EU Withdrawal Bill
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1. There is currently an overlap of responsibilities between the Scottish Parliament and the European Union. There are two dimensions to this:
   a. A series of specific competences that are devolved and also held by the European Union. The main ones are: agriculture and fisheries; environmental regulation; regional policy including aid to industry and economic development; aspects of Justice and Home Affairs. The UK’s input into policy making in these fields is managed by the Joint Ministerial Committee (Europe).
   b. The Single Market and competition policy, which provide general principles constraining governments at all levels.
2. European laws and regulations are then binding on all levels; this is specified in the devolution statutes.
3. Because the Scottish Parliament operates on a ‘reserved powers’ model, unless something is done to change that, Europeanized powers in devolved fields will revert directly to the devolved bodies.
4. It is widely recognized that, after Brexit, there may need to be UK-wide or cross-border frameworks to replace the EU ones in order to:
   a. Deal with externalities and cross-border spill-overs in matters like environment policy;
   b. Ensure fair trading conditions in what the UK Government has called ‘the UK’s own single market’;
   c. Allow the UK to commit itself in international trade agreements, both with the EU and with third countries. The number of scope of these will expand as they replace the EU framework;
   d. Allocate finance for competences currently funded by the EU.
5. There are various ways in which such frameworks could be established:
   a. By reserving all current EU competences to Westminster, irrespective of where they are currently held;
   b. Adopting transversal UK laws laying down general principles and parameters within which the devolved bodies will have to operate;
   c. Allocating funding centrally so as to achieve common objectives;
   d. Intergovernmental negotiation so as to reach common policies where needed. The Welsh Government has proposed a UK Council of Ministers modelled on the Council of the EU.
6. It is likely that all of these will be used.

Retained EU Law
7. The EU Withdrawal Bill focuses on the first and proposes a category of ‘retained EU law, which will be reserved to Westminster. This includes current competences shared between the EU and the devolved legislatures. Powers can be ‘released’ back with the agreement of both levels.
8. This represents a rolling-back of devolution and it is agreed that it should be subject to a Legislative Consent Motion (LCM) in the devolved legislatures. The Scottish and Welsh Governments have stated that they will not give consent to the Bill in its present form. Legally, Westminster could proceed without an LCM but this would represent a challenge to the conventions prevailing since devolution.

9. As powers are released from Westminster, this would be a move towards a conferred powers model, in contrast to the original reserved powers model.

10. With the devolved bodies having only a collection of conferred powers, rather than a broad scope, it would be more difficult to make coherent policy or to work across policy fields.

11. The idea of ‘retained EU law’ creates a new category of powers, not defined by policy fields but by existing legislation, which could also hamper coherent policy-making. It is not clear for how long the shadow of old EU competences will remain or whether at some future time there will be a clearer division of competences.

12. If legislative responsibility is take back to Westminster, it would be difficult for Whitehall departments to make or administer policy in matters where conditions are different and they have no experience. It is likely that responsibility will remain with the devolved administrations as they have the machinery in place. This expands the category of administrative devolution without legislative powers, moving closer to a hierarchical model of devolution, in which the broad principles set in London and the details filled in across the nations.

13. After Brexit, many matters previously covered by EU law will be the subject of international trade treaties, both with the EU and with third countries, including treaties replicating existing EU treaties with third countries. Unlike EU law, international trade deals are not directly applicable in law. It is clear, however, that the UK Government intends these to be binding. This may be done by continuing to reserve such matters. Alternatively, there is already power to instruct devolved ministers to give effect to international obligations and the Withdrawal Bill includes clauses ensuring that they can do so. Until we know what trade agreements will be negotiated, we cannot know what retained EU law will be retained.

14. While the bill limits on the degree to which the devolved governments can deviate from retained EU law or future frameworks, no such limits are proposed in the case of the UK Government in respect of England. Yet changes in English policy, for example on the environment or agriculture, could have spill-over effects in the devolved territories, which could then become policy-takers from England.

The UK Single Market

15. The term ‘a UK Single Market’ is new but the idea underlying it is not. The Treaty of Union between England and Scotland had (rather complicated) clauses about commerce. The UK common market was identified as a constraining factor in the devolution package of 1999. In the 1978 devolution legislation, some relevant powers were reserved to the Secretary of State for Scotland. The present UK Government,
however, has failed to spell out what it means. The provisions for retained EU seem to refer to specific competences, but the implications of the ‘UK Single Market’ are wider and the analogy with the EU Single Market is imprecise.

16. The European Single Market is a long-term programme to eliminate barriers to the free movement of goods, services, capital and labour. It consists of a series of measures proposed by the European Commission, accepted by the Council of the European Union (by qualified majority vote among the member states) and interpreted and enforced by the Court of Justice of the European Union. Single market and competition measures can cover many fields, some unexpected.

17. There have been complaints that the Single Market is a centralizing mechanism and, to counterbalance this, the principles of subsidiarity and proportionality have been put in place. These stipulate that action should be taken at the lowest level practicable and should only be broad enough to achieve its aim.

18. Nothing like these mechanisms exists in the UK or in relation to devolution. Yet one can envisage many instances in which the single market principle could impinge on devolution. Different standards in environmental matters or agricultural produce might be seen to infringe it. The European Single Market contains a provision for mutual recognition so that if a certain products are legal in one country they are legal everywhere. It might be argued that preventing private contractors from bidding for public services is an infringement, given the different practice in England as opposed to Scotland and Wales. Free trade agreements with the EU or third countries might include higher or lower product standards in agriculture. Public health regulation might be challenged by industries like tobacco, alcohol or gaming. For example, the Scottish Government’s legislation on minimum pricing of alcohol was challenged by producers and has been up and down through the Scottish and European courts and back to the UK Supreme Court. The boundary between social provision and commerce may be challenged where devolved or local governments provide free services. All of these questions have arisen in the European Single Market.

19. These broad principles and their implications are not discussed in the UK Government papers. Discussions appear to focus, rather, on the details of individual competences.

Frameworks Elsewhere

20. There is experience elsewhere in similar matters.

21. The United States inter-state commerce clause regulates trade within the USA and has been used over time to extend federal competences.

22. In April 2017, Canadian federal and provincial governments signed a Canadian Free Trade Agreement (CFTA), replacing an earlier Agreement on Internal Trade, to liberalize trade across the country including the alignment of regulatory standards and opening up public procurement. It also aligns internal Canadian rules with those of Canada’s international treaties. Disagreements are handled by a Regulatory Reconciliation and Cooperation Table (RCT). This is an intergovernmental agreement and not a top-down imposition.
23. Framework laws are used in Spain, Italy and Germany. In Spain and Italy, they are imposed from the centre and have been a major source of constitutional litigation as the regions have complained that they are too detailed. In Germany, they were subject to consent in the Bundesrat, representing the federal Länder. They were later abandoned as part of constitutional reform, with the emphasis now on horizontal inter-regional cooperation.

**Funding**

24. The funding of competences that are both Europeanized and devolved does not automatically revert to the devolved level. The UK’s net contribution to the EU will revert to the UK Government, which can then decide on how to allocate it. There are several possibilities.

a. Distribution according to a UK-wide formula, following a UK-wide policy framework;

b. Distribution on a historic basis, which would favour the devolved governments, given their larger spending on agriculture;

c. Distribution on a per capita basis, which would not take account of needs and which would favour England;

d. Incorporating the money into the block grant and adjusting according to the Barnett Formula. This would not, as some commentary has suggested, mean distribution according to population. Rather, following the precedent of previous transfers of competences, it would carry over existing levels of funding and adjusting thereafter by giving the devolved territories a per capita share of any *changes* in funding for England. The devolved territories would then have discretion as to how this money was allocated, including spending it in other fields, subject to any new UK or cross-border frameworks.

25. UK-wide provisions after Brexit will in practice involve a combination of reserved powers; broad frameworks; financial constraints; and intergovernmental relations.

26. The Withdrawal Bill raises as many questions as it answers in relation to the future position of the devolved legislatures after Brexit.