CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

10th Meeting, 2023, Session 6

23 March 2023

How is Devolution Changing Post-EU?

1. The Committee concluded in its report on *The Impact of Brexit on Devolution* that there are fundamental concerns which need to be addressed in relation to how devolution works outside the EU.

2. The operation of the Sewel Convention, which the Committee views as being 'under strain', and the use of delegated powers in devolved areas are two significant areas in which the Committee believes devolution has begun to evolve following Brexit.

3. The Committee's recent scrutiny of Legislative Consent Memorandums (LCMs) for the Northern Ireland Protocol Bill and Retained EU Law (Revocation and Reform) Bill has highlighted the need to re-set the constitutional arrangements within the UK following EU withdrawal, both in respect of relations between the UK Government and the devolved governments and between the four legislatures and governments across the UK. The Committee's view is these relations are clearly not working as well as they should and this needs to be addressed.

4. Furthermore, the Committee's report on *The UK Internal Market* concluded that while the UK Internal Market Act has sought to address the tension between open trade and regulatory divergence within the UK that has arisen from the UK leaving the EU, it has led to tensions within the devolution settlement.

5. The Committee recognises that Common Frameworks have the potential to resolve the tensions within the devolved settlement through managing regulatory divergence on a consensual basis while facilitating open trade within the UK internal market. But the Committee believes there is a risk that the emphasis on manging regulatory divergence at an inter-governmental level may lead to less transparency and Ministerial accountability and tension in the balance of relations between the Executive and the Legislature. The Committee is concerned that this may result in reduced democratic oversight of the Executive and a less consultative policy-making process.

6. Through its inquiry *How is Devolution Changing Post-EU?* the Committee is now looking to explore how devolution is changing, and, importantly, how devolution should now evolve to meet the challenges and opportunities of the new constitutional landscape.

7. The call for views on this inquiry closed on 30 November 2022. It focused on the following questions, which the Committee will explore through the course of its inquiry—

    - How is devolution now working following the UK's departure from the EU, including the policy-making and legislative processes?
    - How should devolution evolve post EU exit, to meet the challenges and opportunities of the new constitutional landscape?
    - How much scope there is for regulatory divergence in areas such as environmental standards, food standards and animal welfare between each of the four parts of the UK;
    - Are there sufficient safeguards to allow regulatory divergence across the four parts of the UK in areas where there are disagreements between governments?
    - Are there sufficient safeguards to ensure an open and transparent policy-making and legislative process in determining the post-EU exit regulatory environment within Scotland and how it relates to the rest of the UK?

8. At this meeting, the Committee will take evidence from—

    - **Professor Aileen McHarg**, Professor of Public Law and Human Rights, Durham University.

9. A written submission from Professor Aileen McHarg is attached at **Annexe A**.

CEEAC Committee Clerks
March 2023

CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE:

HOW IS DEVOLUTION CHANGING POST-EU?

Introduction

Brexit has had profound impacts on devolution, some direct and some indirect. These various changes to the powers of the devolved institutions, and to the constitutional context in which they operate, have created significant challenges for the meaningful exercise of devolved autonomy, for effective devolved law and policy making, and for good governance in the devolved policy space. Good governance effects include adverse impacts on the intelligibility, transparency and stability of the boundaries of devolved competence, with knock-on consequences for effective political participation, scrutiny and accountability, constructive inter-governmental relations, and legal certainty and legal risk.

The changes that have taken place have done so in an *ad hoc*, often rushed and largely non-consensual manner, with little apparent concern for their impact on devolution – beyond a concern to assert and protect the constitutional primacy of the UK Parliament and (increasingly) UK Ministers. A reset is required to improve the functioning of devolution post-Brexit. Bearing in mind the limits of what can be achieved within the UK's current constitutional order, there are nevertheless practical reforms which could restore a degree of coherence and harmony to the devolution arrangements, and reverse some of the adverse effects of the Brexit-related changes that have occurred.

The Impacts of Brexit on Devolution

Direct Impacts

The major direct impact of Brexit on devolution comes from the lifting of the obligation to act compatibly with EU law – an obligation which applied (in practice) symmetrically to the devolved and UK institutions alike – and its replacement with a new framework for internal and external trade.

The new ***UK internal market framework*** consists of three main elements: the United Kingdom Internal Market Act 2020 (UKIMA); the Subsidy Control Act 2022; and non-statutory Common Frameworks in areas previously governed by EU law.

The new framework differs from EU law in a number of important respects:

1. The *substance* of the new rules, though similar to the EU internal market and state aid rules which they replace, is not identical, thus creating an inevitable degree of *uncertainty* about their application. There is also uncertainty about the interaction of non-statutory Common Frameworks and the internal market rules contained in UKIMA. For example, an agreement in a Common Framework that divergence is acceptable *may* lead to a disapplication of the market access principles, but is not guaranteed to do so.

2. In *form*, the effects of the new rules on devolved competence are also different. Whereas breach of EU law meant that devolved legislation was invalid, breach of the market access principles leads merely to *disapplication* of the legislation to importing producers or suppliers. This is confusing for people to understand, and means that the consequences of the application of the market access principles in terms of the effective implementation of devolved policies is heavily context dependent. The enforcement of the internal market rules also takes place outside the standard processes for policing the boundaries of devolved competence, and on principles which are as yet unclear. This is particularly significant in

relation to the subsidy control principles contained in the Subsidy Control Act, which are enforceable – against devolved legislation as well as executive decision-making – via the ordinary processes of judicial review, notwithstanding that judicial review is ordinarily *not* available in respect of devolved primary legislation. Where policy-making is conditioned by Common Frameworks, there are particular challenges of transparency and accessibility, as well as scrutiny and accountability.

3. The impact of the new rules is highly *asymmetrical*, both *de facto* and *de jure*. The operation of the mutual recognition principle in practice will typically favour regulatory choices made by the UK Parliament or UK Ministers in relation to England, given the much greater size of the English market compared to the devolved territories. For instance, the Genetic Technology (Precision Breeding) Bill is an England-only Bill which amends existing rules on genetically modified organisms (GMOs). The Scottish and Welsh Governments declined to participate in a GB-wide Bill, preferring to maintain their existing bans on GMOs. Nevertheless, under the mutual recognition principle, it will be impossible to prevent gene-edited crops grown in, or imported into, England from being sold in Scotland or Wales. Thanks to the principle of parliamentary sovereignty, the UK Parliament is also not bound by the internal market rules to the same extent as the devolved legislatures. The subsidy control principles do *not* apply to UK primary legislation; and the market access principles can be overridden by subsequent UK legislation (but not by devolved legislation). UK ministers also have greater power than the devolved governments to determine amendments to or exemptions from the internal market rules.

4. The new UK internal market rules – particularly the market access principles – are significantly *more restrictive* than the EU internal market rules which they replace. There are very few grounds specified in UKIMA itself on which the market access principles can be set aside or overridden. UK Ministers can make regulations creating further categories of exemption (as for instance was done in relation to single-use plastic products), in particular where regulatory divergence has been agreed via a Common Framework. Exemptions are normally to be made with the consent of the devolved governments, but consent can be dispensed with. Moreover, if the UK Government *declines* to make an exemption (as has been threatened in relation to the Scottish Deposit Return Scheme) it is likely to be very difficult to challenge that decision. What this means in practice is that the scope for regulatory divergence – and the appropriate balance between unfettered trade and non-market regulatory objectives – is heavily dependent on the views of UK Government ministers. The effect is that policy issues which nominally fall within devolved competence in reality operate within a shared regulatory space in which the devolved institutions are very much the junior partners.

The new ***external trade framework*** is also more complex than before, and again consists of different elements. The EU Trade and Co-operation Agreement was implemented via the European Union (Future Relationship) Act 2020 and takes precedence (via s.29) over all pre-existing domestic law, including in devolved policy areas. Other new trade agreements may be implemented either by the devolved governments or by UK primary legislation. Although, like most other international agreements, trade agreements do not directly limit *future* devolved decision-making, failure to adhere to their terms could attract UK Government intervention under s.35 or s.58 of the Scotland Act 1998, or via UK primary legislation. The devolved institutions are also bound by the terms of the EU Withdrawal Act, which, via s.7A of the EU (Withdrawal) Act 2018, does take precedence over future

as well as past enactments. Finally, the continued application of EU law via the Northern Ireland Protocol to goods produced in, or imported into, Northern Ireland may have an indirect effect in the rest of the UK through the operation of UKIMA.

In respect of all these aspects of the external trade framework, there are significant problems of transparency, intelligibility and predictability, as well as limited opportunities for the devolved institutions to participate in, or the devolved legislatures to scrutinise, the making of rules and agreements which may affect devolved policy freedom.

Indirect Impacts

The indirect effects of Brexit on devolution are twofold, resulting respectively from changing political and judicial attitudes towards the constitution and the place of devolution within it.

In terms of ***changing political attitudes***, there has been a marked – and progressive – breakdown since the 2016 referendum in inter-governmental co-operation, and respect for the boundaries of devolved competence. This has largely been driven by a more assertive, centralising attitude on the part of successive UK Governments, but there have also been instances of devolved governments pushing at the boundaries of devolved competence, partly driven by their opposition to Brexit and other UK Government policies which have consequences in devolved areas.

The effects of changing political attitudes can be seen in several different ways:

- The *breakdown of the Sewel Convention* as a mechanism for promoting co-operation in areas of overlapping/intersecting competences, and for protecting devolved autonomy. There are many more disputes about the need for devolved consent to UK legislation; many more instances of the devolved legislatures withholding consent to UK legislation; frequent complaints by the devolved governments about lack of adequate notice of or consultation over UK Bills affecting devolved matters; as well as a new willingness on the part of the UK Parliament to legislate on devolution related issues without devolved consent, and with scant attempt to justify its decisions to do so.

- The increased willingness of the UK Parliament to confer *powers on UK Ministers to act in devolved areas*, subject to inconsistent and typically rather weak requirements to consult with or seek the agreement of devolved ministers.

- The increasingly *assertive use of oversight mechanisms* by the UK Government. These include the first uses of the power under s.33 of the Scotland Act 1998 for UK Government Law Officers to refer devolved Bills to the Supreme Court, and of the power under s.35 for UK Government Ministers to block the Presiding Officer from presenting a Bill for Royal Assent. Although justified in each case in terms of enforcing the limits of devolved competence, or protecting the operation of the law in reserved areas, on two occasions – the *Continuity Bill Reference* and the s.35 Order made in relation to the Gender Recognition Reform Bill – the intervention took place in the context of significant policy disagreements between the UK and Scottish Governments.

The consequences of these changes for the operation of devolution have been severe. As well as the obvious affronts to devolved autonomy, they have increased the unpredictability of law-making in devolved policy areas, created risks of incoherent and inefficient duplication of policy-making,

provoked inter-governmental litigation, and encouraged forum shifting by opponents of decisions made at devolved level.

In terms of ***changing judicial attitudes***, there has been a noticeable "conservative turn" in the Supreme Court's constitutional jurisprudence since the 2016 referendum. Whereas prior to 2016, the doctrine of parliamentary sovereignty appeared to be increasingly qualified, in more recent cases, the Supreme Court has strongly reasserted the constitutional centrality of parliamentary sovereignty and has been unwilling to countenance any restrictions on it. Indeed, it has adopted an expansive notion of restrictions on sovereignty to include not merely legal limits but also political constraints (unless these are imposed by Westminster upon itself).

In relation to devolution, this renewed emphasis on parliamentary sovereignty has manifested in a number of ways:

- The refusal in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (*Miller 1*) to give any legal effect to the statutory recognition of the Sewel Convention in the Scotland Act 2016, or to play any role in resolving disputes about the meaning and application of the Convention;

- The refusal to allow testing of the boundaries of devolved competence via legal routes other than those provided in the devolution statutes (see: *Miller 1*; *Keatings v Advocate General for Scotland* [2021] CSIH 21; *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] UKCA Civ 118);

- The doubt cast by the recent Supreme Court decision in *Re Allister* [2023] UKSC 5 on the protection offered to the devolution statutes via the constitutional statutes doctrine;

- Most problematically, the unexpected (and conceptually confusing) use of what was hitherto considered to be a symbolic declaration of Westminster's continued sovereignty in relation to devolved matters in s.28(7) of the Scotland Act 1998 in the *Continuity Bill Reference* [2018] UKSC 64 and the *Treaty Incorporation Bill References* [2021] 42 to create an additional, highly restrictive, constraint on devolved legislative competence. In these two cases, the Supreme Court has held that any attempt to impose "conditions" on UK legislation in devolved areas amounts to an unlawful modification of s.28(7), notwithstanding that Westminster is not legally bound by any such conditions, and that the devolved legislatures incontrovertibly have the power to amend or repeal UK legislation in devolved areas.

In these cases, the courts have not only proved unwilling to counteract the political weakness of the devolved institutions in the face of the reassertion of parliamentary sovereignty, but have also shown no regard for the conditions of effective policy making or good governance at the devolved level.

Strengthening the Legal and Constitutional Framework for Devolution Post-Brexit

There are several ways in which the legal and constitutional framework for devolution could and should be strengthened. I suggest that the main areas for attention are as follows.

<u>Reforming the Internal Market Framework</u>

The internal market framework needs to be reformed both in form and substance.

In terms of form, the way in which the internal market legislation interacts with the devolution statutes is unnecessarily complex, making it difficult to understand what the devolved institutions can and cannot do, and creating potential inconsistencies and uncertainties. In principle, all constraints on devolved competence (or at least on devolved legislative competence) should be contained within the devolution statutes themselves, subject (so far as possible) to a consistent scheme of pre- and post-legislative enforcement mechanisms, interpretive rules, and remedies.[1]

In terms of substance, there needs to be a more generous set of *statutory* grounds on which the market access principles can be disapplied or interference with free trade justified, so that there is greater space for policy divergence and that the effective exercise of devolved legislative competence is less dependent upon the UK Government agreeing to make *ad hoc* exemptions. This would also help to improve the predictability of the application of the internal market rules.

In addition, while it is impossible to ensure complete symmetry in the way in which the internal market rules apply to UK and devolved legislation (and indeed, UKIMA gives a misleading impression of symmetry in the application of the market access principles), efforts should be made to reduce asymmetry where possible. For instance, there is no reason in principle why devolved primary legislation should be subject to the subsidy control principles when UK primary legislation is not. Processes for amending the internal market rules, to the extent that they remain necessary, should also be genuinely consensual. For instance, where agreement on regulatory divergence has been reached via a Common Framework it could be mandatory rather than discretionary for an exemption order to be laid under s.10 of UKIMA. Alternatively, there could be a statutory (rather than, as at present, non-statutory) right for each government to initiate the exemption process, with a statutory (and therefore potentially reviewable) duty on the others to give reasons for refusal to agree, thus removing the gatekeeper role of the UK Government.

<u>Reforming the Devolution Statutes</u>

Other reforms to the devolution statutes should also be considered:

- The statement of the UK Parliament's ongoing competence to legislate in relation to devolved matters in s.28(7) of the Scotland Act 1998 (and equivalent provisions in the other devolution statutes) is not necessary to preserve Westminster's sovereignty, and should be repealed. This would have the effect of reversing the problematic line of authority in the *Continuity Bill Reference* and the *Treaty Incorporation Bill References*, and would restore flexibility to the devolved legislatures to control the whole devolved statute book.

- The Secretary of State's veto powers in s.35 and s.58 of the Scotland Act (and equivalent – but not identical – powers in the other devolution statutes) should also be repealed, or at least the threshold for their use substantially increased. There should be no possibility for the UK Government to interfere in devolved decision-making simply because it disagrees with the policy being pursued. If there are genuine concerns about *vires* or about adverse effects on reserved law or policy, there are other mechanisms available for addressing those concerns, other than, perhaps, in situations of genuine urgency. If these powers are to be retained, they should be subject to a requirement to demonstrate that there is no other course of action

[1] N.b., if the Bill of Rights Bill is enacted in its current form, problems of inconsistency could also arise from the simultaneously protection of Convention Rights under the devolution statutes and the inclusion of devolved legislation within UK-wide human rights legislation – see How does the Bill of Rights impact devolution? – Constitutional Law Matters.

reasonably available, and that reasonable notification has been given of the nature of the concerns leading to the exercise of the veto.

- Consideration might be given to the adoption of a fuller set of principles to guide the interpretation of limits on devolved competence. These could include, for example, a principle of subsidiarity, clarification of the extent of plenary legislative competence under a reserved powers model, and/or "principles of union". These could help to produce a more principled approach to the interpretation of the devolution statutes, in place of the highly technical approach adopted at present. However, caution would be required since such a reform could simply increase legal uncertainty around the limits of devolved competence.

Strengthening and Reinforcing the Sewel Convention

A *sine qua non* for restoring the security and stability of the devolution arrangements is to reinvigorate the Sewel Convention. This requires:

1. Clarity over the meaning of the Convention, including the circumstances in which devolved consent can legitimately be dispensed with;

2. Improved procedures at Westminster for considering the granting or withholding of devolved consent; and

3. Improved procedures for resolving disputes about the application of the Convention.

A number of proposals have been put forward for reform, of varying degrees of formality and strength. A key question is to what extent reforms should be essentially political or should involve legal change. For instance, political reforms might include a new inter-governmental agreement on the circumstances in which devolved consent is required, and the procedures to be followed, along with changes to parliamentary procedures to require ministers to make formal statements about devolved consent and/or to give parliamentary committees a role in considering disputes about the need for, or the granting of consent. By contrast, the Brown Commission has proposed legal reform, including a statutory restatement of the Convention, and a new legal veto power for a reformed second chamber in respect of legislation engaging the Convention, including a mandatory judicial reference in order to trigger the veto power. The Scottish Government has also proposed statutory reform, including legally enforceable duties on UK Ministers to seek consent, which would also allow for judicial resolution of disputes about whether devolved consent is required in relation to particular Bills.

My personal view is that a statutory route is preferable for several of reasons. First, the Convention is already recognised in statute, albeit currently non-justiciable. Second, statutory reform would have greater authority than purely political mechanisms, especially given evidence of declining respect for conventional rules. Thirdly, whether devolved consent is or is not required can involve tricky legal questions which can only be authoritatively and independently resolved by a court.

In addition to reforming the Sewel Convention itself, further statutory changes could be considered in order to reinforce it. For example, a statutory presumption that UK legislation is not intended to apply in devolved areas could help to bolster political constraints on legislating without devolved consent. This would mean that the application of UK legislation to devolved matters would have to be explicit; and failure to seek consent would be evidence that the relevant provisions were not intended to apply

in devolved areas. Similarly, there could be a general statutory rule or presumption that powers for UK ministers to make decisions or secondary legislation affecting devolved matters could only be exercised with the consent of (or more minimally after consulting) the relevant devolved ministers, which would again have to be explicitly set aside by later legislation in order for it not to apply.

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