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The implications of EU withdrawal for the devolution settlement

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The implications of EU withdrawal for the devolution settlement

A paper by Professor Alan Page

Prepared for the
**CULTURE, TOURISM, EUROPE AND EXTERNAL
RELATIONS COMMITTEE**

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Joan McAlpine MSP, Convener of the Culture, Tourism, Europe and External Relations Committee



The week after the vote in the EU referendum to leave the European Union, the Committee initiated a number of pieces of work in order to better understand the implications of the vote for Scotland. One of these was to commission Professor Alan Page to conduct research into the implications of withdrawal for the devolution settlement. I am grateful to Professor Page for conducting this research, which the Committee is publishing as part of our ongoing inquiry work.

Since the vote, we have been investigating what Brexit will mean for Scotland, but we are still waiting for answers as to the kind of settlement that the Prime Minister and her Government hope to achieve. It is clear from this paper that, even with many EU powers likely to be reserved to Westminster, there will be a significant impact for Scotland. There is a lot for the Committee to consider and Professor Page's paper will be a useful guide for the Committee over the coming months.

Joan McAlpine MSP

A handwritten signature in black ink, appearing to read 'Joan McAlpine', with a long horizontal line extending to the right.

**Convener
European and External Relations Committee**

Professor Alan Page biography



Professor Alan Page LLB PhDⁱ was appointed Professor of Public Law in 1985. He was previously a senior lecturer in the Department of Public Law (1981-85), and a lecturer at the Universities of Wales Cardiff (1975-80) and Westminster (1974-75).

He was Deputy Principal, Research Governance (2011-2015) and Dean of the School of Law (2006-15), having previously been Head of the Department of Law (2004-2006 and 1985-95), Dean of the Faculty of Law (1986-89) and Head of the Department of Public Law (1981-86).

He has acted as a specialist adviser - to the Scottish Parliament's Scotland Bill Committee (2010-11), European and External Relations Committee, (2005-07) and Subordinate Legislation Committee (2004-06), the House of Lords and House of Commons Joint Committee on Financial Services and Markets (1998-99), and the House of Commons Select Committee on Scottish Affairs (1993-97); to the London Stock Exchange (1992-93) where he was responsible for rewriting the rules of the Exchange; and to the European Union, the Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights, and the United Nations in respect of many of the 'transition' countries of central and eastern Europe and the former Soviet Union.

He was a member of the Tax Law Review Committee (1994-2004) and the Scottish Law Commission's Advisory Group on the Law of the Foreshore and Seabed (2000-03); and the Scottish Higher Education Funding Council's Lead Assessor in Law (1995-96).

He is an Honorary Fellow of the Society of Advanced Legal Studies.

ⁱ [Professor Alan Page LLB PhD, University of Dundee](#)

Introduction

1. In discussing the implications of the UK's withdrawal from the EU for the devolution settlement, it is important to stress that the referendum vote on 23 June 2016 by itself did not change anything. The current position will therefore continue to apply until such time as the UK withdraws from the EU, the position thereafter depending on the terms of any future relationship between the UK and the EU. Until such time, therefore, as the UK withdraws from the EU:
 - EU law will continue to apply in Scotland as it will continue to apply in the rest of the UK (ECA 1972, s 2(1));
 - Acts of the Scottish Parliament will continue to be open to challenge on grounds of incompatibility with EU law (SA 1998, s 29(2)(d)). The Scotch Whisky Association case (alcohol minimum pricing) case is a current example;
 - The functions of the Scottish Ministers will continue to include observing and implementing obligations under EU law (SA 1998, ss 53(1),57(1)); and
 - Acts of members of the Scottish Government, including subordinate legislation, will continue to be open to challenge on grounds of incompatibility with EU law (SA 1998, ss 57(2)).
2. The implications of withdrawal may be discussed under the following heads:
 - The Scottish Parliament's legislative competence
 - The Scottish Ministers' executive competence
 - EU law in Scotland
 - Inter-governmental relations
 - Parliamentary scrutiny

The Scottish Parliament's legislative competence

3. In the absence of any amendment to the Scotland Act 1998, the UK's withdrawal from the EU would not affect the distribution of legislative competences between the UK and Scottish Parliaments: the distribution would remain as set out in the Scotland Act 1998, as amended by the Scotland Acts 2012 and 2016. What in some cases are largely notional devolved competences, however, because of the impact of EU membership, would for the first time become real competences. It would thus be open to the Scottish Parliament to legislate in the devolved policy or subject areas currently governed by EU law.

4. The appendix to this paper maps the reserved areas defined in Schedule 5 to the Scotland Act 1998 onto the EU competences set out in the EU Treaties (Articles 2-6 TFEU) in order to establish the policy responsibilities the Scottish Parliament would acquire in the absence of any amendment to the Scotland Act following the UK's withdrawal from the EU, the extent of the policy responsibilities acquired in practice depending on the terms of any future relationship between the UK and the EU.
5. The main conclusion that emerges from this analysis is that most existing EU competences are reserved to the UK Parliament. If we ask why that should be the case, the answer is to be found in the fact that the devolution settlement, like the European Union, is based on a 'single market' in goods, persons, services and capital. There is therefore a considerable degree of overlap between EU competences and reserved matters. The UK Parliament would thus acquire the majority of the policy responsibilities that would fall to the UK following withdrawal from the EU, including those in respect of the free movement of goods, persons, services and capital, and the negotiation and conclusion of trade agreements with non-EU countries.
6. The policy responsibilities that would fall to the Scottish Parliament are correspondingly few, the principal ones being in respect of justice and home affairs, agriculture, fisheries and the environment. In the latter three areas, the prospect is said to be one of increasing policy and legislative divergence between the nations and regions of the UK in the absence of a common EU framework, although the extent of international obligations has led some observers to question how much scope there would be for change in the environmental field (Environmental Audit Committee, EU and UK Environmental Policy HC (2015-16) 537). It may be therefore that adjustments will be made to the devolution settlement in order to prevent such divergences emerging. Any such adjustments would require the consent of the Scottish Parliament and would thus be a matter for agreement between the two governments.
7. Withdrawal also implies that Acts of the Scottish Parliament should no longer be open to challenge on grounds of incompatibility with EU law. The question that will arise here is whether an amendment to the Scotland Act to this effect also requires the consent of the Scottish Parliament.
8. Assuming that the Scotland Act was amended to this effect, the Scottish Parliament would no longer be obliged to act in accordance with EU law. Notwithstanding the absence of an obligation, it might nevertheless choose to do so in order, for example, to maintain access to EU markets, or for reasons of legislative or administrative convenience.
9. In terms of the day-to-day business of devolved government, however, the removal of the restrictions entailed by EU law is likely to be at least as significant as any new policy responsibilities the Scottish Parliament might acquire as a result of EU withdrawal. It would mean that legislative proposals would no longer need to be scrutinised for their compatibility with EU law. It would also mean that Acts of the

Scottish Parliament could no longer be blocked or their implementation delayed on grounds of incompatibility with EU law.

10. The fact that the majority of EU competences are reserved to the UK Parliament does not mean that MSPs will have no interest in them, but the nature of that interest and the means by which it might be pursued are outside the scope of this report.

The Scottish Ministers' executive competence

11. The implications of withdrawal for the Scottish Ministers' executive competence will again depend on the terms of any future relationship between the UK and the EU. In principle, however, the functions of the Scottish Ministers would no longer include observing and implementing obligations under EU law (SA 1998, ss 53(1), 57(1)). In addition, acts of members of the Scottish Government, including subordinate legislation made by members of the Scottish Government, would no longer be open to challenge on grounds of incompatibility with EU law (SA 1998, s 57(2)).

EU law in Scotland

12. There are two points of importance here. The first is that EU law will cease to apply in Scotland as it will cease to apply in the rest of the rest of the UK, subject to the terms of any future relationship with the EU. Simply repealing section 2(1) of the European Communities Act 1972, which gives effect to EU law in the UK, without more, however, would result in legal chaos. Under the proposed Great Repeal Bill, therefore, EU law will continue to be given effect in the UK including in Scotland until such time as fuller consideration can be given to the question of whether it should be replaced, amended or retained.
13. The second is that, as with the transposition of EU obligations since the UK joined the EU in 1973, it is difficult to see the relationship between EU law and UK law being unpicked without heavy reliance on subordinate legislation. Under the Scotland Act the power to make such legislation will be exercisable by the Scottish Ministers in areas of devolved competence (SA 1998, s 53(1)). The question that will arise is whether it should be exercisable by UK Ministers as well, as is currently the case with the transposition of EU obligations in the devolved areas (SA 1998, s 57(1)). This would then open up the possibility of relying on UK subordinate legislation in disentangling UK law from EU law, which in turn raises the question of Scottish parliamentary control over such legislation. At the moment there is no requirement of the Scottish Parliament's consent to UK subordinate legislation transposing EU obligations in the devolved areas; nor is the Parliament routinely informed about such legislation. Were obligations to be transposed by UK Act of Parliament the Scottish Parliament's consent would be required, but if they are transposed by subordinate legislation its consent is not required. The situation could thus arise in which the UK legislated extensively in areas devolved to

Scotland without seeking the consent of the Scottish Parliament as there would be no requirement of its consent in relation to subordinate legislation altering the effects of EU law in the devolved areas. In my view, this represents a significant potential gap in the framework of Scottish parliamentary control over UK law making in the devolved areas, which the Scottish Parliament should be alert to the need to close should UK Ministers be given the power to revise EU law in the devolved areas.

Inter-governmental relations

14. In terms of inter-government relations, the initial focus will be on the arrangements for involving the Scottish Government in the formulation of a 'common UK approach' to the withdrawal negotiations. Thereafter, the focus will switch to the successor to the current JMC(E) arrangements and the relatively untested arrangements under the Concordat on International Relations.

Parliamentary scrutiny

15. Withdrawal will represent a major challenge for the Scottish Parliament with the potential to detract from other inquiry and scrutiny work at a time when it is assuming new responsibilities under the Scotland Act 2016. As well as the withdrawal negotiations, UK matters that will be of particular interest to the Parliament will include the withdrawal legislation as well as legislation providing for the legal consequences of any future relationship with the EU. The Parliament itself will need to put in place new regulatory regimes for agriculture and fisheries. And then there will be the legislation, UK as well as Scottish, much of it secondary, disentangling UK law from EU law, where the scale of the challenge will depend in part on the approach adopted by the Scottish Government - will it be content to follow the UK or EU approach or will it prefer to devise its own approach? - as well as on how quickly it is committed to unpicking the relationship. Among the committees that will be affected are the Delegated Powers and Law Reform Committee, the Environment, Climate Change and Land Reform Committee, the European and External Relations Committee, the Justice Committee, and the Rural Economy and Connectivity Committee, with the demands on the European and External Relations Committee being particularly heavy from the outset.

Alan Page
31 August 2016

Appendix - Devolved EU competences

This appendix maps the reserved matters defined in Schedule 5 to the Scotland Act 1998 onto the EU competences set out in the EU Treaties (Articles 2-6 TFEU) in order to establish the policy responsibilities the Scottish Parliament would acquire in the absence of amendment to the Scotland Act following the UK's withdrawal from the EU, the extent of the responsibilities acquired in practice depend on the terms of any future relationship between the UK and the EU. It is based on the Scotland Act in force on 31 August 2016.

The EU Treaties adopt a threefold classification of EU competences as exclusive, shared and supporting (Article 2 TFEU). In areas of exclusive competence, such as the customs union and common commercial policy, only the EU may legislate and adopt legally binding acts, the member states being able to do so only if so empowered by the EU or for the implementation of EU acts (Article 2(1) TFEU). In areas of shared competence, such as the single market, environment and energy, both the EU and the member states may act, but action by the EU has the effect of pre-empting action by the member states (Article 2(2) TFEU). In areas of supporting competences, such as culture, tourism and education, both the EU and the member states may act, but action by the EU does not prevent the member states from taking action of their own (Article 2 (5) TFEU).

Exclusive competences (Article 3 TFEU)

Customs Union (Article 3(1)(a) TFEU)

Governed by Articles 28-33 TFEU	EU law enables goods to move freely across the EU by establishing a customs union and a free trade area. This means that no customs duties (taxes) or other, unjustified restrictions are applied to the movement of goods within the EU, and that there is consistent application of customs rules and tariffs by all member states for goods imported from outside the EU.
Reserved or devolved?	Reserved: SA 1998, sch 5, pt II, s C5 (import and export control)
Implications of withdrawal for the Scottish Parliament's legislative competence	None

Establishing the competition rules necessary for the functioning of the internal market (Article 3(1)(b) TFEU)

Governed by Articles 101-109 TFEU	EU competition rules, including on state aids and mergers, are a fundamental part of the proper functioning of the single market. They help ensure a level playing field undistorted by anti-competitive practices.
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Reserved or devolved?	The regulation of anti-competitive practices and agreements, abuse of a dominant position, and monopolies and mergers are reserved, subject to an exception in favour of the regulation of certain practices in the legal profession (SA 1998, sch 5, pt II, s C3). State aid is not reserved (SA 1998, sch 5, pt III, para 4), but is subject to the concordat on financial assistance to industry.
Implications of withdrawal for the Scottish Parliament's legislative competence	Competition: none other than in respect of the regulation of certain practices within the legal profession. Financial assistance to industry: the EU state aid rules will no longer apply

Monetary policy for member states whose currency is the euro (Article 3(1)(c) TFEU)

Not applicable and in any event reserved (SA 1998, sch 5, pt II, s A1 (fiscal, economic and monetary policy)).

Conservation of marine biological resources under the common fisheries policy (Article 3(1)(d) TFEU)

See fisheries

Common commercial policy (Article 3(1)(e) TFEU)

Governed by Articles 206-207 TFEU	The rules governing foreign commercial relations, in particular foreign trade and foreign direct investment.
Reserved or devolved?	Reserved with exceptions for observing and implementing international obligations and assisting UK Ministers, including in relation to the regulation of international trade (SA 1998, sch 5, pt I, para 7).
Implications of withdrawal for the Scottish Parliament's legislative competence	None

The conclusion of international agreements (Article 3(2) TFEU)

Governed by Articles 206-207 TFEU	Covers the conclusion of international agreements when their conclusion is provided for in a legislative act of the EU or is necessary to enable the EU to exercise its internal competence, or in so far as their conclusion may affect common rules or alter their scope.
Reserved or devolved?	Reserved with exceptions for observing and implementing international obligations and assisting UK Ministers, including in relation to

	the regulation of international trade (SA 1998, sch 5, pt I, para 7).
Implications of withdrawal for the Scottish Parliament's legislative competence	None

Shared competences (Article 4 TFEU)

Internal market (Article 4(2)(a) TFEU)

The internal market constitutes 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties' (Article 26(2) TFEU).

The free movement of goods is governed by Articles 28-37 and 110-113 TFEU	
Reserved or devolved?	The subject-matter of the Import, Export and Customs Powers (Defence) Act 1939 is reserved, as is the prohibition and regulation of the import and export of endangered species of animals and plants, with exceptions for: (a) the control of the movement into and out of Scotland of food, animals, animal products, plants and plant products for the purposes of protecting human, animal or plant health, animal welfare or the environment or observing or implementing EU obligations under the Common Agricultural Policy; and (b) the control of the movement into and out of Scotland of animal feeding stuffs, fertilisers and pesticides for the purposes of protecting human, animal or plant health or the environment (SA 1998, sch 5, pt II, s C5).
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would no longer be required to act in accordance with EU rules in the excepted matters, but might choose to do so in order, for example, to maintain access to EU markets. See also subjects allied to agriculture / food safety below.

Intellectual Property

Article 118 (TFEU)	The free movement of goods is facilitated by EU rules on copyrights, trademarks and designs, and intellectual property enforcement which are intended to ensure that business and creators receive uniform protection for their intellectual property in each member state.
Reserved or devolved?	Intellectual property is reserved, with an exception for plant breeders' rights in view of the devolution of agricultural matters generally (SA 1998, sch 5, pt II, s C4).
Implications of withdrawal for the Scottish Parliament's legislative competence	None other than in respect of plant breeders' rights.

Technical Standards

The Technical Standards Directive (Directive 2015/1535/EU).	In addition to the rules contained in the EU Treaties, the Technical Standards Directive is one of the EU's tools for preventing the adoption of national measures that create new barriers to trade.
Reserved or devolved?	Technical standards and requirements in relation to products in pursuance of an obligation under EU law are reserved, with exceptions for food, agricultural and horticultural produce, fish and fish products, seeds, animal feeding stuffs, fertilisers and pesticides (SA 1998, sch 5, pt II, s C8).
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would no longer be required to act in accordance with EU rules in respect of the excepted matters, but might choose to do so in order, for example, to maintain access to EU markets. The obligation to notify the EU Commission about new technical standards before those standards are adopted would also fall away.

Free movement of services and freedom of establishment

Freedom of establishment is governed by Articles 45-55 TFEU, the freedom to provide services by Articles 56-62 TFEU. Supplementary rules include the Services Directive (Directive 2006/123/EC) and the Recognition of Professional Qualifications Directive (Directive 2005/36/EC).	The free movement of services denotes the right to provide services in another member state on a temporary basis, freedom of establishment the right to permanently set up a business in another member state.
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Reserved or devolved?	<p>Financial services and financial markets are reserved (SA 1998, Sch 5, pt II, ss A3 and A4).</p> <p>Telecommunications and broadcasting are reserved with an exception in the case of the former for the subject-matter of Part III of the Police Act 1997 (authorisation to interfere with property etc.) (SA 1998, sch 5, pt II, ss C10 and K1)).</p> <p>The regulation of certain professions is reserved: architects, auditors, and some but not all of the health professions (SA 1998, sch 5, pt II, ss G1-G3).</p>
Implications of withdrawal for the Scottish Parliament's legislative competence	<p>Financial services: none</p> <p>Telecommunications and broadcasting: none</p> <p>Regulation of the professions: none in respect of the professions whose regulation is reserved. Withdrawal may have implications for the regulation of other professions insofar as their regulation may have to be adjusted, or be open to adjustment, in the light of withdrawal.</p>

Public Procurement

	<p>EU law requires public bodies to follow transparent processes when awarding contracts.</p>
Reserved or devolved?	<p>Public procurement is not reserved.</p> <p>The Public Contracts (Scotland) Regulations 2015, SSI 2015/446, gives effect in Scots law to: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014; Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulation and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended; and Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.</p> <p>The Utilities Contracts (Scotland) Regulations 2016, SSI 2016/49, and the Concession Contracts (Scotland) Regulations 2016, SSI 2016/65, give effect to Directive 2014/25/EU of</p>

	the European Parliament and of the Council of 26 February 2014, and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, which regulate the award of utilities contracts and concession contracts respectively.
Implications of withdrawal for the Scottish Parliament's legislative competence	It would be open to the Scottish Parliament to revise the existing rules governing the award of public contracts.

Free movement of capital

Free movement of capital is governed by Articles 63-66 TFEU	Means that businesses and individuals in the UK can invest in property, raise capital and make payments anywhere across the EU.
Reserved or devolved?	Reserved by a combination of SA 1998, sch 5, pt II, ss AI (fiscal, economic and monetary policy) and C5 (import and export control).
Implications of withdrawal for the Scottish Parliament's legislative competence	None

Free movement of persons

Governed by Articles 21 and 45 TFEU and rules adopted under the EU Treaties, including Directive 2004/38 EC.	EU law gives UK and other EU nationals rights to enter, live and work in another member state.
Reserved or devolved?	The free movement of persons within the EEA is reserved by SA 1998, sch 5, pt II, s B6 (immigration and nationality).
Implications of withdrawal for the Scottish Parliament's legislative competence	None

Social policy, for the aspects defined in this Treaty (Article 4(2)(b) TFEU)

Articles 19 and 151-161 TFEU	The EU has agreed rules that cover social and employment policy, health and safety, non-discrimination and equality.
Reserved or devolved?	Employment and labour law: employment and industrial relations is reserved with an exception for the subject-matter of the Agricultural Wages (Scotland) Act 1949 (SA 1998, sch 5, pt II, s H1). Health and safety at work: health and safety is reserved with exceptions for some elements of fire safety (SA 1998, sch 5, pt II, s H2).

Implications of withdrawal for the Scottish Parliament's legislative competence	Employment and labour law: none Health and safety at work: None other than in respect of the exceptions for fire safety.
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Non-discrimination and equality

Article 19 TFEU and Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC	
Reserved or devolved?	Equal opportunities is reserved with exceptions for: (a) the encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements; (b) the imposition of duties on office-holders in the Scottish Administration, or Scottish public authorities with mixed functions or no reserved functions, to make arrangements with a view to securing that their functions are carried out with due regard to the need to meet the equal opportunities requirements; and (c) the imposition of duties on cross-border public authorities to make arrangements with a view to securing that their Scottish functions are carried out with due regard to the need to meet the equal opportunities requirements (SA 1998, sch 5, pt II, s L2).
Implications of withdrawal for the Scottish Parliament's legislative competence	None other than in respect of the exceptions listed (as at 31 August 2016)

Data Protection

Article 16 TFEU and Directive 95/46/EC, which will be replaced by the General Data Protection Regulation	EU law gives certain rights to individuals in the EU whose personal data is being collected, stored and used or otherwise processed by others.
Reserved or devolved?	Reserved (SA 1998, sch 5, pt II, s B2).
Implications of withdrawal for the Scottish Parliament's legislative competence	None

Economic, social and territorial cohesion (Article 4(2)(c) TFEU)

Governed by Articles 162-164 and 174-177 TFEU	EU cohesion policy aims to reduce disparities between regions and support economic development. The policy is mainly delivered through the structural and cohesion funds. The UK is eligible for funding from the European Regional Development Fund and the European Social Fund.
Reserved or devolved?	Reserved in part (SA 1998 sch 5, pt II, s C13 (designation of assisted areas)).
Implications of withdrawal for the Scottish Parliament's legislative competence	None but implications for regional development funding.

Agriculture and fisheries, excluding the conservation of marine biological resources (Article 4(2)(d) TFEU)

Articles 38-44 TFEU	EU agricultural policy comprises the establishment and development of a common agricultural market (market regulation policy), agricultural structural policy (rural development), the harmonisation of laws in the agricultural sector (e.g. food law, animal health and phytosanitary policy) and quality policy for agricultural products.
Reserved or devolved?	Agriculture is devolved. There are also a number of agriculture-related exceptions (SA 1998, sch 5, pt II, ss C5 (import and export control) and C8 (product standards, safety and liability)).
Implications of withdrawal for the Scottish Parliament's legislative competence	Withdrawal would create a major legislative and policy gap, which the Scottish Parliament would need to fill

Subjects allied to agriculture - Animal health and welfare

	The EU has agreed rules to protect animal health and ensure the well-being and humane treatment of animals.
Reserved or devolved?	Animal health and welfare is devolved.
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would no longer be obliged to act in accordance with EU rules in animal health matters but might do so in order, for example, to maintain access to EU markets.

Subjects allied to agriculture - Food safety

	EU rules on food safety cover areas such as the use of additives and other food enhancers, and limit the level of contaminants in food.
Reserved or devolved?	Devolved (SA 1998, sch 5, pt II, s C8) (product standards, safety and liability).
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would no longer be obliged to act in accordance with EU rules in food safety matters but might do so in order, for example, to maintain access to EU markets.

Subjects allied to agriculture - Food labelling and food composition

Reserved or devolved?	Food labelling is devolved (SA 1998, sch 5, pt II, s C8) (product standards, safety and liability), as is food composition.
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would no longer be obliged to act in accordance with EU rules in other food related matters but might do so in order, for example, to maintain access to EU markets.

Subjects allied to agriculture - Fisheries

Regulation (EU) No 1380/2013 on the conservation and sustainable conservation of fisheries resources under the common fisheries policy	The Common Fisheries Policy regulates all fishing in waters of EU member states, and EU member states' boats that fish outside those waters.
Reserved or devolved?	Devolved (SA 1998, sch 5, pt II, s C6 (sea fishing)).
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would acquire responsibility for fisheries policy, but in the context of the continued reservation of international relations (SA 1998, sch 5, pt I, para 7(1)).

Environment (Article 4(2)(e) TFEU)

Articles 191-193 TFEU	EU environmental policy covers, among other things, air pollution, greenhouse gas emissions and the emission of ozone-depleting substances; improving and protecting the quality and cleanliness of drinking water and clean bathing water; promoting waste reduction, re-use and recycling; the marketing and use of chemicals, pesticides and genetically modified organisms; and protecting wildlife and vulnerable habitats and species.
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Reserved or devolved?	Devolved
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would no longer be obliged to act in accordance with EU rules in environmental matters.

Subjects allied to Environment - Climate change

Article 191(1) TFEU	The EU has put in place a strategy for tackling climate change
Reserved or devolved?	Devolved save insofar as a matter of international obligations (SA 1998, sch 5, pt I, para 7).
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would be free to pursue its own policy subject to any other international obligations to which the UK is subject.

Consumer protection (Article 4(2)(f) TFEU)

Article 169 TFEU	The EU contributes to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
Reserved or devolved?	Consumer protection is reserved, subject to exceptions in favour of consumer advocacy and advice, and food safety and consumer protection (SA 1998, sch 5, pt II, s C7).
Implications of withdrawal for the Scottish Parliament's legislative competence	None other than in respect of the exceptions listed where the Scottish Parliament would no longer be obliged to act in accordance with EU rules, but might do so in respect of food safety and consumer protection so in order to maintain access to EU markets.

Transport (Article 4(2)(g) TFEU)

Articles 90-100 TFEU	The EU has sought to create a single market in transport services within the EU so as to introduce greater competition. It has also agreed common rules and standards to protect consumer rights, ensure safety and protect the environment.
Reserved or devolved?	Transport is reserved subject to a number of exceptions, which mainly relate to transport within Scotland, and which for the most part are not pre-empted by EU law (SA 1998, sch 5, pt II, ss E1-E5).

Implications of withdrawal for the Scottish Parliament's legislative competence	None
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Trans-European networks (Article 4(2)(h) TFEU)

Articles 170-172 TFEU	In the areas of transport, telecommunications and energy infrastructures
Reserved or devolved?	Transport, telecommunications and energy are all reserved with exceptions which are not applicable to trans-European networks.
Implications of withdrawal for the Scottish Parliament's legislative competence	None

Energy (Article 4(2)(i) TFEU)

Article 194 TFEU	EU energy policy operates in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment
Reserved or devolved?	Extensive reservations in respect of electricity, oil and gas, coal, nuclear energy, and energy conservation with exceptions which include the subject-matter of Part 1 of the Environmental Protection Act 1990 (pollution control) (SA 1998, sch 5, pt II, ss D1-D5). Renewable energy on the other hand is not reserved.
Implications of withdrawal for the Scottish Parliament's legislative competence	The Scottish Parliament would no longer be obliged to act in accordance with EU rules in energy matters.

Area of freedom, security and justice - commonly referred to as 'justice and home affairs' - (Article 4(2)(j) TFEU)

New EU laws in this area do not apply to the UK unless it decides to participate, in accordance with the Treaties (Protocols (No 19) and (No 21)).

The process of 'opting in' (Protocol (No 21)) applies to justice and home affairs measures, 'opting out' (Protocol (No 19)) to 'Schengen building measures' in the fields of police and judicial cooperation.

Asylum and non-EU migration

Articles 77-80 TFEU	The TFEU envisages a common policy on asylum, immigration and external border control
Reserved or devolved?	Reserved (SA 199, sch 5, pt II, s B6).
Implications of withdrawal for the Scottish Parliament's legislative competence	None

Police and criminal justice

Articles 82-89 TFEU	Most of the rules in this area exist to facilitate cooperation between law enforcement agencies, investigators, prosecutors and judges when handling cross-border crimes in the EU. There are also some minimum standards for criminal law and procedure.
Reserved or devolved?	Devolved other than in respect of national security and terrorism (SA 1998, sch 5, pt II, s B8).
Implications of withdrawal for the Scottish Parliament's legislative competence	None but the Scottish Parliament might wish to retain the benefits of the current arrangements.

Civil judicial co-operation

Article 81 TFEU	The EU has agreed a set of rules aimed at resolving cross-border issues that may arise in civil, commercial and family law disputes.
Reserved or devolved?	Devolved
Implications of withdrawal for the Scottish Parliament's legislative competence	None but again the Scottish Parliament might wish to retain the benefits of the current arrangements.

Common safety concerns in public health matters (Article 4(2)(k) TFEU)

Article 168 TFEU	The EU's role in public health is mostly limited to facilitating cooperation on cross-border health issues like infectious diseases and supporting member states in promoting public health objectives. It has also agreed rules in certain areas which promote public health. These include: medicines and medical devices; organs, blood, tissue and cells; and tobacco, smoking and alcohol.
Reserved or devolved?	Some of these matters, e.g. medicines, are reserved (SA 1998, sch 5, pt II, s J4 (medicines, medical supplies and poisons)).
Implications of withdrawal for the Scottish Parliament's legislative competence	None insofar as reserved.

Research, technological development and space (Article 4(3) TFEU)

Articles 179-190 TFEU	More accurately characterised as a 'parallel' competence rather than a 'shared' competence: in contrast to other shared competences the exercise of the EU's competence does not prevent member states from exercising theirs.
Reserved or devolved?	The regulation of activities in outer space is reserved (SA 1998, sch 5, pt II, s L6), research and technological development devolved.
Implications of withdrawal for the Scottish Parliament's legislative competence	The most important implication of withdrawal is that Scotland would no longer be able to participate in EU programmes such as Horizon 2020, but see Article 186 TFEU (cooperation with third countries).

Development cooperation and humanitarian aid (Article 4(4) TFEU)

Articles 208-215 TFEU Supporting competences (Article 6 TFEU)	More accurately characterised as a parallel competence rather than a shared competence: in contrast to other shared competences the exercise of the EU's competence does not prevent member states from exercising theirs.
Reserved or devolved?	International relations are reserved with an exception for assisting UK Ministers with international development assistance and co-operation (SA 1998, sch 5, pt I, para 7)..
Implications of withdrawal for the Scottish Parliament's legislative competence	None

Supporting competences (Article 6 TFEU)

The legislative competence of the Scottish Parliament is not affected in the following areas as action by the EU does not prevent the member states from taking action of their own (Article 2(5) TFEU).

Protection and improvement of human health	(Article 6(a) TFEU) See public health above
Industry	Article 6(b) TFEU & Article 173 TFEU
Culture	Article 6(c) TFEU & Article 167 TFEU
Tourism	Article 6(d) TFEU & Article 195 TFEU
Education, vocational training, youth and sport	Article 6(e) TFEU & Articles 165-166 TFEU

Civil protection	Article 6(f) TFEU & Article 196 TFEU
Administrative cooperation	Article 6(g) TFEU & Article 197 TFEU

Summing up

The main conclusion that emerges from this analysis is that most existing EU competences are reserved to the UK Parliament. This reflects the fact that the devolution settlement, like the EU, is based on a 'single market' in goods, persons, services and capital. The UK Parliament would therefore acquire the majority of the policy responsibilities that would fall to the UK following withdrawal from the EU, including those in respect of the free movement of goods, persons, services and capital, and the negotiation and conclusion of trade agreements with non-EU countries.

The policy responsibilities that would fall to the Scottish Parliament are correspondingly few, the principal ones being in respect of justice and home affairs, agriculture, fisheries and the environment. In the latter three areas, the prospect is said to be one of increasing policy and legislative divergence between the nations and regions of the UK in the absence of a common EU framework, although the extent of international obligations has led some observers to question how much scope there would be for change in the environmental field (Environmental Audit Committee, EU and UK Environmental Policy HC (2015-16) 537). Withdrawal could, however, call into question the UK single market in e.g. agricultural produce, unless the UK as a whole continues to follow EU rules or common rules are otherwise adopted. It may be therefore that adjustments will be made to the devolution settlement in policy areas such as agriculture in order to prevent such fragmentation occurring.

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