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governed areas that are of particular concern to the UK's smaller nations.

Prior to devolution, there were a number of channels through which the interests of Scotland, Wales and Northern Ireland could be represented on a European stage. These were rolled over into the post-devolution era. The first was the European Parliamentary elections in 1979, which elected MEPs from across the UK, respecting national territorial boundaries. The vast majority of the UK's MEPs are from English constituencies. Scotland, Wales and Northern Ireland, however, each comprise a constituency for European elections, and MEPs from Scotland, Wales and Northern Ireland have some incentives to cooperate with each other across party lines, to promote their national interest.

Second, the EU's own Committee of the Regions (CoR) provides a formal (albeit relatively weak) channel for Scotland, Wales and Northern Ireland to articulate their distinctive policy positions within Europe. Established in 1994, the CoR is charged with the representation of regional and local interests in EU decision-making. As 'regions' within the EU, Scotland, Wales and Northern Ireland all have representatives within this institution, which has pursued an agenda of Europe of the Regions. Scotland and Wales have also sought recognition as part of the movement of Regions with Legislative Powers (RegLeg), differentiating themselves from the administrative regions and local governments that are also represented in CoR.

Post-devolution there was increased scope for the devolved nations to assert themselves more proactively in Europe. The existing Scottish representation in Brussels through Scotland Europa (a platform for civil society representation established in the 1990s) was matched with a delegation representing the Scottish government. Wales established Wales House, which is home to the Welsh government delegation, the National Assembly's EU Office, the Welsh Local Government Association and the Welsh Higher Education Brussels office, and the Northern Ireland executive opened its own office in Brussels in 2001. These all serve to give voice to the particular policy positions of the devolved administrations and are well placed to establish networks of individuals and organisations who can work in the national interest, as well as relaying valuable information from Brussels back to Edinburgh, Cardiff and Belfast. These interests go beyond areas of devolved competence, reflecting the socioeconomic status, key industries, political priorities and relative size of the devolved nations. Some of these issues are common across the three nations, while others are confined to one or two.

Unsurprisingly, the single market—a non-devolved area—is a central concern for Scotland, Wales and Northern Ireland. Given that all three are small territories, the single market has a pivotal role to play both in promoting trade and encouraging inward investment. It is widely held that access to the single market is a key selling point for international companies to locate in Scotland, Wales and Northern Ireland. The EU's Structural Funds have been prominent, especially in Wales and Northern Ireland. While the UK's interpretation of additionality means that these do not represent additional moneys to those coming through the Barnett Formula, they have raised the salience of Europe and drawn economic and social actors into European networks. They have also ensured a continued commitment to regional development policy.

The Common Agricultural Policy (CAP) has been of central importance to farmers across the UK. Agriculture is a key industry in Wales and Northern Ireland and has distinct characteristics in Scotland, and the devolved administrations have been able to use the leeway they have to shape the details of its reform in significant ways. There are also divergent attitudes towards the social dimension of the EU within the UK, with Scotland, Wales and Northern Ireland inclined to favour the EU's more socially minded policies and Westminster more resistant. Another salient issue is environmental policy, which is both Europeanised and devolved. Finally, it is important to highlight the particularly important role the EU has played in supporting peace and reconciliation in Northern Ireland since 1995 through its unique Peace Programme initiative. Peace IV was launched in early 2016 and sees a further €270 million (actual additional money) being earmarked for specifically cross-border initiatives.

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There are arrangements for the devolved governments to make a contribution to the formulation of UK European policy, but these are weak in comparison to those in federal states such as Germany and Belgium. The devolved authorities may participate in the UK delegation to the Council of the European Union where devolved matters are at issue, but they represent the UK as a whole and not themselves individually, and are very rarely given the opportunity to lead the delegation. They are consulted on the line the UK will take through the Joint Ministerial Committee (Europe), consisting of ministers from all four governments, but the UK government has the final say. They are also able to participate in the official-level preparatory bodies, where their influence is generally in proportion to the quality of their contribution. The offices of the devolved administrations are part of the United Kingdom Permanent Representation (UKREP) 'family' in Brussels, which gives them diplomatic status and access to some key papers. Under the SNP, the Scottish government has regularly complained about the restrictions on its role and demanded more 'direct' representation. In fact, direct representation is only open to member states, and what they really seem to be claiming is a *right* to attend the Council of the EU and to lead the delegations on matters, such as fisheries, where they have the biggest stake. Since the line will still be set by the UK, this is largely symbolic. Moreover, while participation in the Council of the EU does give them presence, it also restricts them since they cannot publicly disagree with the line taken.

In Germany, by contrast, the Länder must consent to the negotiating position where devolved matters are concerned, using majority voting through the *Bundesrat* (Federal Council) if necessary. The Belgium provision is even stronger, as all the relevant governments (federal, regional and community) must agree on matters that affect their competences. Even were this approach acceptable to the United Kingdom, it could not in practice be applied, given that there is no government to speak for England; only a fully federalised UK could address this problem. Strengthening the position of the devolved administrations in relation to devolved matters also would not address the issue of their particular interests in reserved matters such as migration, freedom of movement or regulation.

Renegotiation and reform: a devolved perspective?

Cameron's efforts to secure a 'good deal for Britain' through the EU renegotiation and referendum have taken much of his time and energies since his re-election as Prime Minister in May 2015. As shown above, the devolved dimension is highly significant in any such deliberation because issues about EU membership that may resonate for London may not necessarily be the most important aspects for other constituent parts of the UK. The devolved nations did make a coordinated approach to the UK government when the negotiations started, but their involvement has been limited. There is some consultation through the Joint Ministerial Committee (Europe) but there was nothing equivalent to the provisions for devolved participation that apply in regular EU negotiations. The House of Lords EU Committee has argued forcefully that 'given the profound implications for the nations of the UK of a referendum on membership of the EU, it is vital that the government engage fully with the devolved institutions during the negotiations'. Moreover, it stated that these three devolved administrations should not be handed a *fait accompli* by Whitehall but ought to be 'closely involved in negotiations so as to ensure that the specific interests of the nations of the UK are taken into account'.

Minister for Europe, David Lidington, claimed to be keeping in close touch with the three devolved administrations but in practice the degree of meaningful engagement is debatable, and has been criticised in both Cardiff and Edinburgh. Lidington refused to give evidence to the Scottish Parliament's European and External Relations Committee about Cameron's negotiations. With much of the government's negotiations having been conducted behind closed doors, given their sensitivity and the need to keep Cameron's eurosceptic critics guessing, serious issues can be raised over the transparency and accountability of the process

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and how this approach has hindered and will continue to hinder interchanges with the devolved administrations.

Of the three devolved territories, Scotland has been the most vocal regarding its own distinct EU priorities under devolution (for example, scrutinising EU legislation, creating a European committee, establishing an office in Brussels and the Scottish government's comprehensive reports on 'Scotland in the EU'). As such, it has demonstrated its intention to be a proactive player and to be heard by London. The SNP government regularly expresses its commitment to EU membership and, given its sizeable presence in the House of Commons, has arguably the greatest ability of the three devolved territories to be heard in London. There have been interactions between the Minister for Europe and Scottish ministers in Edinburgh in a way that has not been replicated in Northern Ireland or Wales. As the EU dimension had formed part of the Scottish independence referendum debate, the public, media and political parties were aware and prepared to enter debates on Brexit and to consider the possible implications of a UK vote to leave, including a new referendum on Scottish independence.

Another point to note here is the potential confusion and cross-contamination between multiple, overlapping campaigns. Now set for Thursday 23 June 2016, the EU referendum will take place just seven weeks after the national elections in Scotland, Wales and Northern Ireland. The leaders from all three devolved administrations articulated their dissatisfaction with the chosen timing, given the risk of a blurring of the campaigns attached to the two votes, but such expressions of concern were ignored by Downing Street.

Post-referendum scenarios

The territorial dimension to the UK's relationship with Europe will remain important whatever the outcome of the referendum vote. Only if all four parts of the United Kingdom vote to leave will the issue not arise. Opinion polls, however, have shown consistent majorities in Scotland and Northern Ireland in favour of remaining, so that there is a possibility that they would vote to remain while England, and thus the UK as a whole, votes to leave.

The Scottish National Party have indicated that such an outcome would constitute the material change of circumstances that would justify them calling a new independence referendum. Indeed, the threat of being taken out of the EU against the will of the Scottish people was a theme they deployed in the 2014 referendum on Scottish independence. It is not clear, however, that the desire to remain in the EU would be enough to swing sufficient voters to give a convincing majority for independence. Recent polls have suggested that the scenario might push support up to the mid-fifties, but that is before the difficulties have been rehearsed.

While Brexit could give a justification for a new independence push, it would actually undermine the independence-in-Europe policy that has been the SNP's mainstay for the past thirty years. That was predicated on both the UK and Scotland being within the EU, so allowing common policies on key economic and regulatory matters without a political union, and keeping an open border. The prospect of a hard EU border with England and Scotland would make independence more difficult to sell and force Scots to make an explicit choice between the two unions. The SNP does not therefore see this as an auspicious circumstance for independence.

The UK being out and Scotland in the EU could also threaten the continued ties with the UK that made independence easier to sell in 2014. This includes the currency union and common regulatory frameworks that converted separation into 'independence-lite'. It would also be necessary for Scotland to establish a clearer position of its own with regard to its role in Europe and the degree of integration it wanted. The independence proposals of 2014 envisaged keeping the same opt-outs as the UK currently has, on the euro, Schengen and Justice and Home Affairs. This would have enabled it to retain elements of the old UK union, including the passport-free border, but retaining these links with a non-member state could be much more difficult, especially if European and UK policies started to diverge.

Were Northern Ireland to vote to remain but be pulled out by England, it would

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increase tensions, especially if the two communities had voted in different ways. Brexit could unwittingly damage relations between the two communities and in turn key elements of the political settlement within Northern Ireland. It would impose a hard EU border with the Republic of Ireland, going against the spirit of the settlement. Cross-border institutions would find it more difficult to work across an EU border. UK and Irish ministers would no longer meet regularly in European forums, a venue that has proved valuable in the past in providing a neutral place for encounters. More generally, European membership has allowed for a dilution of the concept of sovereignty in Ireland, as sovereignty is shared at multiple levels, lowering the stakes in the old battles between Irish unification and UK unionism. Sinn Fein regard Brexit as an opportunity for Irish re-unification. The argument runs that were the nationalist community to have voted heavily in favour of Europe, and assuming the UK had voted to leave the EU, demands would intensify for a border poll on Northern Ireland's status within the UK. This would be politically sensitive and divisive, but is a possibility, and one that many unionists are not reluctant to acknowledge.

Were Scotland to leave the UK, there would be knock-on implications for Wales as England's 'junior partner' within Britain. Indeed, losing the balancing role of Scotland would likely inspire a more proactive assertion of nationalism within Wales, and the further unsettling of the union.

Brexit would require the UK to decide on its future relationship with Europe (see Chalmers, this issue). One option is membership of the European Economic Area; another is to go it alone, without a special relationship with Europe. The devolved administrations might prefer the former, in line with their preference to keep their European links, but the decision would be for the UK government to take, presumably without a direct say for the constituent parts. Nor would they be likely to have a role in the details of negotiations should the UK opt for a new relationship with Europe outside the EU framework.

Another effect of Brexit would be that powers currently devolved but subject to European law would be repatriated not just to London but to Edinburgh, Belfast and Cardiff. Swathes of law and policy in areas including agriculture and fisheries, environment, and higher education (including tuition fees) and some social benefits would be repatriated to the devolved administrations who could choose, if they wished, to align policies in these fields with London or with Brussels.

A UK vote to remain in Europe could avoid some of these issues but pose others. Were England to vote narrowly to leave, the Scottish, Welsh and Northern Ireland votes could swing the overall result in favour of 'Remain'. We know that there is a certain alignment of English nationalism with euroscepticism (see Jeffery et al., this issue). English people who most strongly identify as English tend to be against Europe, compared with those who see themselves as British. English opinion has been exercised increasingly over the issue of Scottish MPs voting on English matters, while both the SNP and Labour opposed the change in standing orders in 2015 requiring an English majority for laws applying only in England. Even after that, Scottish MPs can vote on the final stage of English legislation, allowing them to participate in a blocking majority. There has also been resentment against what is seen as the Scottish advantage in public spending. A grievance over the EU would add to these discontents, further destabilising the union and feeding English nationalism.

A vote to remain in the EU could also return attention to the different views of Europe in the various parts of the United Kingdom. Whatever the outcome of the vote, David Cameron's negotiations appear to have secured what amounts to a permanent opt-out of future moves to more integration in Europe. The UK is destined to be a semi-detached member of the EU, keen on the single market but suspicious of EU action in other fields, including notably migration and the social dimension. The Scottish and Welsh governments, on the other hand, are in favour of a more social Europe and, in Scotland, this extends to almost the entire parliament and likely future governments. The main Scottish parties (SNP and Labour) are also in favour of the free movement of labour and a more generous immigration

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policy as a whole. Scotland, Wales and Northern Ireland have different interests in relation to agriculture and energy. Scotland has a strong interest in oil and gas and a commitment to renewable energy. All of these could put the devolved administrations in opposition to positions taken by the UK in EU negotiations.

The issue of the role of the devolved administrations in Europe will thus remain a live one. With increasing differences, there will be calls for a stronger role for Scotland, Wales and Northern Ireland in setting UK European policy. This parallels demands for stronger and more formal intergovernmental mechanisms within the UK, pointing towards a more federal conception of the state.

These post-referendum scenarios will not play out in a vacuum. Indeed, the constitutional transformations in the UK are set within a wider context of a changing EU. Similar territorial re-configurations are taking place in other EU member states, where there is contestation over internal territorial boundaries and the level of autonomy afforded to these territories. These devolution experiences across the EU inspire—and take inspiration from—each other so that the repercussions of the EU referendum will be felt beyond the UK.

Conclusion

The outcome of the forthcoming EU referendum will play into two constitutional stories in the UK. It will determine whether the UK's future will be inside or outside the EU. Also, it will have implications for the future of the United Kingdom as a union of four nations. This is so whether a 'Leave' or 'Remain' outcome is returned.

The territorial differentiation within the UK is characterised by varying levels of legislative and judicial autonomy enjoyed by Scotland, Wales and Northern Ireland. The four nations also hold distinct political priorities, in function of their size, socioeconomic status, key industries and historical legacies. This distinctiveness is visible in the multidimensional nature of the relationships between the constituent parts of the UK and the EU: Edinburgh, Cardiff and Belfast are themselves actors in Brussels, where they seek to pursue their own political priorities that may or may not be aligned with those of London.

It is hardly surprising, then, that the devolved administrations have been increasingly vocal about the UK's future relationship with the EU and the particular impact any changes would have upon them, touching on devolved and non-devolved policy areas. However, this appears broadly to have fallen on deaf ears in London. There is little to suggest there has been clear and decisive action to incorporate these voices within the EU renegotiation discussions; and little to indicate that there is any real sensitivity to the implications of the vote upon the future constitutional make-up of the UK. That there will be a knock-on effect is, however, beyond doubt.

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