

Cynulliad Cenedlaethol Cymru / National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol a'r Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol / The Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee

Ymgynghoriad ar Fil yr Undeb Ewropeaidd (Ymadael) a'i oblygiadau i Gymru / The European Union (Withdrawal) Bill and its implications for Wales

EUWB 02

Ymateb gan Yr Athro Michael Keating / Evidence from Professor Michael Keating

The repatriation of competences after Brexit

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1. The devolution settlements are based on the reserved powers model, meaning that all competences not reserved to Westminster are devolved.
2. Westminster retains the right to legislate in devolved matters but this is limited by the Sewel Convention under which Westminster will not 'normally' legislate in devolved matters without the consent of the devolved legislatures. A larger interpretation covers changes in the powers of devolved bodies. The Sewel Convention is not enforceable at law, so that there is no definitive ruling on what it covers and how it should work.
3. Non-reserved matters include competences that are also held by the European Union. The main ones in Wales are:
 - a) Agriculture and fisheries
 - b) Environmental regulation;
 - c) Regional policy including aid to industry and economic development.
4. Overlaps between European and devolved competences are handled in the Joint Ministerial Committee (Europe) in

which the UK and devolved governments agree on the position the UK delegation will take in the Council of the European Union.

5. After Brexit, *if nothing else is done*, these overlapping powers will revert to the devolved administrations. For Westminster to regain these powers requires a specific reservation.

Clarifying Competences

6. In practice, matters are more complex.
7. Whether a law falls within the reserved or the devolved field depends on the broad purpose. A bill in a devolved field might meet a reserved purpose.
8. Some powers are concurrent, such as scientific research.
9. Even where a competence is not reserved, the international aspects of it are. So agricultural support is devolved but agricultural trade is reserved. The two are inseparable, as any international agreement on agricultural trade will include rules on support to ensure fair trading conditions. This would extend to trading under World Trade Organization (WTO) rules. Fisheries will be subject to international agreements on access.
10. The funding of competences that are both Europeanized and devolved does not automatically revert to the devolved level. The UK's net contribution to the EU will revert to the UK Government, which can then decide on how to allocate it. There are several possibilities.
 - a. Distribution according to a UK-wide formula, following a UK-wide policy framework;
 - b. Distribution on a historic basis, which would favour the devolved governments, given their larger spending on agriculture;
 - c. Distribution on a per capita basis, which would not take account of needs and which would favour England;

- d. Incorporating the money into the block grant and adjusting according to the Barnett Formula. This would not, as some commentary has suggested, mean distribution according to population. Rather, following the precedent of previous transfers of competences, it would carry over existing levels of funding and adjusting thereafter by giving the devolved territories a per capita share of any *changes* in funding for England. The devolved territories would then have discretion as to how this money was allocated, including spending it in other fields, subject to any new UK or cross-border frameworks.
11. Devolved and reserved competences are interlinked so that changes in one can affect the other.
12. There are externalities and cross-border effects of devolved policies. For example, environmental conditions spill over the border so that actions in one jurisdiction can affect the other.
13. Differing policies across the UK could create market distortions. The UK Government has introduced the concept of the UK single market to highlight these. This is not a concept that has been used officially before, although it has featured in some academic analysis.ⁱ Difficulties could arise if the devolved governments wished to adopt distinctive policies, including raising regulatory or environmental standards or refusing to lower them. They could also arise if the devolved governments were to choose to shadow EU standards rather than UK ones, in order to retain access to EU markets. Conflicts might also arise were the UK to negotiate international trade agreements relaxing controls in matters such as agricultural and food standards, which the devolved administrations did not want to follow. There is already a concordat on aid to industry.

Implications of Brexit

14. There are important differences in interpretation of these matters.
15. The UK Government has argued that at present the devolved administrations 'are responsible for implementing the common policy frameworks set by the EU' and that 'When the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the UK'.ⁱⁱ At the same time it has promised that no 'no decisions currently taken by the devolved administrations will be removed from them'.ⁱⁱⁱ Indeed, they may gain powers: 'we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved.'^{iv} On this interpretation, if any powers currently held by the EU come to the devolved legislatures, that would count as an expansion of their decision-making power.
16. An alternative interpretation is that, rather than reverting to the UK, these framework powers will cease to exist as there is no provision for them in UK domestic law. The Scottish and Welsh Governments have, moreover, disputed the interpretation that they merely administer EU policy, arguing that the policy-making powers belong to them and must come back to them.
17. There is common ground on the need for some coordinating machinery. The Welsh Government has accepted that there should be some common policies but not by centralizing them.^v The Scottish Government has accepted a need for some (negotiated) 'cross-border frameworks'^{vi} but otherwise emphasized its scope for autonomous policy-making.

Taking Back Powers

18. The question is about what form these frameworks will take and who will be responsible for making them. The Welsh Government has argued that devolved competences should remain devolved and that common frameworks, where necessary, should be negotiated among the four UK nations.^{vii}

This would be done through a UK Council of Ministers modelled on the EU Council of Ministers.

19. The proposals in the EU Withdrawal Bill are very different. A category of 'retained EU law' is created and *all* EU such law will revert to Westminster. Ministers have suggested that, at a later stage, some powers may again be devolved. In order to achieve this, the Withdrawal Bill amends the devolution statutes for Scotland, Wales and Northern Ireland.
20. This is a development of great constitutional import as the first significant rolling back of devolution. Under the Sewel Convention, such changes normally require the agreement of the devolved legislatures. It does appear that Westminster will seek to gain such approval through Legislative Consent Motions. This tests the Sewel Convention to its limits. The Scottish and Welsh governments have indicated that they will not recommend consent, meaning that the motions would be voted down in the Scottish Parliament and the National Assembly for Wales.
21. As a strict matter of law, Westminster could go ahead and take back the powers anyway. The UK Supreme Court, in the *Miller* case, on the role of Parliament in Brexit, insisted that the Sewel Convention is not legally enforceable. The incorporation of the Sewel convention into statute in the Wales Act (2017) makes no difference. In any case, the law merely states that Westminster will not 'normally' legislate without devolved consent.
22. This exposes a major weakness in the devolution settlement. The United Kingdom is not a federation, in which the powers of each level are entrenched. Nor, on the other hand, should it be understood as a unitary state in which the centre always has the last word. Much of the UK constitution is based on conventions. These are not mere matters of political convenience but are part of the rules of the political game. The conventions around legislative consent are the equivalent, in our unwritten constitution, of those provisions that elsewhere prevent central government

changing the rules of the game unilaterally. They are what distinguishes devolved national legislatures, established by referendum, from mere local authorities. Incorporating Sewel into the devolution statutes was intended to recognize this federal spirit, without federalizing the state. The fact that it might be complicated to leave powers at the devolved level, or that the devolved legislatures are already restricted by EU laws, is irrelevant.

23. If the UK government insists that it is the sole interpreter of the convention, it looks rather meaningless. In other devolved or federal systems, it is rare for the central parliament to be able to change the balance of competences without the consent either of the devolved governments, or a territorial second chamber, or a special parliamentary procedure.

Managing Frameworks

24. There has been no indication of what powers might later be transferred back to Scotland, Wales and Northern Ireland. The extent of common provisions needed across the UK will not be clear until the UK's future trading relationship with the EU is settled. Free trade agreements with non-EU countries will also impinge on devolved matters.
25. Nor is it clear what form future framework provisions will take and how much legislative and administrative scope will be allowed to the devolved level. Even where legislative competence is taken back to Westminster, administrative responsibility will remain with the devolved governments as they have the machinery in place.
26. EU regulatory agencies will need to be replaced in the UK but it is not clear how far these will be devolved to reflect devolved competences.
27. The idea of framework laws is new to the UK devolution settlement. The principle of administrative devolution without legislative powers has been used sparingly. Together, they move towards a hierarchical model of devolution, in which the

broad principles set in London and the details are filled in across the nations.

28. Framework laws in Spain and Italy have been a source of constitutional litigation as the regions complain that they are too detailed. In Germany, they have been abandoned but, when they existed, they required approval in the Bundesrat, representing the federal Länder.
29. A further issue arises in relation to the international dimension of devolved competences. International agreements will expand, as trade deals are negotiated with the EU and third countries. Such agreements are not directly applicable in UK and devolved law (as EU law presently is) until they are transposed at the appropriate level. UK ministers can, however, direct devolved ministers to give effect to obligations created by them. This is a matter that also arises in some federal systems including Canada and Belgium.
30. It can be argued the devolved bodies should be included in the negotiation of such agreements as they relate to devolved matters and perhaps also non-devolved issues affecting them.

Negotiating Brexit

31. Negotiations on Brexit have started but the role of the devolved governments in the process is unresolved. The Joint Ministerial Committee (European Negotiations) has not been a success. Devolved governments have complained that:
 - a) they are not consulted before decisions are taken and UK policy papers published;
 - b) they do not receive information on time;
 - c) they are consultees and not participants;
 - d) they are not present in negotiations as they are in regular EU meetings where devolved matters are at issue.

Future Prospects

32. Brexit poses a challenge to the UK devolution settlement. Short of disintegration, it could go in three directions:
- a. Towards more centralization as Westminster insists that the UK is a unitary state and it can set the rules;
 - b. Towards more decentralization and differentiation as devolved governments gain powers and variously choose to follow UK, European or their own policy leads;
 - c. Towards cooperative federalism in which there are broadly similar policies but with a stronger role for the devolved level in setting frameworks as well as filling in the details.
33. Brexit is a test case for these competing tendencies and will set important precedents.

ⁱⁱ Michael Keating, *Devolution and Public Policy in the United Kingdom: divergence or convergence?*, in John Adams and Peter Robinson (eds.), *Devolution in Practice*, IPPR, 2002.

ⁱⁱ White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*, (March, 2017).

ⁱⁱⁱ Prime Minister's Speech, 17 January 2017.

^{iv} White Paper, *The United Kingdom's exit from and new partnership with the European Union*, (February 2017).

^v Welsh Government, *Securing Wales' Future*, 2017. Welsh Government, *Brexit and Devolution*, 2017.

^{vi} Letter from Michael Russell to Joan McAlpine, 4 May, 2017.

^{vii} Welsh Government, *Brexit and Devolution*, 2017.