

Finance and Constitution Committee

Possible Implications of the UK-EU Withdrawal Agreement

I have been asked to provide a briefing on the implications for devolved government of the Withdrawal Agreement of the UK from the EU. In explaining the effect of the Withdrawal Agreement, this briefing assumes that it is adopted in its current form

Introduction

The Withdrawal Agreement:

- sets out the terms on which the UK will leave the EU on 31st March 2019;
- provides for a transition period lasting until 31st December 2020; and
- includes a Protocol on Ireland and Northern Ireland which sets up the “backstop” for avoiding a hard border between the two.

Implementing the Withdrawal Agreement

The Withdrawal explicitly states that both the EU and UK must ensure that, in their respective legal orders, the terms of the Agreement are given primacy and direct effect. The Agreement, therefore takes priority over any inconsistent UK law. It will also be possible for persons to invoke some terms of the Withdrawal Agreement in the national courts of both the UK and EU Member States. Those terms will be any terms which meet the conditions for having direct effect under EU law.

The Withdrawal Agreement includes provisions which create arrangements for the effective management, implementation and enforcement of the Agreement, including mechanisms for dispute settlement. Where a dispute arises about the interpretation of the Withdrawal Agreement, the initial process is a political consultation in a Joint Committee. If no solution can be found in this way, either the UK or the EU can refer the dispute to binding arbitration. Where the dispute involves a question of EU law, the arbitration panel has an obligation to refer the question to the CJEU for a binding ruling. The decision of the arbitration panel must be consistent with any ruling of the CJEU. The ultimate decision of the arbitration panel will be binding on the EU and the UK. The Withdrawal Agreement does not impose any specific obligations on the UK Government to consult the Scottish Government or the Scottish Parliament on any aspect of Withdrawal from the EU. Any such obligations arise only from UK law and constitutional practice.

Section 13 of the European Union (Withdrawal) Act 2018 (EUWA) provides that the House of Commons must vote to approve the Withdrawal Agreement and Political Declaration on the future relationship before the Withdrawal Agreement can be ratified and enter into force. However, there will also be a requirement for new UK primary legislation to implement the Withdrawal Agreement. In November 2017, the Government said that it would introduce an EU (Withdrawal Agreement) Bill (EUWAB) for this purpose. The UK Government has also said that it will continue to follow the established practices and conventions for seeking the consent of the devolved legislatures where it is relevant to do so. Therefore, if any provisions of the EU (Withdrawal Agreement) Bill change the law on devolved matters or alter the legislative competence of the Scottish Parliament, there will need to be a legislative consent motion in the Scottish Parliament. However, as recent events have shown, if the Scottish

Parliament were to refuse consent, that would not prevent the EU (Withdrawal Agreement) Bill being enacted. It is to be expected that EUWAB will deal comprehensively with all aspects of implementing the Withdrawal Agreement across the UK. Therefore, it is unlikely that a separate Scottish Bill will be required, although this will depend on the terms of EUWAB.

The UK Government has also said that this Bill will be introduced only once Parliament has approved the final deal of leaving the EU under the terms of the EU (Withdrawal) Act 2018. The Bill will have to be passed before the UK leaves the EU on 29 March 2019 so that the Withdrawal Agreement will have legal effect in the UK. There will have to be separate legislation in future to implement any agreement on the UK's future relationship with the EU after the transition period.

The Withdrawal Agreement will also be subject to the provisions of the Constitutional Reform and Governance Act 2010 on the ratification of treaties.

The Transition Period

The transition period will last (subject to any agreed extension) until 31st December 2020. During the transition period, the whole body of EU law will continue to apply as if the UK were a Member State. The UK will be bound to respect all its EU law obligations. The UK Parliament and the Scottish Parliament will have no greater freedom to legislate on matters covered by EU law than they have now. Persons whose EU law rights are infringed will continue to be able to rely on them in the UK courts. The Court of Justice of the European Union (CJEU) will also remain the ultimate authority on the interpretation of the meaning and effect of EU Law until the end of the transition period.

EU law changes constantly. Any changes in EU law which come into effect during the transition period will apply automatically in the UK and will require implementing measures to be taken by either the UK or Scottish Parliaments or by the UK or Scottish Governments.

Although it will continue to be bound by EU law, during the transition period, because it will have left the EU, the UK will not be represented in the EU institutions, such as the European Commission, European Parliament and the Council of the European Union. There will, therefore, be no formal UK input into EU decision-making during the transition period other than is provided for in the Withdrawal Agreement.

Northern Ireland and Ireland

The Agreement includes a Protocol on Ireland and Northern Ireland. It is intended to ensure that there will be no hard border between Ireland and Northern Ireland and the protection of the Good Friday (Belfast) Agreement 1998 in all its dimensions. It sets up the so-called "backstop" for avoiding a hard border. The backstop provisions will apply only if by the end of the transition period, the EU and the UK have not reached an agreement on their long-term relationship that avoids a hard border.

If the backstop is required, the Withdrawal Agreement establishes a single EU-UK customs territory to run from the end of the transition period until an agreement on the future relationship between the UK and the EU comes into effect. Northern Ireland and the UK will, therefore, remain part of the same customs territory during this period and there will be no

tariffs, quotas, or checks on rules of origin on goods moving between Northern Ireland and the rest of the UK.

The Protocol affects Scotland because Scotland will, of course, be part of the EU-UK customs territory. The effects go beyond ensuring the absence of tariffs, quotas, or rules of origin checks on goods. The UK has also committed to aspects of the single market which are deemed necessary to avoid a hard border and to ensure a level playing field. These relate to:

- State aid
- Competition
- Taxation
- Environment
- Labour and social protection.

As can be seen, these are a mixture of devolved and reserved areas of policy. The UK has also committed to, amongst other things the continuation of the Common Travel Area.

The period for which the backstop will last is unspecified. Whilst the Protocol is not intended to create a permanent relationship between the EU and the UK, and both EU and UK are committed to trying to conclude and ratify a long-term agreement between them by 1 July 2020, there is no guarantee that this will happen. So long as such an agreement has not been concluded the backstop will continue to apply and there will continue to be a single EU-UK customs territory which will include Scotland.

After the Transition Period

The Withdrawal Agreement does not deal with the longer-term relationship between the UK and the EU. All aspects of the post-transition period remain to be negotiated; nothing has been agreed. The future relationship between the UK and the EU might well involve agreements restricting the UK's freedom of action in policy areas which are currently devolved such as agriculture, fisheries and the environment. At the moment, we do not know, and cannot predict, what the extent of any such restrictions might be.

Equally, it is possible that there will be no long-term deal with the EU. Brexit remains a possibility in which case, the obligations on the UK to apply EU law will cease to apply at the end of the transition period.

Specific Policy Areas

Police and Judicial Co-operation in Criminal Matters

The Scottish police and prosecution authorities have a substantial interest in the existing framework for police and judicial co-operation in criminal matters. Title V of the Withdrawal Agreement sets out how this will be brought to a close at the end of the implementation period. It may well be that police and judicial co-operation in criminal matters will continue after the end of the transitional period under the long-term relationship with the EU but there is no guarantee of this. The Scottish police and prosecution authorities will, therefore, have to have contingency plans for the possibility that co-operation will cease.

Judicial Cooperation in Civil and Commercial Matters

Currently, there is substantial co-operation on cross-border civil and commercial proceedings. This includes questions of which court has jurisdiction, recognition and enforcement of judgments and insolvency proceedings. These may all be included in the long-term relationship agreed between the UKJ and the EU but again there is no guarantee of this. Contingency plans will, therefore, have to be made for the possibility that such co-operation will cease.

Fisheries

During the transition period, the UK will continue to be bound by the EU Common Fisheries Policy. However, for any time period that falls within the transition period, the UK must be consulted on the fishing opportunities related to the United Kingdom. In theory, the UK would be free to set its own fisheries policy after the end of the transition period, but the UK and the EU have said that they intend to conclude a new fisheries agreement that will apply after the end of the transition period. Any such agreement would, of course, affect devolved matters.

Agriculture

There are provisions relating to agriculture in the Protocol on Ireland and Northern Ireland.

Environment

Environmental matters are likely to be included in any long-term agreement concluded between the UK and the EU to apply after the end of the transition period. However, there is no guarantee that negotiations on the long-term relationship will be concluded before the end of the transition period. However, if such negotiations are not concluded in time for the long-term relationship to come into effect at the end of 2020, then the backstop for the Ireland/Northern Ireland will come into effect. The backstop includes, amongst other things, a commitment by the EU and the UK to non-regression in the level of environmental protection, i.e. the UK commits to maintaining the existing level of environmental protection at the end of the transition period. That includes access to environmental information, public participation and access to justice in environmental matters; environmental impact assessment and strategic environmental assessment; industrial emissions; air emissions and air quality targets and ceilings; nature and biodiversity conservation; waste management; the protection and preservation of the aquatic environment; the protection and preservation of the marine environment; the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release and disposal of chemical substances; and climate change.

Again, this affects devolved matters.

Common Frameworks

EUWA provides that certain currently devolved matters will become reserved matters in order to ensure that there no new barriers to trade and commerce within the UK by imposing common frameworks in those areas across the UK. It will not be necessary to have these common frameworks in force during the transition period as the harmonisation required by EU law will still be in force. There is a relationship between common frameworks and the Withdrawal Agreement as the backstop for Ireland/Northern Ireland may be in effect for some time after

the end of the transition period and it continues the effect of certain aspects of EU law for the whole of the UK so long as the backstop is required (see above).

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