The Institute for Government is a London-based think tank that works to improve the effectiveness of government across the UK. We have a strong interest and research track record on both Brexit and devolution. Below we set out our views on several of the central issues addressed by the committee in this important inquiry.

Introduction

It is broadly accepted that to deliver the result of the EU referendum, there is a need for enabling legislation that transposes EU law into domestic law in the UK, subject to changes necessary to ensure its operability after Brexit and to reflect the terms of the UK’s withdrawal agreement. That is the central purpose of the European Union (Withdrawal) Bill (‘the bill’).

The bill is opposed in its current form by the Scottish and Welsh Governments, and unless compromise is reached, the UK Government may seek to pass the bill without devolved consent, which would be an unprecedented development at odds with the spirit of devolution and a breach of the Sewel Convention in particular.

It has long been apparent that Brexit would have significant implications for devolution, due to the complex intersection between EU law and areas of devolved competence. In an October 2016 report, the Institute for Government argued for this reason that the Brexit process should proceed on the basis of consensus between the UK and devolved governments:

‘Leaving the EU will have a significant impact on the powers and budgets of the devolved bodies. This means the devolved parliaments will almost certainly seek to vote at some point on whether to give consent to the terms of Brexit.

Imposing a Brexit settlement in the absence of consent from the devolved bodies may be legally possible, given that the UK Parliament remains sovereign. However, this would run contrary to convention and to the spirit of devolution, which recognises the right of the three devolved nations to determine their own form of government.’

Based on this analysis, we argued for a strengthening of intergovernmental working between the UK and devolved governments, and that the guiding principle should be that the four governments would work together in partnership to reach consensus on the UK’s Brexit strategy and on consequential changes to the UK territorial constitution.

Intergovernmental relations since the EU referendum

This has not happened. The intergovernmental machinery established in October 2016 appeared to mark a positive start. The terms of reference of the Joint Ministerial Committee (EU Negotiations) (JMC (EN)) set out the intention ‘to agree a UK approach to, and objectives for, Article 50 negotiations’. However, in practice, every major decision about Brexit has been taken more or less unilaterally by the UK government, even when these decisions have had significant implications for the devolved institutions. This has contributed to a general low level of trust between the UK and devolved Governments, which bodes ill for the chances of reaching agreement on the bill or other aspects of Brexit.

In our 2016 report, we concluded that:

‘The devolved governments should be treated as partners in the Brexit process, not as mere consultees alongside business or other lobby groups. However, this does not mean the four governments of the UK will have equal influence. The UK Government will lead the Brexit process, and Westminster will retain the right to have the final say.

[...] the governments must collectively step up a gear and establish the necessary systems for joint working on this issue. Working in partnership in this way will naturally require all sides to compromise. If agreement proves elusive, then each of the four governments should be held to account for their contribution to this failure.’

We stand by this analysis, and call upon the UK and devolved administrations urgently to reset their relationship, starting with a relaunch of the JMC (EN). As things stand, the UK and Scottish Governments appear to be far apart on many crucial issues, not least the terms of the Bill, and time to bridge the gap is worryingly short.

Clauses 7-9 – Ministerial powers
One of the Scottish Government’s key criticisms of the bill is the wide scope of the executive powers granted to UK ministers. These powers (in clauses 7-9) are designed to ensure that the UK Government has sufficient ability to amend the body of EU law being brought into domestic legislation, both to render it operable after Brexit, and to bring it in line with the terms of the UK withdrawal agreement.

A central point of contention is that the bill would give UK ministers the power to use secondary legislation to amend any Act of Parliament, and to amend existing law in areas of devolved competence.

The Scottish Government has (with its Welsh counterpart) proposed amendments that would (a) prevent ministers from amending the Scotland Act 1998 using secondary legislation, except in urgent cases to bring the law in line with the UK-EU withdrawal agreement, and then only with devolved consent, and (b) require UK Ministers to seek

2 Akash Paun & George Miller (2016), Four Nation Brexit, p.3.
consent from Scottish Ministers before introducing secondary legislation in areas of
devolved competence.

The UK government is keen to give itself the maximum room for manoeuvre. That is in
principle sensible, given the complexity and unknown size of the task of correcting the huge
bulk of retained EU law in advance of exit day. However, the wide scope of executive
powers in the bill does give rise to valid concerns, not least in terms of the implications for
devolution.

In particular, we agree that the consent of Scottish ministers required be sought before UK
ministers act in devolved areas. That would be in keeping with the established Sewel
convention that consent is sought for primary legislation that relates to devolved issues.

We also believe there is a strong case for treating the Scotland Act 1998 (and the
Government of Wales Act 2006) as fundamental constitutional laws that should not be
subject to amendment by means of secondary legislation, which can be passed with little
scrutiny at Westminster.

We therefore agree that these acts should be afforded at least the same level of protection
from amendment using ‘Henry VIII powers’ as the bill currently grants to the Northern

**Clause 11 – Repatriation of EU powers**

Another central point of disagreement concerns Clause 11 of the bill. This bill removes the
current requirement that devolved legislation (primary and subordinate) must comply with
EU law. In place of this, the bill imposes a new constraint that devolved legislation cannot
modify ‘retained EU law’.

In other words, all powers currently held by the EU (including in areas such as the
environment, agriculture and fisheries) would in the first instance return to Westminster,
before potentially being ‘released’ to Holyrood on a case by case basis using Orders-in-
Council, at the discretion of UK ministers.

The UK government position is that Westminster may need to retain the power to legislate
to create new UK-wide frameworks in some of these areas. It points out that the devolution
settlements were designed in the expectation of continued EU membership, meaning that
the powers were devolved on the assumption that EU law would prevent significant policy
divergence. The government also points to the safeguard in clause 11 that ensures that any
legislation that is within competence before exit day would remain within competence after
exit day.

The Scottish and Welsh Governments have proposed amendments to the bill that would
simply remove the current requirement to comply with EU law and put nothing in its place.
The effect of this would be that all EU powers relating to these policy areas would become
fully devolved after Brexit. This is because Scottish devolution operates on a ‘reserved
powers’ model, and since these areas are not listed in the Scotland Act as being reserved to
Westminster, they are already (at least nominally) devolved. From a Scottish point of view,
these powers are therefore *already* devolved. There appears to be agreement that some new common frameworks will be required to replace EU law, but the Scottish Government view is that these should be created on the basis of consensus, with no ability for Westminster to impose new arrangements in the event of disagreement.

We can see the validity of both these perspectives, but given the nature of our existing constitutional settlement, we believe the best way to resolve the deadlock must be through negotiation and compromise. If this proves impossible, then Westminster may feel it has no alternative but to impose its will unilaterally, notwithstanding the absence of consent from the Scottish Parliament. Such a course of action would most probably be deemed lawful in the event of a legal challenge, on grounds of the continued supremacy of the Westminster Parliament. However, it would also mark a big breach of constitutional convention that would further undermine relations between the UK and Scottish institutions.

To avoid this outcome, the UK and devolved governments should urgently agree a set of principles to determine in which areas Westminster should gain the power to legislate for the whole UK in order to replace EU law. That should be accompanied by a non-exhaustive list of powers that will be ‘released’ immediately upon exit day to the Scottish Parliament (and the other devolved institutions). The presumption should be that powers are devolved unless there is a strong, evidence-based reason why new frameworks will require the passage of legislation at Westminster.

**Conclusion**
The UK created its devolved settlements within the context of membership of the EU, which provided regulatory frameworks over many areas that were technically devolved to Scotland. This has meant that difficult questions on frameworks and joint decision-making have not had to be addressed before.

The decision to exit the EU presents an opportunity for the UK Government and the devolved administrations to develop a new kind of relationship, ideally one based on principles of partnership and cooperation. However, with trust and goodwill in short supply, Brexit also threatens to throw the UK territorial constitution into crisis.

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