

Written evidence to the Legislation, Justice and Constitution Committee, Senedd Cymru

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This evidence addresses the role of devolved governments and legislatures in the institutional architecture and governance of the UK-EU agreements. It first provides an overview of the governance structures contained in the Withdrawal Agreement (WA) and the Trade and Cooperation Agreement (TCA) and then discusses the arguments in favour and against granting the devolved governments and legislatures greater involvement in these.

This is followed by a short comparative exercise on how other countries with multi-level governance arrangements (Switzerland and Germany) approach the formulation of European policy where the competences of their respective sub-state entities are affected. This comparison demonstrates that there are examples of different approaches to the involvement of the sub-state level in matters of EU governance.

1. Governance structures in the Withdrawal Agreement and TCA

a) Withdrawal Agreement

Governance of the WA is complex as it contains a mix of directly effective rules (notably those on citizens' rights¹ and in the Protocol on Ireland/Northern Ireland²) where the European institutions have by and large retained their functions of enforcement (EU Commission) and dispute settlement (European Court of Justice); and "traditional" public international law rules, for which the governance arrangements (including dispute settlement) follow a relatively typical inter-governmental model.

The main institution established by the WA is the **Joint Committee** "comprising representatives of the Union and the United Kingdom". The Joint Committee is co-chaired by both parties and decides unanimously. This means each party has the power to block Joint Committee decisions.

Apart from its role in bilateral dispute settlement (Article 169 WA), the Joint Committee has important decision-making powers concerning the day-to-day running of the agreement. It can also issue recommendations, which despite not being binding have significant authority. In specified cases, it has the power to amend the WA (if expressly empowered to do so). Most significantly so far, the Joint Committee's decision 1/2023 effected the changes to the Protocol on Ireland/Northern Ireland envisaged by the Windsor Framework.³

¹ Article 158 WA

² Article 12 Protocol on Ireland/Northern Ireland.

³ <http://data.europa.eu/eli/dec/2023/819/oj>.

In addition to the Joint Committee, the WA sets up several specialised committees: on citizens' rights, other separation provisions, the Protocols on Ireland/Northern Ireland, Sovereign Base Areas in Cyprus and Gibraltar, and on the financial provisions.

In terms of membership the WA only stipulates that the Committees "comprise representatives of the Union and representatives of the United Kingdom." Who precisely these representatives are is in the discretion of the respective party. However, it is important to note that each party can only ever speak with one voice as decisions must be taken by mutual consent between the EU-side and the UK-side.

The decision-making powers of the Joint Committee and specialised committees are not aligned with the competence divide in the UK's devolution arrangements. This means that committee decisions adopted under the WA structures may affect policy areas that are devolved.

At present, the UK Government facilitates the attendance of representatives of the devolved governments at Joint Committee meetings as well as those of the specialised committees where issues touching on devolved competence are on the agenda.⁴

b) TCA

Governance of the TCA follows a similar basic structure as that of the WA, but the TCA contains some additional governance features.⁵

The **Partnership Council** is the main governance institution in the TCA. Like the Joint Committee under the WA, the Partnership Council comprises representatives of the EU and the UK and it has supervisory and decision-making powers. As the TCA too cuts across reserved and devolved competence areas, the Partnership Council may take decisions in areas of devolved competence, notably fisheries, animal and plant health, and the environment.

As with the Joint Committee, the UK Government enables representatives of the devolved governments to attend Partnership Council meetings where devolved matters are on the agenda. The UK Government strives to involve those representatives in the preparation of such meetings where items discussed include matters of devolved competence. However, the UK Government reserves for itself the final discretion as regards attendance, meaning that attendance (and involvement in preparation) does not happen by right, but is a privilege extended by the UK Government.⁶ It is therefore not clear how much (if any) influence the devolved governments have on the agenda or on the UK's overall position.

⁴ Letter by former Minister of State Lord Frost of 27 May 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/990199/Letter_from_Lord_Frost_on_engagement_regarding_EU_matters.pdf.

⁵ The following is based on a briefing for the Scottish Parliament's CEEAC Committee co-authored by Tobias Lock and Iain McIver of the Scottish Parliament Information Centre (SPICe): CEEAC/S6/22/14/1 Annexe A (<https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/joint-briefing-from-spice-and-professor-tobia-lock-the-committees-adviser.pdf>).

⁶ See letter by Lord Frost, fn 4.

The Partnership Council is supported by 18 **specialised committees** and 4 working groups. Finally, there is the **Parliamentary Partnership Assembly (PPA)**, comprising members of the European Parliament and of the UK Parliament. The PPA has no decision-making role, but serves as a forum for exchanges of views between parliamentarians. It has the power to seek information from the Partnership Council, to be informed about decisions and recommendations of the Partnership Council and make its own recommendations to it.

The UK delegation to the PPA currently comprises of 5 MPs representing constituencies in the devolved parts of the UK, of which one is from Wales; one from Northern Ireland; and three from Scotland.⁷ The devolved legislatures have been invited to send two members each to attend meetings of the PPA as observers.

2. Should there be a greater role for the devolved legislatures and governments?

Both the WA and the TCA are treaties concluded between the UK and the EU only. At the same time both agreements deal with policy areas that – within the UK context – are in the competence of the devolved legislatures. Furthermore, even where the agreements deal with subject matters that are reserved, the devolved governments will have a duty to act in compliance with the agreement and may have duties in carrying out obligations under the agreement (e.g. non-discrimination duties under the citizens' rights part of the WA; border control posts at Welsh ports; etc).

The question therefore is whether a case can be made for greater involvement of the devolved legislatures and governments in the governance of UK-EU relations under the agreements currently in force.

a. Arguments against a greater involvement

The arguments against a greater involvement of the devolved legislatures and governments would result from taking a traditional international law perspective: the TCA and the WA were concluded between the EU and the UK. The UK is therefore responsible for any violation of these agreements (much like the EU is responsible for violations by the EU Member States) whether caused by central government or a devolved government or legislature; it should therefore be the UK government (and Parliament) alone that should be responsible for the governance of the agreements.

Furthermore, one could argue that on the EU-side its Member States are not directly involved in the TCA bodies either: it is the EU Commission that represents the EU at the Joint Committee/Partnership Council; and it is the EU Parliament that represents the EU-side at the PPA. Hence no argument from equality of arms with the EU Member States can be made in this regard.

⁷ <https://www.parliament.uk/mps-lords-and-offices/offices/delegations/uk-eu-parliamentary-partnership-assembly-delegation/uk-eu-parliamentary-partnership-assembly/>.

b) Arguments in favour of a greater involvement

The WA and the TCA both deal with devolved policy areas. Notably under the TCA the Partnership Council has the power to adopt binding decisions. This includes binding decisions to interpret the provisions of Part Two of the TCA (on trade), which affects also devolved areas, such as fisheries, level playing field obligations on the environment, sanitary and phytosanitary measures.⁸ While these do not have direct effect⁹ in the UK's legal orders, the Welsh government is obliged to respect the UK's international obligations and the Secretary of State has powers to ensure compliance with UK international obligations by Welsh Ministers under s. 82 of the Government of Wales Act 2006.

Furthermore, the Partnership Council has the power to make recommendations to the parties (UK and EU) affecting areas of devolved competence. While these are not legally binding, they have considerable authority given that they have been adopted on the basis of a consensus of both the EU and the UK. Hence they may well be followed up by legislative or executive acts, possibly adopted at the central level, which may – again – affect devolved competence. Finally, the power to adopt amendments to the TCA in the cases provided is potentially far-reaching and would occur purely at an intergovernmental EU-UK level without the need to involve Parliament or the devolved governments or legislatures.

Moreover, for the first four years (i.e. until May 2025) the Partnership Council has the power to amend the TCA to 'correct errors, or to address omissions or other deficiencies'.

Given the powers of the Partnership Council, the devolved legislatures and governments have a legitimate interest in influencing its decisions. Otherwise, there is a danger that devolved competence nominally existing under the Government for Wales Act 2006 and other devolution legislation is in practice squeezed out due to international obligations agreed by the UK Government without devolved input.

Additionally, the comparison with the EU Member States – which are not represented – is not entirely convincing. The reason the EU Member States are not represented in the TCA Partnership Council or in the WA Joint Committee is chiefly because these two treaties were concluded by the EU alone on the basis of exclusive EU competence. One can contrast the UK-EU agreements with other EU partnership agreements, e.g. the EU's association agreement with Ukraine,¹⁰ which was concluded as a so-called mixed agreement, i.e. between the EU and its Member States on the one side and Ukraine on the other. This happened because the EU did not have the competence to conclude the entire agreement on its own. As a consequence, the Member States (through the Council of the EU) are part of the Association Council (the equivalent to the Partnership Council in the TCA). Given therefore that the EU had the exclusive competence to conclude the TCA and the WA, the EU Member States did not need to be represented in this way.

The situation as far as the devolved parts of the UK are concerned is markedly different, however. For one, devolved competence areas are clearly affected by the TCA and WA. In

⁸ Article 519 (b) TCA.

⁹ Articles 4 and 5 TCA.

¹⁰ http://data.europa.eu/eli/agree_internation/2014/295/oj

other words, the subject matter of the agreements is not within the exclusive competence of the UK Parliament or UK Government.¹¹ Furthermore, the imbalance of the UK's devolution settlement – with devolution only applying to the three devolved parts of the UK but not to England – comes to bear here too. Whereas the EU Commission and other EU institutions are set up to serve (only) the EU interest – however defined – the UK Government is caretaker not only of the interests of the UK as a whole, but also fulfils the role of the government for England. Thus England's specific interests will always be represented at the Partnership Council or Joint Committee, whereas the specific interests of the devolved nations may not be.

As far as the PPA is concerned, however, the full membership of members of the devolved legislatures may not be possible given that the TCA expressly mentions "Members of the UK Parliament", i.e. Westminster. That said, there would appear to be space to upgrade the current observer status in practice, e.g. by granting full speaking rights to observers or giving them input into the agenda.

c) Review of the TCA as a specific and time-sensitive reason for engagement and involvement

According to Article 776 TCA, there shall be a joint review of the implementation of the TCA every five years. Given the TCA's entry into force on 1 May 2021, the first such review is due to take place around May 2026. While the TCA is open-ended as to the substance and specific procedure for such review, it is likely that the parties will thrive to keep any changes to the TCA confined to ones which can be effected by a Partnership Council decision and/or by way of a Partnership Council recommendation. This would save the parties the process of formal treaty amendment and subsequent domestic ratification.

Furthermore, the EU-UK fisheries deal – which is part of the TCA – will expire on 30 June 2026 and access to waters, quota, etc will have to be renegotiated on an annual basis.¹² In addition, a number of unilateral acts by both the UK and the EU will be up for renewal (or abandonment). These include the UK's decision to accept "CE" markings on goods as well as the UK's approach to chemicals regulation as well as the EU's adequacy decision on the free flow of personal data due to expire in June 2025.¹³

The Senedd and/or the Welsh Government may therefore want to use the opportunity to influence these decisions while they are being considered.

4. How can devolved input best be achieved?

Neither the TCA nor the WA are prescriptive as to the composition of the UK delegation or its internal decision-making processes. This means the UK delegation can feature representatives of the devolved administrations (be it at ministerial or civil servant level).

¹¹ Though of course, technically external relations are a reserved matter, so there is absolutely no suggestion being made here that the UK Government acted ultra vires when concluding the TCA or the WA.

¹² Annex 38 to the TCA; and Article 498 TCA (stipulating annual negotiations).

¹³ <https://ukandeu.ac.uk/wp-content/uploads/2023/01/UKICE-Where-Next-the-Future-of-the-UK-EU-Relationship-3.pdf>.

That said, the UK can only speak with one voice in the Partnership Council or in the Joint Committee. Thus the key to ensuring that the voice of the devolved governments and legislatures is heard is to be found at the domestic level. At present, the UK Government facilitates the attendance of devolved governments at meetings of the Partnership Council and Joint Committee as set out above. While this should be welcomed, it should be noted that this decision was entirely in the UK Government's discretion and could be reversed at any time.

Furthermore, meaningful involvement would require more than mere attendance at meetings. An ability to influence the meeting agenda, having access to meeting documents, or being able to introduce documents would be of greater benefit.

As far as the PPA is concerned, the TCA contains greater limitations as it is only open to Members of the UK Parliament and would thus exclude AMs, MLAs or MSPs as full members. The current observer status is probably the only achievable status. However, greater information flow and transparency might be unilaterally achieved by the UK. Furthermore, the UK delegation currently features three MPs representing Scottish constituencies and one each representing Wales and Northern Ireland. Greater regional balance could perhaps be achieved in this regard.¹⁴ Greater involvement of observers at meetings of the PPA, e.g. in terms of speaking rights, would need to be agreed with the EU, however.

5. Comparative examples

a) Switzerland

A useful comparison may be drawn with Switzerland, which is not a Member State. Its relations with the EU are governed by a large number of bilateral agreements, not entirely unlike the two agreements governing the UK-EU relationship. Switzerland is a federation and so the question of involving the Swiss cantons in the governance of EU-Swiss relations arises there too.¹⁵

Foreign policy is a federal competence. However, Article 55 of the Swiss Federal Constitution envisages an involvement of the cantons in certain situations:

1 The Cantons shall be consulted on foreign policy decisions that affect their powers or their essential interests.

2 The Confederation shall inform the Cantons fully and in good time and shall consult with them.

¹⁴ Note, however, that not all EU Member States are represented in the EU delegation.

¹⁵ Obviously, there are considerable differences between devolution (in essence parallel competences between the central and devolved level) and Swiss federalism where the cantons have certain exclusive competences.

3 The views of the Cantons are of particular importance if their powers are affected. In such cases, the Cantons shall participate in international negotiations in an appropriate manner.

This means that two situations must be distinguished depending on whether the powers (competences) of the cantons are affected or not. If they are not, the federation will inform them and consult with them. If they are, the federation must involve the cantons in the negotiations. In practice this means that the cantons are involved in the preparation of negotiations with the EU and they are represented in the Swiss delegations.¹⁶ Typically, the cantons will act in a concerted fashion here through the conference of canton governments,¹⁷ which adopts joint positions with a majority of 18 (out of 26).¹⁸

This gives the cantons some, but not decisive influence in Swiss European affairs. They must be informed and there is a formal process for making their views known, but the federation is not bound by these even if they concern matters falling within their exclusive competence.

b) Germany

Another example is Germany, which is a federal state and an EU Member State. EU competences and the competences of the German federal state are not aligned, which means that the EU sometimes legislates within the competence of the German *Länder* (states). Furthermore, even where there is an exclusive federal competence (the equivalent to a reserved matter in the UK's devolution settlement), the interests (be they only practical) of the *Länder* may be affected. This is recognised by the relevant provision in the German constitution (Basic Law). As can be seen in its wording, the Basic Law envisages a participation of the *Länder* governments (via the *Bundesrat* – Federal Council) with differing intensity depending on the intensity with which competences of the *Länder* are affected ranging from “participation in the decision making process”, to “taking into account”, to giving the *Länder* position “prime consideration” to ultimately ceding the representation of Germany at EU level to the *Länder*.

Article 23 (4) – (7) is worded as follows:

4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter or insofar as the subject falls within the domestic competence of the *Länder*.

(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the *Länder* are affected and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the *Länder*, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall receive prime consideration in the formation of the political will of the Federation; this process shall be consistent with the responsibility

¹⁶ <https://www.eda.admin.ch/missions/mission-eu-brussels/en/home/key-issues/cantons-role.html>.

¹⁷ <https://www.zh.ch/de/politik-staat/kanton/aussenbeziehungen/aussenpolitik.html>.

¹⁸ https://kdk.ch/fileadmin/redaktion/uber_uns/zweck_und_organisation/vereinbarung_kdk_2006-en.pdf.

of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the *Länder* concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the *Länder* designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.¹⁹

More details are contained in the Act on Cooperation between the Federation and the *Länder* in the affairs of the EU²⁰ and in administrative guidance.²¹ The latter spells out duties to share documents, including internal documents drawn up by the German EU representation and duties to consult in so far as the competences of the German Federal Council (which represents the *Länder* as an upper chamber of the federal parliament) are affected.

By contrast to the Swiss cantons, the German *Länder* do therefore have powers to veto initiatives that affect their competences. In this regard, the German model would certainly be one of a more robust involvement of the sub-state level.

This shows that there are different approaches to the involvement of the sub-state level in matters of EU governance. Again, both the Swiss and German approaches are entirely internally determined.

There is some criticism of this set-up as it is deemed to hamper effective policy formulation by the German state where EU affairs are concerned:²² it is said to be slow, so that German policy proposals often come too late to have any influence and – where no agreement can be reached internally – to result in Germany having to abstain on important issues.

These issues would also exist if the devolved parts of the UK were given greater decision-making powers with regard to the WA or TCA. However, these would be less problematic in practice: an inability to reach an internal compromise at UK level would not result in the UK voice not being heard (as is the case with a German abstention) because all decisions under the TCA and WA must be taken unanimously. Furthermore, there is not the same pressure to come to decisions as at the EU level: the TCA and WA are not designed to be dynamic, but largely static, so that decisions by the Joint Committee or Partnership Council will happen relatively rarely so that there would usually be enough time to come to a compromise.

¹⁹ https://www.gesetze-im-internet.de/englisch_gg/.

²⁰ Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union, <https://www.gesetze-im-internet.de/euzblg/BJNR031300993.html>.

²¹ https://www.verwaltungsvorschriften-im-internet.de/bsvwwbund_29101993_E05.htm.

²² <https://www.bpb.de/shop/zeitschriften/apuz/30626/die-koordination-der-deutschen-europapolitik/>

That said, it should be reiterated that the situations of Germany and Switzerland differ considerably from that in the UK: Germany is an EU Member State, the UK is not. Both Germany and Switzerland are federations, which the UK is not.

The point of drawing this comparison is therefore not to suggest using it as a blueprint for the participation of the devolved nations in the governance of UK-EU relations, but to demonstrate that a) a structured and agreed approach to questions of participation of sub-state entities in EU-relations is possible; b) that different levels of involvement are conceivable; c) that transparency and information flow can be ensured in a systematic way; and d) that all of this can be done by way of internal rules.