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C H A N C E



BREXIT

EUROPEAN UNION
(WITHDRAWAL) BILL
AND THE DEVOLUTION
DIMENSION



— **THOUGHT LEADERSHIP**

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BREXIT: EUROPEAN UNION (WITHDRAWAL) BILL AND THE DEVOLUTION DIMENSION

The Scottish and Welsh devolved administrations have said that they will refuse their consent to the Government's Repeal Bill. Refusal would be a political gambit rather than a legal one, but no less significant for that. But the Bill, or something like it, must be passed if the UK's legal system is to function after Brexit. Politics, even of devolution, must not be allowed to block critical measures.

Key issues

- The Government proposes that retained EU law should be a UK responsibility, not a devolved one
- Under the Sewel convention, the UK Government will ask the devolved administrations for their consent to the Bill
- Refusal of consent will not, legally, stop Parliament passing the Bill
- Overriding the devolved administrations will intensify the politics of the Bill

The European Union (Withdrawal) Bill (formerly known as the (Great) Repeal Bill) will, if and when passed by Parliament, convert into UK law most EU law applicable in the UK on exit day. But the UK is not the unitary state it once was. The UK now has devolved administrations in Scotland, Wales and Northern Ireland. Unsurprisingly, some of these devolved administrations consider that the UK's renewed control over what used to be EU law should fall to them rather than to the UK Parliament and the UK Government. Any fight for control of retained EU law has been intensified by the Government's statement that it will seek the consent of the devolved authorities to the Bill. This raises a legal question as to whether the probable refusal of consent by one or more devolved authorities would block the Bill but, more significantly, it raises the political stakes over the Bill.

Constitutional fundamentals

The basic rule of UK constitutional law is that Parliament in Westminster has unlimited legislative authority. For most practical purposes, Parliament can do whatever it wants. However, since 1998, the UK has been edging towards federalism through the creation of the Scottish Parliament and the National Assembly for Wales (Cynulliad Cenedlaethol Cymru) and the re-establishment of a Northern Irish Assembly, each of which has legislative power for their countries over certain matters. For example, the Scottish Parliament has unlimited legislative competence, save for those matters that are excluded, while the Welsh Assembly has legislative competence only over those areas that are expressly set out in

its legislation, such as agriculture, culture and economic development (though, when the relevant provisions are brought into force, the Wales Act 2017 will place the Welsh Assembly in the same position in this regard as the Scottish Parliament).

The devolved administrations only exist because the UK Parliament has legislated them into existence, and they only have such powers as the UK Parliament has chosen to bestow upon them. In bringing about devolution,

the UK Parliament was careful to assert its continuing supremacy. So, for example, sections 28 and 29 of the Scotland Act 1998 says that the Scottish Parliament may pass laws for Scotland on matters within its competence, but the Act adds in section 28(7) that this "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland" (section 107(5) of the Government of Wales Act 2006 is to the same effect and section 5(6) of the Northern Ireland Act 1998 is similar).

It makes no sense for the UK Parliament and the devolved legislatures both to pass potentially rival laws on the same topic, and doing so would undermine the purpose of devolution. As a result, what is referred to as the Sewel convention was established in 2001 in a memorandum of understanding between the UK Government and the three devolved administrations. This has now found its way into section 28(8) of the Scotland Act 1998 and section 107(6) of the Government of Wales Act 2006 by tacking the wording in the box on the right on to the assertions of continuing UK Parliamentary supremacy set out in those Acts. (These Sewel provisions were

added to the Scottish and Welsh devolution legislation in 2016 and 2017 respectively; there is as yet no legislative equivalent for Northern Ireland.)

As a result of the Sewel convention, if the UK Government wishes to legislate on matters within the competence of a devolved legislature or that affect its competence, the Government generally asks for the devolved authority's consent. This is given by a legislative consent motion voted on by the relevant assembly.

Although the Sewel convention now has a statutory incarnation, it remains a political convention, not a legal requirement. In *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the Supreme Court decided that even if the UK Parliament were to legislate for a devolved region on a matter within the relevant devolved authority's competence without first obtaining consent, the law would still be legal, valid and binding. The courts will not ask themselves with whether the legislation has been passed in "normal" circumstances.

Devolution and the EU

The UK's membership of the EU places an obligation on the UK as a whole to comply with EU law, including in areas within the competences of the devolved authorities. As a result, sections 108(6)(c) of the Government of Wales Act 2006, 29(2)(d) of the Scotland Act 1998 and 6(2)(d) of the Northern Ireland Act 1998 provide that any measures that are incompatible with EU law lie outside the competence of the devolved legislatures. Where the EU has exercised its competence, the devolved authorities are excluded.

Where EU law on a matter that is within the competence of a devolved authority requires implementation (usually of EU directives, which are most commonly implemented under section 2(2) of the European Communities Act 1972), that implementation falls within the responsibility of the devolved administrations (eg section 53 of the Scotland Act 1998 and section 80 of the

Government of Wales Act 2007), though implementation is on occasions carried out on a UK-wide basis.

Devolution, the EU and Brexit

The Government's European Union (Withdrawal) Bill (see our briefing entitled *Brexit: European Union (Withdrawal) Bill published*) will, if passed, repeal the European Communities Act 1972, thereby expunging from UK law the large amount of EU law that is dependent on the Act. However, in order to avoid gaps in the UK's legislative acquis, the Bill will convert into UK domestic law most EU law applicable in the UK immediately prior to the UK's exit day.

As a result of Brexit and the resulting removal of EU law as such from the UK, the limitations regarding EU law on the competences of the devolved legislatures will disappear (indeed, the Bill expressly removes these limitations: clauses 11(1)(a), 11(2)(a) and 11(3)(a)).

Faced with this, the Government (through the Bill) had a choice between, essentially, two options:

- It could allow the devolved authorities to take over all areas of law within their competences that are currently occupied by EU law. This would require the devolved authorities to exercise the power to prevent, remedy or mitigate any failure in retained EU law within their competence to operate effectively and any other deficiency in retained EU law as a result of the UK's withdrawal from the EU. The devolved authorities could also then legislate as and when they saw fit to change any retained EU law within their competences.
- It could place retained EU law outside the competence of the devolved authorities. This would leave as matters solely for the UK Parliament and UK Government both the modification of retained EU law to ensure that it operates effectively or to cure other deficiencies and any subsequent legislative change to retained EU law.

The Sewel convention, as enacted in section 28(8) of the Scotland Act 1998

"But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [Scottish] Parliament."

The United Kingdom

Population

United Kingdom: 65.6m England: 55.3m (84%)

Scotland: 5.4m (8%)

Wales: 3.1m (5%)

Northern Ireland: 1.9m (3%)

(Office for National Statistics estimates for mid-2016)

Land area

United Kingdom: 248,532 km²

England: 132,938 km² (53%)

Scotland: 80,239 km² (32%)

Wales: 21,225 km² (9%)

Northern Ireland: 14,130 km² (6%)

The Government's choice, set out in the Bill, is the second of these options. Rather than allowing Brexit to expand in practice the competences of the devolved authorities, the Bill proposes to replace the devolved authorities' inability to act in areas occupied by EU law with an inability to act in areas of EU law retained as UK law under the Bill unless an Order in Council is made passing competence over particular areas of retained EU law to a devolved authority (there is an exception if any modification of retained EU law would, before Brexit, have been within a devolved authority's competence, in which case it will remain within its competence). The devolved authorities would therefore have only a limited role in adapting retained EU law to ensure it operates effectively or to cure deficiencies. For example, the devolved authorities will not be able to adapt retained EU law found in regulations (eg to end reciprocal arrangements with the EU).

If the UK Government were to decide that control over specific areas of retained EU law should pass a devolved authority, thereby expanding its competence, a legislative consent motion would be sought from the relevant devolved authority. This would likely be a formality: what self-respecting devolved authority would reject the conferral of extra powers?

More significantly, the Government's Explanatory Notes to the Bill say that the Government proposes also to seek legislative consent from the devolved administrations for the main provisions of the Bill, including those dealing with "the preservation and conversion of EU law", the "replication of the EU law limit on the devolved institutions and the power to vary that limit", and the repeal of the European Communities Act 1972. The reasons offered are that some of the laws that will be converted from EU law into domestic UK law would be within the competence of the devolved administrations, and because the Bill will remove a limitation on the competence of the devolved administrations, namely that relating to EU law.

EU law currently applies more or less uniformly across the whole of the UK. The Government argues that keeping power

over retained EU law in Westminster and Whitehall is "intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed". Where common policy approaches are not required (ie because there are no adverse consequences from English, Scottish, Welsh and Northern Irish laws potentially being different), the Government proposes to "release" those areas to the devolved authorities. The Government stressed the need to ensure that "no new barriers to living and doing business within the UK are created" because this is "vital if we are to protect the UK internal market, and ensure that we have the ability to strike the best trade deals around the world" (some might see irony in this plea for the preservation of the UK's single market when the UK is leaving the EU's far larger version).

The Government clearly expected outraged fulminations from at least some of the devolved administrations as a result of its proposal to exclude retained EU law from their competence. In "The Repeal Bill, Factsheet No 5: Devolution" issued by the Department for Exiting the European Union alongside the Bill, the Government asked itself the following rhetorical question: "Aren't you just re-reserving powers? Isn't this a Westminster land grab?" The Government's answer was that the Bill does not change the devolved legislatures' current competence: they do not have competence now over areas occupied by EU law; and they will not have competence after Brexit (though they may gain competence over time as selected areas are released to them).

The Government's expectation was rapidly fulfilled. On the day that the Bill was published, the First Ministers of Scotland and Wales (from the Scottish National Party and the Labour Party respectively) issued a joint statement condemning the Bill's failure to "return powers from the EU to the devolved administrations, as promised. It returns them solely to the UK Government and Parliament, and imposes new restrictions on the Scottish Parliament and the National Assembly for Wales". This, said they, was a "naked power-grab, an attack on the founding principles of devolution

and could destabilise our economies”, though they recognised that “common frameworks to replace EU laws across the UK may be needed in some areas.” The First Ministers said that they “cannot recommend that legislative consent is given to the Bill as it currently stands”.

What happens next?

One could debate the accuracy of the various assertions made by the UK Government and by the Scottish and Welsh First Ministers and, indeed, the consistency of the UK Government’s position, but the row over the Bill was nothing if not predictable.

Politically, the Government could have refused to seek legislative consent from the devolved administrations for the Bill on the ground that withdrawal from the EU is not “normal” in any sense of that word or, indeed, that the Bill itself will not change substantively the devolved authorities’ competences (DExEU’s argument rather than that in the Bill’s Explanatory Notes). But having chosen to seek the consent of the devolved legislatures, the Government will be conscious of the need for a plan if, as seems likely, a legislative consent motion fails to find favour in at least one of the devolved authorities.

If legislative consent is not forthcoming, the Government could press on regardless – legally, the UK Parliament can do so – but the political eruptions that would follow would be Vesuvian in comparison to the garden fireworks seen so far. At the least, it would risk re-fuelling demands in Scotland for a second independence referendum, demands that had been subdued by the decline in the SNP’s vote share in June’s general election.

Those of a Machiavellian disposition may wonder if the UK Government is tacitly laying a bargaining chip, even a poisoned chalice, before the devolved administrations in the form of the Bill. Perhaps the Government is prepared

eventually to concede that at least some aspects of retained EU law could fall into the competence of the devolved authorities, but only in return for their support for the Bill – the backing of the SNP’s 35 Members of Parliament could prove invaluable if, for example, the Labour Party is united in its opposition to the Bill and is able separate a few Conservative backbenchers from their party ties.

The Government might also wonder whether the task required of the devolved administrations if retained EU law were to be released to them by the Bill is actually within their capacity. The devolved administrations would need to introduce measures to prevent, remedy or mitigate any failure of retained EU law to operate effectively and any other deficiency in retained EU law resulting from Brexit. This task is huge for the UK Government; the task would be somewhat less for the devolved administrations because of their more limited competences, but it remains a monumental undertaking, and one they would need to carry out with significantly fewer resources than are available to the UK Government. Would the devolved administrations have any real choice but in most cases to follow the UK Government’s lead subject, perhaps, to a few symbolic exceptions?

Conclusion

Whatever happens to the Bill, the politics – not least the politics of devolution – surrounding it will be intense and potentially bloody. But it is important that, if Brexit is to happen, there must be a European Union (Withdrawal) Act of some sort, whether in the form currently put forward in the Government’s Bill or something like it. If there is no Act, there will be unacceptable gaps in the UK’s legislative acquis on the day the UK leaves the EU. It is equally necessary for retained EU law to be adapted to cure problems caused by Brexit. Political manoeuvring is inescapable, even necessary, in a democracy, but it should not be allowed to obstruct essential measures.

The Bill is a ‘naked power-grab, an attack on the founding principles of devolution and could destabilise our economies’

—THE FIRST MINISTERS OF SCOTLAND AND WALES

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