

# Briefing Paper – European Union (Withdrawal Bill)

This briefing paper is intended to provide members with a general overview of the [EU \(Withdrawal\) Bill](#), as introduced, as well as an overview of the key themes raised within the Committee's [Call for Evidence](#). The paper deals in turn with:

- The purpose and general overview of the Bill
- Its implications for the devolution settlement
- The issue of common frameworks
- Intergovernmental relations during and after Brexit
- Parliamentary scrutiny of the Bill and its effects

The Bill was introduced to the House of Commons and given its First Reading on 13 July. The Second Reading is scheduled for 7<sup>th</sup> and 11<sup>th</sup> September.

## 1. PURPOSE AND OVERVIEW OF THE BILL

**1.1 Stated Purpose:** The purpose of the Repeal Bill as described in the Queen's Speech is "*to repeal the European Communities Act and provide certainty for individuals and businesses.*" In the [White Paper](#) "Legislating for the United Kingdom's withdrawal from the European Union", published in March, the UK Government explained that the proposed [Great] Repeal Bill "*will, wherever practical and appropriate, convert EU law into UK law from the day we leave so that we can make the right decisions in the national interest at a time that we choose.*"

**1.2 Complexity:** The Bill has been described as "[a turgid and difficult document](#)" and as "[technical dense and complex](#)". Professor Mark Elliott has blogged that "*To say that it is byzantine in nature would be to do a disservice to the emperors of Byzantium*". These comments are reproduced simply to highlight a feature of the Bill that has been much remarked upon: that it is not easy to understand or to follow. Its structure is complex and the purpose and likely effect of many of its provisions are open to considerable debate amongst lawyers and others.

**1.3** It seems inevitable that this complexity will provoke considerable debate during the Bill's passage and it seems highly likely that the Bill will be amended, perhaps significantly. That will obviously have an impact for this Committee in considering whether to recommend to Parliament that its consent be given to the Bill and the timing of that recommendation.

**1.4 Overview:** The following summary is necessarily superficial and incomplete but is intended to give the Committee an overview of the key provisions of the Bill:

- **Exit day:** The Bill provides for a range of things to occur on or after "exit day". Exit day is "*such day as a Minister of the Crown may by regulations appoint*". The day specified by UK Government as 'exit day' need not (so far as the Bill is concerned) be the same day on which (as a matter of EU law) the UK leaves the EU. It is at least possible that there may be more than one 'exit day'.
- **Repeal of the European Communities Act 1972:** The Bill provides for the repeal of the ECA 1972 (and associated EU related legislation concerning, e.g. European parliamentary elections). The repeal of the 1972 Act will occur on exit day.
- **Preservation of EU law:** The Bill creates a new legal concept called "**retained EU law**". At its simplest "retained EU law" is made up of those parts of EU law that are to remain (or

become) part of UK law after Brexit. Understanding the status and scope of retained EU law will be crucial to understanding the breadth of the Bill, including its impact on the devolution settlement, because many other provisions of the Bill concern powers to, and restrictions on, modifying retained EU law. Retained EU law will include:

- **“EU-derived domestic legislation”**: existing UK (or devolved) legislation and statutory instruments that have been made over the years (whether by the UK Parliament/Government or the devolved authorities) to give effect to EU law. It is also to include “*any enactment so far as relating otherwise to the EU or the EEA*”. This last phrase is potentially very wide ranging. The [Explanatory Notes](#) to the Bill comment: “*For example, if an Act of Parliament contained cross references to a definition contained in an EU instrument, those provisions would fall within the definition and would be preserved.*” There is at least the potential for dispute in due course about whether a statutory provision relates ‘otherwise’ to the EU or the EEA and has therefore been preserved.
- **“Direct EU legislation”**: This is EU law that wasn’t implemented by domestic legislation because under EU rules it was treated as having effect within the UK ‘automatically’. One example is the EU state aid rules (which apply within the UK even though there is no UK legislation giving effect to them). Most of EU legal rules that have this automatic effect are contained in EU Regulations (rather than Directives).
- **Rights and remedies**: Clause 4 of the Bill is intended to preserve legal rights that are enjoyed by individuals, companies etc. under EU law. It would preserve, for example, the rights of other EU nationals in the UK not to be discriminated against on grounds of nationality – at least until these rights are the subject of amendment or change. Not all rights are to be preserved.
- **Parts of EU law not preserved**: Some parts of EU law are not to be preserved after exit day. One example is that the EU Charter of Fundamental Rights is not to be retained as part of domestic law after exit day. For the avoidance of doubt, the Charter is not to be confused with the European Convention on Human Rights which is not directly affected by the Bill.
- **The Courts and EU law**: The Bill contains provisions about how the Courts should approach interpretation of “retained EU law”. These are complex and we have not summarised them here. The practical point is that if the Bill creates doubt about how the Courts should deal with retained EU law that has the potential to impact on individuals, companies and others by creating uncertainty about their legal rights and obligations.
- **Dealing with deficiencies arising from withdrawal**: one of the most remarked upon features of the Bill is the extent of the powers it confers on governments (rather than parliaments) to make changes to the law, particularly “retained EU law”. The Bill confers powers on the UK Government to use secondary legislation to “*prevent, remedy or mitigate*” any failure of retained EU law to operate effectively or “*any other deficiency in retained EU law*” arising from the withdrawal of the UK from the EU. Regulations may be made using these powers for a period of 2 years beginning on exit day. The concept of ‘deficiency’ is very widely defined. Secondary legislation dealing with deficiencies can:
  - include provisions that could be made by an Act of Parliament instead;

- provide for functions that are currently exercisable by EU agencies or bodies to be exercised by a UK public authority instead;
- create new public authorities in the UK to carry out those functions.
- **Devolution:** The Bill contains a range of provisions concerning devolution, discussed separately below.

## 2. THE EU WITHDRAWAL BILL AND DEVOLUTION

2.1 Section 29 of the Scotland Act 1998 provides that an Act of the Scottish Parliament “is not law” to the extent that it breaches EU law.

2.2 Clause 11 of the Bill seeks to remove that restriction on the Scottish Parliament’s legislative competence but to replace it with a fresh restriction. The Clause makes similar provision for changing the legislative powers of the National Assembly for Wales and the Northern Ireland Assembly.

2.3 In terms of the Repeal Bill, an Act of the Scottish Parliament will be outside legislative competence if it modifies, or confers power to modify, retained EU law.

2.4 That overarching restriction is subject to qualifications:

- It doesn’t apply to any modification that would, before exit day, have been within the legislative competence of the Parliament. The precise scope of this carve out is unclear but it appears that where the Scottish Parliament already has the power to make legislation in areas that are regulated by EU, that power will continue. Presumably, for example, it would therefore remain within devolved competence for Scottish Ministers to revoke or amend the Food Hygiene (Scotland) Regulations 2006 which were made at least in part to give effect to EU law on food hygiene and safety, but it would not be competent to attempt to change the EU law on which the Regulations were based.
- There is a further qualification allowing for the new restriction to be ‘lifted’ by the UK Government using an Order in Council after intergovernmental negotiation (as discussed below).

2.5 The general approach is to maintain the extent of devolved competence post-Brexit as it was pre-Brexit but to prevent the Scottish Parliament and Government from exercising new powers that would otherwise be available to them because of the removal of the duty not to breach EU law. So far as the rationale for this approach is concerned The Repeal Bill White Paper interpreted the current situation as follows:

“In areas where the devolved administrations and legislatures have competence, such as agriculture, environment and some transport issues, **the devolved administrations and legislatures are responsible for implementing the common policy frameworks set by the EU.** At EU level, the UK Government represents the whole of the UK’s interests in the process for setting those common frameworks and these also then provide common UK frameworks, including safeguarding the harmonious functioning of the UK’s own single market (emphasis added)”.

2.6 A range of other amendments to the Scotland Act 1998 are to be made by the Bill including amendments to reflect withdrawal from the EU (removing, for example, references to European Parliamentary elections) and to prohibit the Scottish Parliament from amending the European Union (Withdrawal) Act (as it will become).

### **3. THE APPROPRIATENESS OF THE POWERS PROPOSED IN THE BILL FOR UK MINISTERS AND SCOTTISH MINISTERS.**

3.1 The Bill confers extensive powers on governments to make secondary legislation dealing with “*deficiencies arising from withdrawal*”. A deficiency will include (but is not limited to) situations in which a Minister of the Crown is of the view that retained EU law:

- contains anything that is redundant or substantially redundant;
- confers functions on EU bodies that no longer have functions in relation to the UK;
- concerns reciprocal or other arrangements between (a) the UK, any part of the UK and any public authority in the UK and (b) the EU, an EU body or a member state that are no longer appropriate;
- contains EU references that are no longer appropriate.

3.2 There are express limits on the powers to correct deficiencies and they include prohibitions on imposing or increasing taxation, making retrospective laws, amending the Human Rights Act 1998 or amending or repealing the Northern Ireland Act 1998. There is no express prohibition against the use of these powers to amend the Scotland Act 1998: that appears to leave open the possibility of amendments to SA 1998 by secondary legislation. Such amendments would not engage the Sewel Convention as the convention is currently understood.

3.3 Schedule 2 to the Bill confers similar but not identical powers on the devolved governments:

3.4 As a “devolved authority” the Scottish Ministers can make regulations to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law arising from the UK’s withdrawal from the EU. The UK Government and the Scottish Ministers are also empowered to act jointly in making such regulations.

3.5 The Bill contains a range of restrictions on the making of such regulations by the Scottish Ministers. These include:

- the condition that no regulations may be made using these powers unless “*every provision of them is within the devolved competence of the devolved authority*”. It appears that if regulations contain even one provision that is outside devolved competence then the regulations as a whole will be ultra vires.
- regulations made by the Scottish Ministers may not modify certain parts of EU retained law.
- regulations made by Scottish Ministers may not be inconsistent with modifications made by the UK Government to certain parts of EU retained law.

3.6 To the extent that the Scottish Ministers might seek to make regulations that would come into force before exit day, those regulations will require the consent of a Minister of the Crown.

3.7 The Committee may want to consider the extent of the powers to make secondary legislation conferred by the Bill. It may wish to consider:

- the appropriateness of the regulation making powers conferred on the UK and Scottish Governments by the Bill and whether the Bill strikes the right balance between parliamentary and executive powers;
- the constraints imposed on Scottish Ministers in relation to the making of regulations compared with the relative freedom of action conferred on Ministers of the Crown;
- the provisions contained in the Bill for parliamentary scrutiny of UK and Scottish regulations made under the Bill.

#### 4. COMMON FRAMEWORKS

4.1 An inherent feature of the EU legal system, long established by the Court of Justice of the European Union, is the principle of the supremacy of EU law. Legislatures and executives within member states (whether state-wide national institutions or devolved/regional institutions) can pass laws or make decisions according to their own constitutions, but these must be compatible with EU law. In effect, in areas governed by EU law, it may be said that EU law has provided a common framework within which member states can make policy and legislative decisions.

4.2 The Prime Minister has repeatedly stated her view that the process of the UK's withdrawal from the European Union should avoid creating new barriers to living and doing business across the UK. That means, as set out in the Lancaster House speech, *'maintaining the necessary common standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world, and protecting the common resources of our islands.'*

4.3 Both the Scottish and Welsh Governments have accepted, in principle, the need for UK-wide frameworks in some areas of devolved competence after Brexit, provided these are negotiated and agreed.

4.4 There are a variety of different ways in which common frameworks can be agreed and maintained. These include:

- **centralizing the authority to make laws in areas deemed necessary to uphold common frameworks:** In the UK context, this would imply increasing the scope of existing reserved matters or creating new ones.
- **establishing areas of concurrent jurisdiction, or shared competence, within which UK law would have supremacy:** In this case, UK law may establish a framework setting the broad parameters within which the devolved institutions could legislate or make policy decisions.
  - Some federal states adopt this tradition by design or by practice, e.g. Germany, Australia and Spain. In the German case, the Länder governments have direct input into national legislation within the Bundesrat. In Spain, formal concurrent competences in fields like education and health mean that the autonomous communities can pass laws in these fields but these must be within legislative frameworks set by the Spanish parliament.

- **conditional funding:** In some areas which have benefited from/depended upon EU funding (e.g. agricultural payments, regional development), fiscal transfers can be made conditional upon meeting specified national standards.
  - Conditional funding is commonplace in many federal systems, e.g. Australia and Canada. Because it is often viewed as 'interference' in state/provincial jurisdiction, conditional funding can be a source of intergovernmental tension. In UK territorial finance, the block-grant system has meant most funding comes without conditional strings.
- **binding intergovernmental agreements:** These may or may not be subject to the consent of their respective legislatures.
  - These are common in federal systems where the states have extensive constitutional authority, e.g. the United States, Canada and Switzerland. While there has been a tradition of concordats and intergovernmental agreements in the UK, these are focused mainly on fostering good communication and cooperation rather than co-decision, and they are binding in honour only.
- **legislative consent:** Without altering the distribution of powers or imposing conditions, by agreement and consent, common frameworks can be established through granting permission on a case by case basis to enable a central parliament to pass laws in areas that fall within the jurisdiction of devolved/regional parliaments. The Sewel convention enables such a process already in the case of primary legislation.

4.5 While legislative consent procedures are tried and tested within the UK's system of devolution, all of the others would represent a marked departure.

4.6 The Bill implies that powers to modify EU law would only be transferred to the Scottish Parliament where it was agreed that there was no need for a common UK framework. Where a common UK framework is deemed necessary, the Withdrawal Bill suggests that the relevant powers would be reserved.

4.7 We might expect future Bills, e.g. the forthcoming Agriculture Bill, to conform more closely to framework legislation, setting the parameters within which devolved powers over agriculture, etc, can be exercised.

## 5. INTERGOVERNMENTAL RELATIONS AND BREXIT

5.1 The early phase of the Brexit process - from the aftermath of the referendum to the triggering of Article 50 - was associated with an intensification of formal intergovernmental relations. The JMC (EU Negotiations) was set up specifically to '*seek to agree a UK approach to, and objectives for, Article 50 negotiations*', and to provide oversight of Brexit negotiations once underway '*to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations*'.

5.2 The JMC(EN) gave the devolved governments the opportunity to present their proposals. However, it failed to provide an avenue for joint agreement on a UK approach to Brexit. The JMC(EN) met four times between November 2016 and February 2017, chaired by the UK Secretary of State for Exiting the European Union. Welsh and Scottish ministers have called for its resumption, but at time of writing it has yet to be reconvened.

5.3 As noted above, Clause 11 substitutes 'EU constraints' on devolved legislation with a new constraint: devolved law must not modify or confer power to modify 'retained EU law'. The Explanatory Notes accompanying the Bill suggest that these new restrictions on devolved competence are 'intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed'. However, there is no sunset clause that would ensure that this new restriction on the powers of the Scottish Parliament is time limited.

5.4 The Government has initiated informal bilateral discussions with the devolved governments 'to rapidly identify... areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power'. These discussions are chaired by Damian Green, First Secretary of State and Minister for the Cabinet Office. In the Scottish case, the Scottish Government was represented at the first meeting by the Deputy First Minister and the Minister for UK Negotiations on Scotland's Place in Europe.

5.5 The committee may want to seek clarity as to the process, duration and form of these inter-ministerial relations with the UK Government, the process through which agreement on issues relating to Brexit and its implications is expected to be met, procedures for dispute resolution, and the consequences of stalemate. Given that the Bill creates a new default position of reserving all EU retained law, it would be reasonable to assume that failure to reach agreement may result in maintenance of the restriction on the modification of retained EU law, and legislative powers to modify that law being exclusive to Westminster.

5.6 Whichever process is adopted to establish UK common frameworks, EU withdrawal can be expected to create a more complex system of devolution, with more jagged edges and interdependencies between devolved and reserved competences. This suggests a need for a more effective system of intergovernmental relations than is currently in evidence.

5.7 The Brexit process has also generated an unprecedented degree of intergovernmental coordination between the Scottish Government and the Welsh Government. These bilateral meetings are not convened within a formal intergovernmental structure. The First Ministers agreed recently to work together on amendments to the Withdrawal Bill and to coordinate the advice they give to the Scottish Parliament and the National Assembly for Wales.

## **6. PARLIAMENTARY SCRUTINY AND THE BREXIT PROCESS**

6.1 The Scottish Government and the Scottish Parliament have a [Written Agreement](#) whereby the former reports on its engagement in formal ministerial-level intergovernmental meetings, concordats, agreements and memorandums of understanding. This Agreement is intended 'to support the Scottish Parliament's capacity to scrutinise Scottish Government activity and to hold Scottish Ministers to account in the intergovernmental arena'.

6.2 The Agreement established three principles to govern the relationship between the Scottish Parliament and Scottish Government with regard to inter-governmental relations: transparency; accountability; and respect for the confidentiality of discussions between governments.

6.3 As part of the Agreement, the Scottish Government issued an [Annual Report](#) in June detailing in more extensive and transparent terms than has hitherto been available its participation in formal intergovernmental structures, concordats, Memorandums of Understanding and informal inter-ministerial meetings.

6.4 Some of the formal inter-ministerial structures set up to facilitate discussion and coordination of relevant Brexit issues - notably the JMC(EN) - appear to have stalled. This may in part be a consequence of the continued absence of government in Northern Ireland, and in part a result of the experiences of the process to date. The bilateral meetings initiated by the UK Government are not being held under the auspices of any of the formal structures for intergovernmental relations, and do not present as formal meetings. As such, they do not appear to fall within the scope of Scottish Parliament-Scottish Government Agreement on IGR. Conversely, the Committee may want to consider whether the spirit of the Agreement and its principles of accountability and transparency are sufficient to expect some ongoing reporting of the Scottish Government's participation in these ministerial-level discussions, in the absence of other formal processes.

6.5 The Committee may wish to consider whether there is benefit to be gained from increased inter-parliamentary cooperation. Two committees within the National Assembly for Wales - the Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee - have ongoing enquiries relating to the Bill. The Commons select committees have yet to resume their work following the General Election.

6.6 Specific aspects of the Withdrawal Bill have implications for parliamentary scrutiny. In particular, Schedule 7 to the Bill concerns "Scrutiny of Powers to deal with Deficiencies", and sets out the process by which regulations to deal with deficiencies are to be made:

- Where those regulations are to be made by UK Government then scrutiny is restricted to the UK Parliament and they will not be subject to the Sewel convention.
- Where regulations are to be made by the Scottish Ministers then certain types of regulation are to be subject to affirmative procedure (for example where the regulations establish a new public authority or create or amend a power to legislate) and all other such regulations are subject to negative procedure.
- There is a 'dual' scrutiny process where regulations are to be made jointly between UK Government and Scottish Ministers.
- There is no specific scrutiny process for Orders in Council made to loosen the new restrictions on devolved competence relating to retained EU law.

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