



KNOWLEDGE IS POWER, INFORMATION IS LIBERATING

IN THIS ISSUE

Welcome to our Newsletter

by Stephen Imrie & Professor Nicola McEwen

Welcome to the second edition of the Newsletter for the External Experts Panel.

When the Experts Panel was first launched in June 2017, we were awaiting the publication of what was previously known as the '[Great Repeal Bill](#)'. We were also witnessing the tentative first stages of the UK's negotiations with the EU as part of the Article 50 withdrawal process. We were also anticipating the Scottish Government's flagship [Social Security Bill](#), detailing its plans to take forward many of the new social security powers from the Scotland Act 2016.

If a week is a long time in politics, then nearly 4 months is an eternity. As we publish this September/October edition of our Newsletter, all of the above issues have moved on substantially, resulting in a marked increase in work within the Scottish Parliament.

It is now even more important that the Scottish Parliament and its committees are provided with access to the latest research and expert advice across these issues.

Building on established in-house expertise within our research and legal services, and complementing the use of appointed committee advisers, the External Experts Panel provides a new means of academic engagement to better inform parliamentarians on key issues.

And it is a two-way street as the committees seek to ensure that the academic community is aware of the business of the Parliament and its committees.



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MSPs discuss Brexit with Michel Barnier

by Stephen Imrie, The Scottish Parliament

A cross-party delegation from the Culture, Tourism, Europe and External Relations Committee held face-to-face talks with the European Commission's Chief Negotiator for Brexit, Michel Barnier, as part of a wider visit to Brussels (11 September 2017).

The Committee took the opportunity to hear first-hand about the progress of the negotiations and the respective positions of the EU and the UK from the European Commission's perspective.

This meeting came at a critical juncture in the negotiations. Following the last round of talks between the UK and the EU, Mr Barnier said that there had been a lack of decisive progress on the main areas of the negotiations.

This visit followed an evidence session on Thursday 7 September where the Committee heard from Michael Russell, Minister for UK negotiations on Scotland's Place in Europe regarding Article 50 Withdrawal Negotiations. A [transcript](#) of this session is available.

Speaking after the meeting in Brussels, Committee Convener **Joan McAlpine MSP** said that the Committee had held a wide ranging and constructive meeting with Mr Barnier. Furthermore, the Committee had presented him with [reports](#) from their long-running inquiry into the consequences of Brexit for Scotland and raised their concerns about the consequences of leaving the single market and the impact on key Scottish sectors such as agriculture, fisheries, higher education and exporting industries. Members had also highlighted their concerns about the future of EU citizens living in Scotland.

Joan McAlpine MSP added that Mr Barnier was interested in Scotland and was well-informed about our concerns around Brexit. She said that members had been able to discuss the importance of reaching a deal and the concerns about the pace of the negotiations.

In his comments after the meeting, Deputy Convener, **Lewis Macdonald MSP**, said that the Committee had been able to have a very constructive discussion with M. Barnier covering the withdrawal agreement, long-term relationships and the transitional period. Mr Macdonald's view was that it is clear that there is plenty of scope for discussions of any proposals the UK Government might make about remaining in the single market and customs union for a transitional period after March 2019.



Members of the Committee meet Michel Barnier

TELL ME MORE

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Who's who?

Members of the External Expert Panel

Constitution/politics/governance etc.	
Professor Nicola McEwen	University of Edinburgh and the Centre on Constitutional Change
Professor Aileen McHarg	University of Strathclyde
Professor James Mitchell	University of Edinburgh
Professor Michael Keating	University of Aberdeen and the Centre on Constitutional Change
Professor Cathy Gormley-Heenan	University of Ulster
Professor Richard Wyn Jones	University of Cardiff
Dr Sandra Leon	University of York
Professor Michael Kenny	University of Cambridge
Mr Akash Paun	Institute for Government, London
EU/Brexit/International Trade matters	
Dr Tobias Lock	University of Edinburgh
Professor Damian Chalmers	London School of Economics
Dr Gracia Marin-Duran	University of Edinburgh
Dr Matias E Margulis	University of Stirling
Professor Alan Page	University of Dundee
Professor Laura Cram	University of Edinburgh
Taxation, economic policy and fiscal matters	
David Phillips	Institute of Fiscal Studies, London
Dr Katerina Lisenkova	University of Strathclyde
Professor David Bell	University of Stirling
Professor Graeme Roy	Fraser of Allander, University of Strathclyde
David Eiser	University of Strathclyde & Standing Adviser to the Finance & Constitution Committee
Social security and social policy	
Dr Sharon Wright	University of Glasgow
David Finch	Resolution Foundation
Dr Jackie Gulland	University of Edinburgh
Dr Nicola Cunningham	University of Stirling
Dr Hayley Bennett	University of Edinburgh and What Works Scotland



News from the Scottish Parliament and its committees

Celtic connections - deepening the ties between committees in the Scottish Parliament and the National Assembly for Wales

by Stephen Imrie, Scottish Parliament.

Summer recess affords parliamentarians the opportunity to take a break from the regular business in the Parliament and deepen the connections already made with their counterparts in other countries.



With a shared interest in scrutinising the UK Government's EU (Withdrawal) Bill and some of the impacts of Brexit on territorial financing more generally, **Bruce Crawford MSP** (Convener) and **Professor Adam Tomkins MSP** (Deputy Convener) of the Scottish Parliament's Finance and Constitution Committee visited the National Assembly for Wales/ Cynulliad Cenedlaethol Cymru to meet with a range of Assembly Members.

As part of the visit, Bruce and Adam met with leading AMs in the Assembly, including Huw Irranca-Davies AM, Chair of the Constitutional and Legislative Affairs Committee; David Rees AM, Chair of the External Affairs and Additional Legislation Committee; and Simon Thomas AM, Chair of the Finance Committee.

In their discussions, the MSPs and AMs were able to compare notes and approaches on a range of subjects, including:

- ❖ The approach to scrutiny of the European Union (Withdrawal) Bill;
- ❖ The scope for increased inter-parliamentary co-operation between Committees of the Scottish Parliament and National Assembly and Westminster in relation to the EU (Withdrawal) Bill;
- ❖ Exchange of views on the approach to scrutiny of the subordinate legislation arising from the Brexit process;
- ❖ Discussion of views on the proposed approach to dealing with devolved powers outlined in the EU (Withdrawal) Bill, e.g. shift from a reserved powers model to a conferred powers model;
- ❖ The extent of the involvement of the Scottish or Welsh governments in the deliberations on the EU (Withdrawal) Bill;
- ❖ The process in the National Assembly for Wales for tracking developments in the 4-weekly cycle of negotiations between the UK Government and the EU;
- ❖ An exchange of views on the potential financial implications for Scotland and Wales of Brexit and the potential impact on devolved public finances; and
- ❖ The impact of the devolution of fiscal powers on the budget scrutiny process in the devolved legislatures.

TELL ME MORE

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Inter-parliamentary co-operation deepens

by Stephen Imrie, Scottish Parliament.

Our preceding article on a visit by MSPs from the Finance and Constitution Committee is an example of one of the many forms of inter-parliamentary relations that take place.

These more ad-hoc and infrequent visits to other legislatures by MSPs and officials are being supplemented now by a more in-depth and systematic effort to improve such relations.

As early as the first few years of devolution, the then European Committee formed a network of chairs/conveners of the European committees in Scotland, Wales, Northern Ireland and in the UK Parliament. Meeting twice per year and rotating in venue, the European Committees-UK group was focused on a shared interest in how to best scrutinise respective governments in terms of EU legislation. The group was given extra impetus with the focus on the role of national parliaments and subsidiarity issues under the Lisbon Treaty.

Now, following an invitation from the House of Lords' European Union Select Committee, we expect this network to be expanded to take into account the wider issues of Brexit, the EU (Withdrawal) Bill etc. to bring in members from other relevant committees dealing with constitutional change and delegated powers.

The new proposal is to establish a **network of parliamentarians** across the legislatures in the UK to meet on a quarterly basis. These informal meetings would have three purposes:

1. Information sharing / relationship-building on issues of common interest, e.g. Negotiations, legislation, scrutinising the Joint Ministerial Committees (such as the JMC(EN)).
2. Hearing from experts / stakeholders who all would have an interest in, e.g. legal experts, academics, UKREP, both sides of industry, MEPs, EU institutions..
3. To hear from respective Governments (both UK and devolved) on the negotiations / JMC (EN) etc.

The first such meeting is expected to take place in the House of Lords in October; more to follow.

TELL ME MORE

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Where stands the EU (Withdrawal) Bill and what happens now?

by Stephen Imrie, Scottish Parliament.

On 20 July 2017, as the Scottish Parliament started its summer recess period, the UK Government introduced the much anticipated [EU \(Withdrawal\) Bill](#) (formerly referred to by many as the Repeal Bill or Great Repeal Bill) in the House of Commons. The primary function of the Bill is to repeal the European Communities Act while converting the existing body of EU law into UK law. In so doing, it creates a new legal category of 'retained EU law'.

A BILL

TO

Repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Repeal of the ECA

- 1 **Repeal of the European Communities Act 1972**
The European Communities Act 1972 is repealed on exit day.

Retention of existing EU law

- 2 **Saving for EU-derived domestic legislation**
 - (1) EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day

The Bill raises a number of areas of interest to the Scottish Parliament, including the amendment to the Scotland Act replacing the existing EU constraints with an obligation to comply with retained EU law, the powers delegated to UK and Scottish ministers to 'deal with deficiencies' in retained EU law, as well as the efficacy of the proposed procedures for delegated powers and legislative oversight.

Both the Scottish Parliament's [SPICe research service](#) and the [UK Parliament's library](#) have produced comprehensive briefings on the Bill.

In the Scottish Parliament, both the [Finance and Constitution Committee](#) and the [Delegated Powers and Law Reform Committee](#) launched calls for evidence into the Bill over the summer recess period. **The Parliament would welcome written submissions from the Expert panel.**

Certain key provisions on the EU (Withdrawal) Bill are subject to the legislative consent of the Scottish Parliament under the Sewel Convention, whereby Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

The Scottish Parliament's standing orders require the Scottish Government to lodge a Legislative Consent Memorandum (LCM) on the Bill, setting out details of which provisions in the Bill are subject to legislative consent and why, and, if they wish, setting out their views (in a draft motion) on whether the Scottish Parliament should give its consent to the Bill. If the Scottish Government does not wish to make a recommendation at this stage (via a draft motion), then it must explain why.

On 12 September, the Scottish Government lodged a [Legislative Consent Memorandum](#). This has been referred to the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee for their consideration. The former committee will take the overall lead and is required to report to Parliament for all MSPs to take a final decision on legislative consent based on the Committee's findings.

Such reports are *normally* debated before the relevant bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced. However, it is not unusual – as was the case with both the Scotland Acts 2012 and 2016 – for the legislative consent debate to be later in the process of considering the bill at Westminster.

The work of both the committees highlighted above is now well underway, with oral evidence sessions planned throughout September and October 2017.

On 19 September, the Scottish Government published its jointly proposed [amendments](#) to the Bill along with the Welsh Government.

TELL ME MORE

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Immigration inquiry - an update

by Stephen Imrie, Scottish Parliament.

Shortly before the start of our summer recess, the Parliament's Culture, Tourism, Europe and External Relations Committee launched a new inquiry looking at how the UK's immigration policy can best respond to Scotland's demographic and skills needs.

The objective of the inquiry is to seek evidence from organisations and individuals in Scotland on how immigration policy can be developed to reflect and respond to Scotland's demographic and skills needs

At the closing date, nearly twenty different bodies [responded](#) to the call for evidence, ranging from further and higher education groups, local authorities, agricultural/food/drink and other business interests, academics and trades unions.



The Committee is set to commence oral evidence taking sessions throughout the next couple of months with a view to publishing a report as a means of contributing to the UK Government's forthcoming Immigration bill.

TELL ME MORE

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Inquiry into the Article 50 negotiations - an update

by Stephen Imrie, Scottish Parliament.



The Parliament's Culture, Tourism, Europe and External Relations Committee has also just closed its call for evidence for its inquiry to monitor and scrutinise the Article 50 withdrawal negotiations and their implications for Scotland. Over twenty submissions of [evidence](#) have been received from church groups, academics (including External Panel Member **Dr Tobias Lock**), local authorities, the Scottish Government itself, business organisations and trade groups etc.

The Committee is set to commence oral evidence taking sessions throughout the next couple of months with a view to publishing a report in the coming months.

TELL ME MORE

FOR MORE INFORMATION:

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The Impact of Brexit on the Scottish budget - Inquiry Update

by Stephen Imrie, Scottish Parliament.



The summer recess has been a busy time for our committees as the preceding articles show. This is also the case for the Finance and Constitution Committee's inquiry into the potential impact of Brexit on the Scottish budget.

Launched before recess, the inquiry is looking at:

- ❖ Are there any indications of a differential economic impact in Scotland separately from rUK?
- ❖ What additional spending pressures are there on the public finances as a consequence of Brexit?
- ❖ What should the Scottish Government's priorities be in formulating Draft Budget 2018-19 in response to the initial economic impact of Brexit?
- ❖ Given that increased inflation is likely to disproportionately impact on the poorest, what measures should the Scottish Government take in its Budget to address this?
- ❖ What issues require to be considered from the loss of EU funding mechanisms arising from Brexit?

At the closing date, the Committee had received over a dozen submissions of [written evidence](#), and will begin the next stage of its inquiry shortly.

TELL ME MORE

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Social Security (Scotland) Bill at Stage 1

by Stephen Imrie, Scottish Parliament.

The Scottish Government's flagship Social Security (Scotland) Bill is now at Stage 1 in the Parliament's legislative process; consideration by a lead committee (in this case the Social Security Committee).

In answer to its call for evidence over summer, a number of [written submissions](#) were received. from disability groups, local authorities and others.



Simultaneously, the Finance and Constitution Committee has issued a call for evidence inviting written submissions on the estimated financial implications of the Bill as set out in its accompanying Financial Memorandum.

In a more innovative development, the Social Security Committee has kicked off its oral evidence taking sessions with an extension of its successful 'Your Say' initiative to this Bill. This sees the Committee ask benefit claimants directly to write in with their experiences of the social security system, whereupon a number of these claimants are asked to appear before the committee to "tell their stories". The ['Your Say' session](#) on the Bill took place on 7 September 2017. The [transcript](#) (Official Report) of this session is now available.

Further sessions of the Committee on the Bill took place on [14 September](#) and [21 September](#), with evidence from Professor Grainne McKeever (Ulster University Law Clinic), Audit Scotland, poverty campaigners, disability groups and others, and with more to follow in the coming months.

TELL ME MORE

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Budget Process Review Group

by Jim Johnston, Scottish Parliament.

The Budget Process Review Group ("the Group") published its [final report](#) on 30 June 2017. The Group recommends that the Scottish Parliament's budget process should have the following four core objectives:

- ❖ To have a greater influence on the formulation of the Scottish Government's budget proposals;
- ❖ To improve transparency and raise public understanding and awareness of the budget;
- ❖ To respond effectively to new fiscal and wider policy challenges; and
- ❖ To lead to better outputs and outcomes as measured against benchmarks and stated objectives.



To meet these core objectives the Group recommends the following framework for the revised budget process:

- ❖ **Full Year Approach:** a broader process in which committees have the flexibility to incorporate budget scrutiny including public engagement into their work prior to the publication of firm and detailed spending proposals;
- ❖ **Continuous cycle:** scrutiny should be continuous with an emphasis on developing an understanding of the impact of budgetary decisions over a number of years including budgetary trends;
- ❖ **Output / outcome focused:** scrutiny should also be evaluative with an emphasis on what budgets have achieved and aim to achieve over the long term, including scrutiny of equalities outcomes;

- ❖ **Fiscal Responsibility:** scrutiny should have a long term outlook and focus more on prioritisation, addressing fiscal constraints and the impact of increasing demand for public services; and
- ❖ **Interdependent:** scrutiny should focus more on the interdependent nature of many of the policies which the budget is seeking to deliver.

Key recommendations include the introduction of a Medium Term Financial Strategy to be published by the Scottish Government annually in the Spring and a Fiscal Framework Outturn report to be published by the Scottish Government annually in September. The Group also recommends that there is a presumption that the Scottish Government will publish multi-year budgets linked to the UK Spending Review cycle.

Both the Cabinet Secretary for Finance and the Constitution and the Finance and Constitution Committee has welcomed the Group's findings. The Cabinet Secretary has stated that he intends to implement the recommendations as quickly as possible including increasing the transparency of budget documentation in time for Draft Budget 2018-19. However, most of the recommendations will be implemented subject to parliamentary approval in time for scrutiny of the Budget for 2019-20.

The Finance and Constitution Committee will now consider the necessary procedural changes to implement the Group's findings before making recommendations for the agreement of the Parliament. The Standards, Procedures and Public Appointments Committee will also have a role in considering any changes to the Standing Orders arising from the revised budget process.

TELL ME MORE

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From our Experts

Dispute Resolution After Brexit

by Dr Tobias Lock, University of Edinburgh

Prime Minister Theresa May's Brexit 'red line' on a role for the European Court of Justice has been a major source of complication in the early stages of the negotiations, writes Tobias Lock. Analysing the recent UK government negotiating paper on dispute resolution, he argues that its shift in emphasis from no ECJ jurisdiction to no 'direct' jurisdiction could prove significant and enable an eventual compromise with the EU to be found.

[This blog was originally posted on European Futures.](#)

When setting out her priorities for the Brexit negotiations in her Lancaster House speech in January, Theresa May promised to 'bring an end to the jurisdiction of the European Court of Justice (ECJ) in Britain.' This forcefully formulated 'red line' has turned into a headache for the British negotiators. It is both somewhat misconceived – the ECJ's preliminary reference procedure hardly results in jurisdiction 'in Britain' – and overly categorical, ignoring both the likely content of the UK-EU withdrawal agreement and the shape of the future UK-EU relationship envisaged by her own government as a 'new, deep and special partnership.'

This week's [w/c 21 August] UK government Brexit paper on 'enforcement and dispute resolution' should therefore be welcomed as injecting a portion of realism and pragmatism in the debate over the ECJ. As I have argued previously, one can broadly identify four types of disputes that are likely to arise after Brexit. These are disputes over (1) cases that arose before Brexit; (2) the interpretation of the withdrawal agreement, in particular on citizens' rights; (3) the interpretation of possible transitional arrangements, which may replicate some EU law; and (4) the agreement(s) on the future relationship between the EU and the UK.

When it comes to agreeing dispute settlement clauses between the EU and the UK, the EU side is constitutionally limited by the ECJ's position concerning its own exclusive jurisdiction to render binding interpretations of EU law with effect for the EU legal order (see Opinion 1/91). There are no comparable constitutional limits in the UK legal order, but Theresa May's red line would have constituted a serious stumbling block to finding agreement on dispute resolution.

The position paper's partial retreat on the matter – performed semantically by reformulating the red line as bringing about an end to 'the direct jurisdiction' of the ECJ – is significant and paves the way for an agreement along the lines of the dispute settlement regime found in the EEA

Agreement (though it does not answer the intriguing question of what is direct jurisdiction of the ECJ).

The UK paper does not really take a position on any specific dispute resolution model, but canvasses a number of models that dispute resolution and enforcement could have in a post-Brexit setting. It can be assumed that the UK government considers none of these options politically unacceptable, so their merits and drawbacks can be assessed with this in mind. Most of these models are mainly interesting for the future EU-UK relationship.

As far as the ECJ's continued jurisdiction over cases arising before Brexit is concerned, however, the position paper is silent. But the UK government's position can be found in the European Union (Withdrawal) Bill – once known as the Great Repeal Bill. Unless amended in the legislative process, it seems to follow from Clause 6 of the bill that a UK court can no longer refer a matter to the ECJ after Brexit Day – which would chime with the loss of the right to do so under the EU treaties.

Importantly, the clause also reads that that UK courts are 'not bound by any principles laid down, or any decisions made, on or after exit day by the European Court' – which would mean that, if a preliminary ruling procedure initiated by a UK court is pending in Luxembourg and the judgment is handed down on or after Brexit Day, the UK court will not be bound by it. It may be, however, that the withdrawal negotiations bring a different outcome.

Where the ECJ's jurisdiction over disputes over the interpretation and application of the withdrawal agreement is concerned, the European Commission position paper on citizens' rights envisages a continuation of the ECJ's role as it presently exists: both enforcement actions by the Commission and preliminary references from UK courts should remain possible. This would be difficult to accept for the UK, even under its modified 'direct jurisdiction' line.

At the same time, there would not appear to be a constitutional need for the EU to insist on a direct involvement of the ECJ in proceedings concerning the UK. It would perhaps suffice to either create a special international court, similar to the EFTA Court – dealing with requests from UK courts – or, perhaps cheaper, for the UK to promise a specialised domestic tribunal dealing with such cases and closely following the ECJ's case law.

Dispute settlement under the future EU-UK relationship agreement (or agreements) is much harder to predict. This is where the various options canvassed in the UK government's position paper – ranging from Joint Committees and arbitration to an EEA-inspired international court – come into play.

What is most striking in the paper is the lack of any discussion of envisaged dispute settlement procedures, and notably of who would have access to dispute settlement. Some of the options discussed would only provide for the resolution of inter-party disputes, others for investor-state arbitration, and others still would seem to allow for reference requests from UK courts to a variation of the EFTA Court, which would in practice follow ECJ precedent.

Of course, much will depend on the substantive content of the future EU-UK deal. If it replicates EU law to a large extent, then an arrangement based on the EFTA Court is the most likely. If, however, it is a mere free trade deal, a much more traditionally international form of dispute settlement – possibly even restricted to political settlement – is conceivable.

The UK government's paper is cautious and disclaims any preference for one of the models discussed. One can therefore assume that not every model might receive the same amount of political support. At the same time, the recent public insistence by some of the most ardent Brexiteers that the EFTA Court is something completely different from the ECJ, as it cannot issue binding preliminary rulings and because EEA law does not have direct effect, suggests that something may be moving politically and that the UK might eventually be in a position to agree to a workable compromise which is acceptable to the EU as well.

TELL ME MORE

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With or without you...? The EU Withdrawal Bill, the devolved institutions and legislative consent

by Professor Nicola McEwen, Centre on Constitutional Change/University of Edinburgh

What's the issue?

One of the primary functions of the European Union (Withdrawal) Bill is to repeal the European Communities Act 1972, while preserving existing EU law. This is to ensure continuity as the UK exits the EU. The Bill achieves this by creating a new category of law - 'retained EU law'. It also gives powers to ministers to use secondary legislation to modify retained EU law so as to 'prevent, remedy or mitigate' any deficiencies. Much of the opposition in the Second Reading debate in the Commons was focused on the breadth of these ministerial powers, and the extent to which they

take power away from Parliament. But it is the effect of the legislation on the authority of the devolved parliaments and assemblies that has been the target of the Scottish and Welsh Governments.

The legislation that created the Scottish Parliament and the National Assembly for Wales required devolved laws to be compatible with EU law. In the absence of any other change, this requirement would be removed after Brexit, leaving these legislatures free to pass laws in devolved areas like agriculture, the environment and fishing that have been governed by EU law. However, Clause 11 of the EU (Withdrawal) Bill replaces the need for compatibility with EU law with a new constraint: devolved law must be compatible with 'retained EU law'. The Bill also gives devolved ministers some powers to modify retained EU law in areas that are already fully devolved, but with the restriction that any changes made by the devolved institutions must be consistent with modifications made by the UK Government.

These restrictions are intended to be transitional. There is provision in the Bill to transfer further powers to devolved institutions – to release them from the new constraint – if, after negotiations between the UK and devolved governments, it is decided that a common policy approach isn't necessary. For their part, the devolved governments have signaled a willingness to develop common approaches if needed, so long as this is achieved by agreement and legislative consent.

Given the strong possibility, in the current climate, that the governments are unable to reach agreement, the default position created by the Bill would leave authority for retained EU law with the UK Government and Parliament. In that event, the devolved legislatures may not have fewer powers than they have today, but the balance of power between them and the UK Parliament would have shifted in favour of the latter.

What happens next?

The legislative consent memorandums issued by the Scottish and Welsh Governments today have set out why they cannot recommend consent for the Bill in its current form. There are three avenues open to the devolved governments to try to influence the Bill.

The first is via direct discussions and cooperation with the UK Government, relying on persuasion and soft power diplomacy. The recent experience of the Joint Ministerial Committee set up to agree a UK approach to Article 50 negotiations left the devolved governments deeply frustrated at the lack of discussion of, and influence over, the UK Government's Brexit priorities. The result has been a loss of trust between the UK Government and the devolved governments, and a lack of confidence in the capacity of intergovernmental relations to provide more than very limited opportunities for influence.

The second avenue is to seek to amend the bill directly during the Committee stage, working with allies in the Westminster parliament. There are 35 SNP MPs who can be relied upon to pursue the Scottish Government's agenda in the House of Commons. Ruth Davidson's 13 Tory MPs may come under pressure to challenge provisions within the Bill if these are widely perceived as a threat to devolution. Welsh First Minister, Carwyn Jones, may be able to persuade his Labour colleagues in Westminster to seek changes to the Bill in line with Welsh Government preferences. Although the Bill passed its 2nd reading comfortably, the UK Government's minority status might make it vulnerable to defeat in Commons' votes if the opposition parties can present a unified front. The Welsh Government will also look to work collaboratively with the Lords, building on recent successes in improving Welsh devolution legislation.

The third avenue is via the devolved legislatures. Under the Sewel Convention, the UK parliament will not normally legislate on devolved matters, nor alter devolved competence, without the consent of the devolved legislatures concerned. Cross-party committees within the Scottish Parliament and the National Assembly for Wales are undertaking their own inquiries on the Bill's effect on their respective devolution settlements. Their reports will highlight perceived flaws, suggest improvements and ultimately recommend a view on legislative consent.

One or more of these avenues may produce some modifications to the Bill. More substantial changes will depend upon the political will of the UK Government to reach compromise with the devolved institutions. Without significant changes, there is a realistic prospect that the devolved governments and legislatures will refuse consent for the Bill. That would not amount to a veto. As the Supreme Court made clear when ruling on the devolution issues raised in the Brexit appeal, the Sewel Convention acts as 'a political constraint on the activity of the UK Parliament' but it has no legal effect.

If consent is withheld, politics, not law, would determine what happened next. It would be for both the UK Government and the UK Parliament, after strategic evaluations of the political costs and benefits, to consider whether and how to heed the will of the devolved legislatures. Ultimately, it will be up to the electorates in Scotland and Wales to decide if it all matters.

TELL ME MORE

FOR MORE INFORMATION:

For further information on this subject, see this [parliamentary briefing](#) written by Prof McEwen and her colleague Prof Christine O'Neill.

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The EU Withdrawal Bill has serious implications for devolution

by Akash Paun, Institute for Government

Originally published by the Institute for Government at <https://www.instituteforgovernment.org.uk/blog/eu-withdrawal-bill-has-serious-implications-devolution>

The EU Withdrawal Bill has exacerbated the already serious tensions between the UK and the devolved Governments over Brexit and creates an urgent need to reset intergovernmental relations.

The EU Withdrawal Bill will take the UK out of the European Union (EU) while providing that all European law be imported into domestic law to avoid a regulatory black hole after Brexit.

The bill creates wide-ranging powers for ministers to amend this huge body of 'retained EU law' to ensure it will be 'operable' outside the EU and to reflect the terms of the Withdrawal Agreement.

In Edinburgh and Cardiff, there are serious concerns about the impact of the bill on devolution and on the balance of power within the UK. The Scottish and Welsh Governments have announced that they oppose granting the bill devolved consent, which Whitehall recognises should be sought under the Sewel Convention.

The EU Withdrawal Bill sets a default that EU powers return to Westminster

The central point of contention is Clause 11. At present, the devolved parliaments cannot pass legislation that is incompatible with EU law. Clause 11 replaces this constraint with a new provision preventing them modifying the new category of 'retained EU law'.

This means all powers currently exercised at EU level will initially flow back to Westminster. There is further provision for some of these powers to be 'released' to the devolved level, but at the discretion of UK ministers.

The Whitehall view is that new frameworks will be required to coordinate policy currently held constant across the UK by EU law in areas such as environmental regulation, agricultural policy, state aid and aspects of justice and transport.

These frameworks might be needed to prevent new barriers to economic activity within the UK, to ensure the UK can strike comprehensive trade deals, to comply with international obligations or to manage common resources such as fisheries.

A long list of policy domains where EU and devolved powers intersect has been published. For Scotland there are 111

areas mentioned. But the extent to which new frameworks will be needed is unclear.

This is partly because the terms of exiting the EU remain unknown and if the UK remains within some EU frameworks, the devolution question will be (largely) moot. But it is also because the government failed to think through these complex questions before triggering Article 50 and is now in a race against the clock.

The underlying problem is a lack of trust between the UK and the devolved governments

The Scottish and Welsh Governments agree that some joint frameworks will be required. But they disagree with the UK government on a fundamental point of principle. The Edinburgh-Cardiff 'Axis of Devol' is adamant that all powers in areas such as the environment should be devolved in full with frameworks then negotiated between the four governments.

To be precise, they argue that these areas are already devolved albeit currently subject to the requirement to abide by EU law. Their proposed amendment to the EU Withdrawal Bill would remove this requirement and put nothing in its place. They also have a practical concern that the bill would muddy the boundary between devolved and reserved (non-devolved) powers, creating confusion and raising the potential of legal disputes.

The underlying problem is a profound absence of trust. The devolved governments are being asked to consent to the bill on the basis of ministerial guarantees that significant further devolution will follow. And the devolved amendment would require Whitehall to trust that Edinburgh and Cardiff will play ball when it comes to creating common frameworks if full control were devolved.

If agreement is not reached then Westminster may push the bill through regardless. That might trigger a legal challenge, albeit one the Government would expect to win. But it would certainly damage relations further, making it harder still for the Governments to work together in the new constitutional context of a post-Brexit Britain.

How can the impasse be resolved? Like the lost tourist asking the surly local for directions, the accurate but unhelpful answer is that 'I wouldn't start from here, if I were you'. Trust and joint working arrangements cannot be built overnight, and it is apparent that the intergovernmental mechanisms established in autumn 2016 have not lived up to the stated purpose of developing a UK-wide approach to Brexit.

The key ministerial body is the Joint Ministerial Committee (EU Negotiations) - also known as JMC (EN) - which is a forum that brings together ministers from the UK and devolved governments to discuss the UK Brexit strategy. But it has not met since February.

A reset of intergovernmental relations on Brexit is urgently needed

A meeting of the JMC (EN) is reportedly pencilled in for October. This is necessary but insufficient. There must be a commitment to much more regular meetings, with greater transparency and information sharing in order to give the devolved Governments the opportunity to influence the UK position in negotiations with the EU.

Alongside this, intensive joint working is required to establish where and how common frameworks should be established. The first move should be to agree clear principles that apply, perhaps with a presumption to devolve unless there is a strong, evidence-based reason to retain the powers at UK level.

Other concessions may be needed too, for instance to protect the Scotland and Wales Acts from further amendment using the ministerial powers created by the EU Withdrawal Bill.

The Institute for Government has long called for a new approach to intergovernmental relations, particularly with regard to Brexit. The deadlock over the EU Withdrawal Bill makes this more urgent than ever.

TELL ME MORE

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What is the UK Single Market?

by Professor Michael Keating, Centre on Constitutional Change/University of Aberdeen

Decisions over the repatriation of powers and the role of a 'UK single Market' will have significant implications for the future of devolution and the nature of the UK as a state, says Michael Keating.

The devolution statutes for Scotland and Wales of the late 1990s were more permissive than those proposed in the late 1970s in several respects. One was that economic development powers, which in the 1970s were to remain in the hands of the Secretaries of State, are now devolved. This was partly because of a reduced emphasis on centralized regional policies, which reached their peak in the early 1970s. Instead, there was a move towards endogenous or bottom-up development and on inter-regional competition, part of an international trend. It was also because by the late 1990s the European Single Market and stronger European

competition policies provided an alternative framework of regulation and secured a level playing field across the UK as well as the EU as a whole. After Brexit, this will disappear and the UK Government has been talking of the need for measures to secure 'the UK's own single market'.

It is by no means clear what this means in practice. The EU Withdrawal Bill addresses competences that are currently both Europeanized and devolved, proposing to take them back to Westminster as part of 'retained EU law'. The main ones concern agriculture, fisheries, the environment and aspects of justice and home affairs. Later, some may be 'released' back to the devolved level as long as they do not interfere with the single market or other obligations. The Scottish and Welsh governments strongly oppose this.

However that dispute is resolved, it only addresses part of the question. The idea of a UK single market is potentially much wider, if it is analogous to the European Single Market.

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. 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.

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 their aim.

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. More stringent 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 product is 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. 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.

It may be that the UK Government will take a permissive line, encouraging regulatory competition of even a 'race to the bottom'. Alternatively, it may seek to enforce standardization by new controls, reservation of more competences or a set of broad framework principles allowing it to intervene in devolved matters. If the example of repatriated competences is anything to go by, it is likely to do this itself, from the top down. Ministers may replace the European Commission and the Court of Justice as the final decision-makers on how the frameworks are to be interpreted. Alternatively, as the Welsh Government has suggested, the UK could seek to imitate the EU by setting up a UK Council of Ministers to decide jointly what needs to be uniform and what does not.

How these matters are resolved will determine whether the UK is on a journey towards some kind of federalism, or remains a decentralized unitary state in which the centre has the last word.

TELL ME MORE

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Brodies LLP, Edinburgh. Contact:

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