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The White Paper on the Great Repeal Bill - Impact on Scotland

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This briefing provides information on the likely provisions in the Great Repeal Bill based on the UK Government White Paper "Legislating for the United Kingdom's withdrawal from the European Union". The briefing then looks at how the provisions proposed in the White Paper may affect Scotland.



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Executive Summary

The UK Government's White Paper, "Legislating for the United Kingdom's withdrawal from the European Union", presented proposals addressing the domestic process required for the United Kingdom's departure from the European Union. The proposals will be given legislative effect in the Great Repeal Bill which is likely to be introduced in the UK Parliament before the Parliament's summer recess.

The White Paper proposes the repeal of the European Communities Act 1972 along with measures to ensure that all existing EU law will be transferred into UK law, so ensuring that there are no gaps in UK law when the UK leaves the EU.

The White Paper also makes proposals for ending the jurisdiction of the Court of Justice of the European Union (CJEU) in the UK after Brexit while at the same time ensuring that the previous case law of the CJEU continues to be applicable where EU related law remains on the UK statute book.

Given the likely volume of legislation required to ensure that the UK statute book is ready for the day the UK leaves the EU, the White Paper proposes giving UK Ministers, and where appropriate Ministers of the Devolved Administrations, so-called "Henry VIII powers" enabling primary legislation to be amended or repealed by subordinate legislation. It has been suggested that the use of Henry VIII powers will make parliamentary scrutiny of the domestic Brexit process more challenging. It has also been suggested that monitoring the use of subordinate legislation to make substantive changes to any legislation ahead of Brexit will also be challenging.

The proposals in the White Paper are likely to have two notable impacts on the devolution settlement. Firstly, the UK Government has proposed that, whilst Brexit is likely to lead to a significant increase in the decision making power of each devolved administration, some powers in devolved policy areas are likely to be exercised at UK level following Brexit to ensure UK frameworks replace EU frameworks in relevant policy areas. The proposal to operate UK wide frameworks has generated a lot of interest following the triggering of Article 50 with a focus on how new UK frameworks will be agreed.

The question of whether the Great Repeal Bill, or any other related legislation will require legislative consent from the Devolved Legislatures has also been the subject of debate. Although UK and Scottish Government Ministers have discussed it, until the detail of the Great Repeal Bill is known, it is not clear whether and where legislative consent will be required.

Context

On 30 March 2017, the United Kingdom (UK) Government published a White Paper [Legislating for the United Kingdom's withdrawal from the European Union](#) which contained proposals to bring forward a Great Repeal Bill to ensure existing European Union (EU) law is converted into domestic UK law from the day the UK leaves the EU.

The White Paper addresses five issues:

- Repealing the European Communities Act 1972 which underpins the UK's membership of the EU
- How existing EU law will be converted into UK law
- Ensuring that when EU law is converted into UK law it is effective
- How the Great Repeal Bill will impact on the Devolved institutions; and
- How the Great Repeal Bill will affect the Crown Dependencies and Overseas Territories

According to the UK Government, the Great Repeal Bill will ensure that “the same rules and laws will apply after we leave the EU as they did before, from the moment we leave” ¹

This briefing provides information on the likely provisions in the Great Repeal Bill and looks at how those provisions may affect the devolution settlement

The European Communities Act 1972

The UK's membership of the EU is given effect in UK law by the European Communities Act 1972 (ECA). In addition, the ECA provides for the incorporation of EU law into UK law and requires UK courts to follow the rulings of the Court of Justice of the European Union (CJEU).

EU legislation and its implementation in the UK

As a member of the EU, the UK is required to ensure that EU law is incorporated into UK law. There are five types or forms of EU legislation which are listed in Article 288 of the Treaty on the Functioning of the European Union:

- Regulations – these are binding and directly applicable in all Member States
- Directives – these are binding as to the result to be achieved but leave Member States to decide on the method of achieving that result. The method is decided by member states when they transpose the Directive into their own domestic legislation.
- Decisions – these are binding upon those to whom they are addressed
- Recommendations – these have no binding force

- Opinions – these have no binding force

EU law is incorporated into UK law in a number of ways. In the case of EU Regulations, as these are directly applicable in all Member States there is no need to introduce legislation to ensure they come into force in the UK. Legislation may however be introduced to ensure EU Regulations can be enforced effectively.

EU Directives require implementation in Member States. In the UK this has often been done (though not always) by the use of secondary legislation. The use of secondary legislation is underpinned by section 2(2) of the European Communities Act 1972.

Directives can also be implemented using primary legislation (Acts of Parliament).

It is not clear how much EU law is incorporated into UK law, but the White Paper cites a search of Eur-Lex (the EU's legal database) as showing that there are over 12,000 EU regulations in force.

Whilst foreign affairs, including relations with the European Union, are reserved, Section 29 of the Scotland Act 1998 requires the Scottish Parliament to ensure that any legislation it passes is compatible with EU law. Section 53 of the Scotland Act transfers functions to Scottish Ministers in relation to observing and implementing EU law. As a result of these functions, the Scottish Parliament is currently responsible for implementing EU legislation in devolved areas such as environmental and agricultural policy.

The Repeal of the European Communities Act 1972

The White Paper states that the Great Repeal Bill will repeal the European Communities Act 1972. However, the White Paper points out that when the Act is repealed there is the potential for gaps in the UK legislative framework if EU legislation is not copied over into UK law:

“ If the Great Repeal Bill did not convert existing EU law into domestic law at the same time as repealing the ECA, the UK’s statute book would contain significant gaps once we left the EU. There are a large number of EU regulations and many other EU-derived laws which form part of our law, which if we were to repeal the ECA without making further provision, would no longer apply, creating large holes in our statute book.² ”

A key reason many pieces of legislation would fall, or no longer work effectively when the ECA is repealed, is that secondary legislation made under Section 2(2) of the ECA would automatically fall without the enabling powers of the ECA.

The Great Repeal Bill will convert all existing EU law at the time of the United Kingdom's departure from the EU into UK law. The conversion into UK law will apply both to (currently directly applicable) EU regulations and UK laws which have been made to implement EU obligations (often under Section 2(2) of the ECA. According to the White Paper:

“ EU regulations will not be “copied out” into UK law regulation by regulation. Instead the Bill will make clear that EU regulations – as they applied in the UK the moment before we left the EU – will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise.² ”

Section 2(2) along with Section 2(4) of the ECA provides Ministers with powers to amend primary legislation using secondary legislation if it is necessary to implement EU obligations. This power is discussed in more detail below as its use has also been proposed in the Great Repeal Bill White Paper.

European Court of Justice Jurisdiction and Case Law following Brexit

Section 3 of the ECA requires UK courts to follow rulings of the Court of Justice of the European Union (CJEU). As a result of the Great Repeal Bill, the supremacy of EU law will be removed as will the requirement of UK Courts to follow EU law. However, the Great Repeal Bill will preserve the case-law of the CJEU.

Although the Great Repeal Bill proposes bringing an end to the jurisdiction of the CJEU, the Government acknowledges it needs to provide for “continuity in how that law is interpreted before and after exit day” and that, for as long as “EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means”. As such, whilst the jurisdiction of the CJEU will end, the previous case law of the CJEU will continue to be applicable where EU law remains on the UK statute book.

According to the White Paper:

“ To maximise certainty, therefore, the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU’s case law as it exists on the day we leave the EU. Everyone will have been operating on the basis that the law means what the CJEU has already determined it does, and any other starting point would be to change the law. Insofar as case law concerns an aspect of EU law that is not being converted into UK law, that element of the case law will not need to be applied by the UK courts. ² ”

The White Paper explains that the Government does not expect the interpretation of the CJEU to be generally altered, but the Great Repeal Bill will make provision for a changed interpretation by giving historical CJEU case law binding or precedent status in UK courts, similar to that status enjoyed by decisions of the Supreme Court. The White Paper states that it is very rare for the Supreme Court to deviate from one of its own decisions, so suggesting that it is unlikely that the case law of the CJEU will be re-visited by the Supreme Court, though the possibility of doing so remains:

“ We would expect the Supreme Court to take a similar, sparing approach to departing from CJEU case law. We are also examining whether it might be desirable for any additional steps to be taken to give further clarity about the circumstances in which such a departure might occur. Parliament will be free to change the law, and therefore overturn case law, where it decides it is right to do so. ² ”

The White Paper provides examples of where CJEU case law has extended or protected rights in the areas of workers’ rights, environmental policy and consumer protection and states that the Great Repeal Bill will ensure that existing EU law will continue to have effect following the UK’s departure from the EU. However, as the UK Government has not chosen to use the Great Repeal Bill to confirm that CJEU case law up to the point of the UK’s departure from the EU is protected as a result of the decision to allow the Supreme Court to depart from previous CJEU rulings, it leaves CJEU case law, established before the UK leaves the EU, open to challenge after Brexit.

The White Paper does make clear that if, after the UK has left the EU, there is a conflict between two pre-exit laws, one of which is EU-derived and the other not, “then the EU-

derived law will continue to take precedence over the other pre-exit law”. In addition, when the UK Parliament passes primary legislation, that new legislation will take precedence over EU-derived law which has been preserved as a result of the Great Repeal Bill.

Charter of Fundamental Rights

The European Union Treaties include adherence to the Charter of Fundamental Rights. These rights apply to Member States when acting within the scope of EU law. As a result, the UK Government has proposed that when the UK leaves the EU, the Charter is not converted into UK law by the Bill:

“ The Charter only applies to Member States when acting within the scope of EU law, so its relevance is removed by our withdrawal from the EU. ² ”

According to the White Paper, as the Charter is only one element of the UK's human rights architecture and many of the rights protected in the Charter are also found in other international instruments, for example, the European Convention on Human Rights (ECHR), the removal of the Charter from UK law will not have a material impact:

“ The Government's intention is that the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK. Many of these underlying rights exist elsewhere in the body of EU law which we will be converting into UK law. Others already exist in UK law, or in international agreements to which the UK is a party. As EU law is converted into UK law by the Great Repeal Bill, it will continue to be interpreted by UK courts in a way that is consistent with those underlying rights. Insofar as cases have been decided by reference to those underlying rights, that case law will continue to be relevant. ² ”

In a blog for Monckton Chambers, Eric Metcalfe suggests that whilst the White Paper is correct in its summary that the Charter was not designed to create any new rights, it is on more uncertain ground when it proclaims that the removal of the Charter “will not affect the substantive rights that individuals already benefit from in the UK”.³ According to Metcalfe, a key benefit of the European Charter on Fundamental Rights is its enforceability and as a number of the rights encapsulated in the Charter are not incorporated into domestic law then these rights will be lost if the Charter itself isn't incorporated into domestic law when the UK leaves the EU:

“ The reality is that, although the Charter contains a great many rights that the UK had already signed up to by way of various international human rights instruments (including the International Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination Against Women, and the UN Convention against Torture, just to name a few), very few of those rights are enforceable (other than by way of the Charter itself) because they were never incorporated into domestic law. Although the government's obligations under those instruments can sometimes affect the interpretation of primary legislation, the orthodox position remains that they can't therefore create rights or impose duties. ³ ”

Proposed use of Delegated Powers

When the UK leaves the EU, EU derived law will be converted into UK domestic law. Although much of the EU law being transferred will be fit for purpose, it is possible that some legislation will not be appropriate to the UK's post EU world. According to the White Paper:

“ There is a variety of reasons why conversion alone may not be sufficient in particular cases. There will be gaps where some areas of converted law will be entirely unable to operate because we are no longer a member of the EU. There will also be cases where EU law will cease to operate as intended or will be redundant once we leave. In some cases EU law is based on reciprocal arrangements, with all member states treating certain situations in the same way. If such reciprocal arrangements are not secured as a part of our new relationship with the EU, it may not be in the national interest, or workable, to continue to operate those arrangements alone. ² ”

The White Paper also proposes removing references to EU law and EU institutions from UK legislation. To allow these and other changes to UK legislation arising from the need to correct problems which result from leaving the EU, the UK Government has proposed including in the Great Repeal Bill powers for UK Government Ministers and Ministers of Devolved Administrations to amend legislation using secondary legislation. These powers are often known as Henry VIII powers. The House of Commons Library describes Henry VIII powers as provisions in a bill enabling:

“ The Government to repeal or amend it after it has become an Act of Parliament. The provision enables primary legislation to be amended or repealed by subordinate legislation with or without further parliamentary scrutiny. Such provisions are known as Henry VIII clauses, so named from the Statute of Proclamations 1539 which gave King Henry VIII power to legislate by proclamation. ⁴ ”

In the White Paper, the UK Government has provided a number of reasons for using secondary legislation arising from powers proposed in the Great Repeal Bill:

1. Matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the Government needs to allow for progress of negotiations;
2. Adjustments to policy that are directly consequential on our exiting the EU; and
3. To provide a level of detail not thought appropriate for primary legislation.

The White Paper sets out the scope and constraints on the delegated powers to be granted to Ministers. The powers will relate to all EU-derived law in the UK which has been implemented using both primary and secondary legislation. The Government has also proposed that the purposes for which the power can be used should be limited. For example:

“ we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU. ² ”

The White Paper states that the delegated powers will enable Ministers to use either negative or affirmative procedures to amend legislation. Negative statutory instruments do not require a debate prior to being made whilst affirmative instruments require both a debate and approval by both Houses of the UK Parliamentⁱ.

The White Paper suggests that the negative procedure would be used for minor changes such as the removal of references to EU law while the affirmative procedure may be more appropriate for substantive changes to legislation.

In terms of time limits, the White Paper proposes that Henry VIII powers should be available as soon as the Great Repeal Bill gains Royal Assent and should then be time limited to help address changes to legislation needed before the UK leaves the EU, but that the powers should not exist in perpetuity.

As noted above, the White Paper indicates that equivalent delegated powers will be conferred on Scottish Ministers to amend legislation within devolved competences. On that basis, it would be expected that some statutory instruments would be laid in the Scottish Parliament.

In the Scottish Parliament, the Delegated Powers and Law Reform Committee considers and reports on all secondary legislation laid before the Scottish Parliament, That secondary legislation can be subject to negative, or affirmative procedures, or be laid, but with no further procedure.

ⁱ Whilst negative instruments don't require a debate, members of either House of the UK Parliament can require a debate and if necessary a vote.

Analysis of the proposed use of Delegated Powers

Much of the analysis of the White Paper has focussed on the Government's stated intention to use delegated powers to amend EU-derived legislation ahead of Brexit. In a blog entry, Professor Steve Peers from the University of Essex has suggested that the provision proposed to allow Ministers to change legislation at a suitable point which allows for progress in the negotiations, could lead in effect to a limitless power:

“ As drafted, these powers are potentially nearly limitless. They could, for instance, be used to adopt every detail of future policies on agriculture, fisheries, trade with non-EU countries or extradition to the EU without full parliamentary scrutiny or public discussion, because each of these are areas where the new laws could be regarded as changes consequential to leaving the EU. ⁵ ”

A further issue in relation to delegated powers is the ability of Parliament to scrutinise the secondary legislation being used to amend EU-derived legislation. A blog by Ruth Fox of the Hansard Society suggested that scrutiny of the use of delegated powers is limited. The blog points out that whilst the White Paper suggested that Members of Parliament could require a debate and if necessary a vote on a negative instrument (paragraph 3.21), in actual fact a Member of Parliament can:

“ 'request' these, but they cannot 'require' them. The government controls the parliamentary timetable in the House of Commons, and it must therefore agree to grant the time for any debate. In the last parliamentary session, MPs debated just 3% of the 585 negative instruments laid before them. And although the Leader of the Opposition and his front bench colleagues tabled 12 prayer motions for a debate, just 5 were granted. ⁶ ”

A further issue raised by the White Paper is how the use of delegated powers to make technical amendments as opposed to substantive changes will be monitored. In considering this issue, the House of Lords sub-committee on the Constitution in its report on [The 'Great Repeal Bill' and delegated powers](#) concluded that an enhanced scrutiny process should be introduced:

“ The solution would seem to be a sifting mechanism within Parliament that considers whether a particular piece of delegated legislation contains policy decisions that should trigger an enhanced form of parliamentary scrutiny. ⁷ ”

The Committee made a number of recommendations including:

1. That the Minister sign a declaration in the Explanatory Memorandum to each statutory instrument amending the body of EU law stating whether the instrument does no more than necessary to ensure that the relevant aspect of EU law will operate sensibly in the UK following the UK's exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU.
2. That the Explanatory Memorandum to each statutory instrument sets out clearly what the EU law in question currently does (before Brexit); what effect the amendments made by the statutory instrument will have on the law (as it will apply after Brexit) or

what changes were made in the process of conversion; and why those amendments or changes are necessary.

3. That the Government make a recommendation for each statutory instrument as to the appropriate level of parliamentary scrutiny that it should undergo. We would expect that a statutory instrument which amends EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure.

Professor Peers has suggested that “the Great Repeal Bill could turn into a major government power grab”. He suggests that, whilst some use of delegated powers would be uncontroversial, in other areas this could be seen as the Executive taking control over the Parliament:

“ There is a further category of changes to EU law which will be more substantive. The white paper gives a non-exhaustive list of cases where the government thinks it should have delegated powers: where a policy might change in light of the Brexit talks with the EU; where a policy changes as a direct consequence of leaving the EU; and where the level of detail is “not appropriate” for an act of parliament. In other words, it wants to award itself the power to change the law under a fairly broad and somewhat vague set of circumstances without the full parliamentary process. Within the scope of these powers, the UK will in effect be governed by the executive, not parliament. It argues that the powers must be widely defined and must apply not only to ex-EU law converted into EU law, but also acts of parliament linked to EU membership. ⁸ ”

Professor Peers suggests that one way in which the UK Parliament can restrain Government in its use of delegated powers would be to rule certain policy areas off-limits entirely, for example in areas where EU law provides for domestic legal harmonisation. He suggests that both employment law and environmental law would fall into this category because “there is generally no reason why the law necessarily has to change if the UK leaves the EU”.

Impact on the Devolution Settlement

The White Paper briefly refers to interaction with the devolution settlements. There is a commitment to providing Ministers of Devolved Administrations with delegated powers to amend EU-derived legislation within the competence of the devolved legislatures or Ministers. This power will be granted in line with the powers granted to UK Ministers.

The repatriation of competences is also addressed in the White Paper with the UK Government stating that the current devolution settlements were agreed when the UK was a member of the EU and, therefore, were premised on EU membership:

“ In areas where the devolved administrations and legislatures have competence, such as agriculture, environment and some transport issues, the devolved administrations and legislatures are responsible for implementing the common policy frameworks set by the EU. At EU level, the UK Government represents the whole of the UK’s interests in the process for setting those common frameworks and these also then provide common UK frameworks, including safeguarding the harmonious functioning of the UK’s own single market. ² ”

The White Paper suggests that a key consideration in the repatriation of powers following Brexit will be to ensure that common UK frameworks and the UK single market are unaffected:

“ Examples of where common UK frameworks may be required include where they are necessary to protect the freedom of businesses to operate across the UK single market and to enable the UK to strike free trade deals with third countries. ² ”

The White Paper states that the UK Government intends to replicate the current frameworks provided by EU rules through UK legislation and then consider where common frameworks need to be retained in the future. This seems to suggest that, at least initially, powers over framework policies such as in agriculture and environmental standards will be held by the UK Parliament despite relating to devolved competences.

The White Paper does, however, state that following the discussion about where powers best sit, “it is the expectation of the Government that the outcome of this process will be a significant increase in the decision making power of each devolved administration”.

The destination of the repatriated powers has generated a lot of interest in the lead-up to the triggering of Article 50.

The Scottish Parliament's Culture, Tourism, Europe and External Relations Committee commissioned research by Professor Alan Page from the University of Dundee which examined [the implications of EU withdrawal on the devolution settlement](#). Professor Page's research concluded that:

“ most existing EU competences are reserved to the UK Parliament. If we ask why that should be the case, the answer is to be found in the fact that the devolution settlement, like the European Union, is based on a ‘single market’ in goods, persons, services and capital. There is therefore a considerable degree of overlap between EU competences and reserved matters. The UK Parliament would thus acquire the majority of the policy responsibilities that would fall to the UK following withdrawal from the EU, including those in respect of the free movement of goods, persons, services and capital, and the negotiation and conclusion of trade agreements with non-EU countries. The policy responsibilities that would fall to the Scottish Parliament are correspondingly few, the principal ones being in respect of justice and home affairs, agriculture, fisheries and the environment. In the latter three areas, the prospect is said to be one of increasing policy and legislative divergence between the nations and regions of the UK in the absence of a common EU framework, although the extent of international obligations has led some observers to question how much scope there would be for change in the environmental field (Environmental Audit Committee, EU and UK Environmental Policy HC (2015-16) 537). It may be therefore that adjustments will be made to the devolution settlement in order to prevent such divergences emerging. Any such adjustments would require the consent of the Scottish Parliament and would thus be a matter for agreement between the two governments. ⁹ ”

Giving evidence to the Culture, Tourism, Europe and External Relations Committee on 27 October, the Secretary of State for Scotland said:

“ There will be no change to existing arrangements other than that the context of leaving the EU automatically changes the devolved settlements because the devolved settlements are predicated on the basis that the UK is a member of the EU. It is clear that a range of changes will flow from that in terms of relationships, as well as a range of options. I am committed to engage with all those interested parties in Scotland on those options. It is very important that we do that. That is what we have done in relation to previous devolution settlements, including the settlement that preceded the establishment of this Parliament, the Calman commission and the Smith commission. All those were heavily consulted on and proceeded on the basis of engagement. ¹⁰ ”

Specifically when asked about the research produced by Professor Alan Page, the Secretary of State for Scotland told the Committee:

“ I am happy to give you an undertaking that no laws will be changed of the type that you refer to without consultation with this Parliament. We would want to work through the process. As Professor Page mentioned, a range of instruments that refer to the EU may need to be changed. We need to find a way in which to ensure their continued validity while not changing their substance. ¹¹ ”

Addressing the House of Commons following publication of the White Paper, the Secretary of State for Exiting the European Union, David Davis, said:

“ In areas where the devolved administrations and legislatures have competence, such as agriculture, the environment and some areas of transport, this competence is exercised within the constraints set by European Union law. The existence of common EU frameworks has had the effect of providing a common UK framework in many areas, safeguarding the functioning of the UK internal market. As powers return from the EU, we have an opportunity to determine the level best placed to take decisions on these issues, ensuring power sits closer to the people of the United Kingdom than ever before. ¹² ”

The Secretary of State confirmed that in some areas common UK frameworks would be necessary and said that the UK Government will work closely with the devolved administrations in this area.

Following publication of the White Paper, the Scottish Government published a news release in which the Minister for UK Negotiations on Scotland’s Place in Europe, Michael Russell, criticised the proposed way in which powers repatriated from Brussels would be treated:

“ There are no new powers proposed for the parliament beyond those required to fix the mess that will be caused by Brexit, exposing what have so far been empty promises from the UK Government. In all other areas where powers already belong to the Scottish Parliament the white paper continues to threaten that in areas such as agriculture, fisheries and the environment, powers will be taken by the UK Government after Brexit. For the UK government to seek to impose legislative frameworks on these areas would be to take the unprecedented step of extending its powers over Scotland and must not take place. The Scottish Parliament's competences must not be diminished as a result of Brexit. ¹³ ”

Impact on the Devolution Settlement Analysis

As the White Paper and the research by Professor Alan Page notes, a number of current EU competences are also competences of the devolved legislatures, such as agriculture, fisheries and the environment.

The White Paper states that where EU frameworks currently exist the intention will be to bring these powers back to establish UK frameworks in the first instance, suggesting that the powers will lie with the UK Parliament.

Professor Michael Keating, writing on the UK in a Changing Europe blog, has suggested that the UK Government position that “no ‘decisions’ currently taken at the devolved level will be recentralized in London” is compatible with the approach to bring back framework powers to the UK Parliament, though the Devolved Administrations are likely to object to this:

“ The UK Government position has not been set out in any detail but it appears to be based on the proposition that, at present, the devolved bodies do not make policy in these fields; they merely implement EU policies. The devolved governments argue that the powers belong to them and that they, like the UK itself, have given them to Europe as part of our EU membership. So, they say, the powers are devolved in UK domestic law, and Westminster has no right to take them back unilaterally. ¹⁴ ”

Professor Keating suggests that there are good reasons for adopting common UK frameworks:

“ There are practical arguments for some UK-wide frameworks. Agriculture, fisheries and environment are mostly devolved, but agriculture and fisheries trade and international agreements in all three fields are reserved. It is not possible to make a clear distinction between the internal and external aspects. Any free trade agreement on agriculture would have to include provisions on agricultural support and subsidies, as would UK membership of the World Trade Organization. Free trade in agriculture within the UK would require agreement on subsidies to ensure a level playing field. The external effects of environmental rules imply both international and intra-UK cooperation. ¹⁴ ”

If a common UK approach is adopted, it may place pressures on the UK’s intergovernmental machinery established to manage relations between the UK Government and the Devolved Administrations. For instance, will the policies to deliver a common framework require to be agreed unanimously by the four nations of the UK or will the UK Government make decisions after consultation with the Devolved Administrations? The Welsh Government has proposed that the policies should be negotiated between the four nations in the same way as the EU’s Council of Ministers operates.

The need for the Scottish Parliament's legislative consent?

The White Paper makes no reference to whether legislative consent would be required from the Devolved Legislatures before the Great Repeal Bill can pass through the UK Parliament.

The Scottish Parliament website provides details of what a Legislative Consent Memorandum is and when it is usually required:

“ Legislative Consent Memorandums are usually lodged in the Scottish Parliament by the Scottish Government. They relate to Bills under consideration in the United Kingdom Parliament which contain what are known as “relevant provisions”. These provisions could: change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998); or alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).¹⁵ ”

The UK Parliament will not normally pass Bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament.

Giving evidence to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee on 22 February 2017, the Secretary of State for Scotland said that he thought the Great Repeal Bill would probably require a Legislative Consent Memorandum:

“ I was very clear and the Scottish Government appears to have accepted this—that the article 50 bill did not require a legislative consent motion because it relates to matters that are entirely the responsibility of the UK Government, but that, when we introduce the great repeal bill, which, on the basis of questions that I have answered before, I expect will change the Scottish Parliament’s powers and responsibilities, subject to the drafting of course, that would require legislative consent, and we would of course seek that.¹⁶ ”

However, speaking in the House of Commons following publication of the White Paper, the Secretary of State for Exiting the European Union was less clear about the question of Legislative Consent. Joanna Cherry MP asked the Secretary of State about the need for Legislative Consent Motions. The Secretary of State said:

“ At this stage we do not know, because we do not know the final format of the Bill. That is the simple truth.¹² ”

Following publication of the Great Repeal Bill White Paper, the Scottish Government’s Minister for UK Negotiations on Scotland’s Place in Europe, Michael Russell, questioned the absence of a commitment in the White Paper to seeking Legislative Consent:

“ This white paper for this Brexit bill leaves many important questions unanswered, such as the nature of the powers for the Scottish Parliament, and the need for the consent of the Scottish Parliament under the Sewel Convention. The UK Government now needs to work closely with the Scottish Government on the detail of the bill as it develops.¹³ ”

Another consideration with regards to Legislative Consent relates to the use of the Delegated Powers which will be granted to UK Ministers. It is possible that UK Ministers may use their delegated powers to use secondary legislation to make amendments to EU-derived legislation. In some cases this secondary legislation may cut across devolved competences. As Legislative Consent is not required for secondary legislation this may lead to the UK Parliament legislating in devolved areas without any input from the devolved legislatures. This issue was raised during the debate on the White Paper on 30 March by Patrick Grady MP who asked the Secretary of State:

“ Given that statutory instruments are not currently subject to legislative consent from the devolved Assemblies, can the Secretary of State assure us that no statutory instruments will be used to legislate on devolved matters? ¹² ”

The Secretary of State replied:

“ We shall be talking to the devolved Administrations about the extent to which this will have an impact, and ensuring that there are increases—not decreases—in the powers available to them. ¹² ”

Although UK and Scottish Government Ministers have discussed it, until the detail of the Great Repeal Bill is known, it is not clear whether and where legislative consent will be required.

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