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The European Union (Withdrawal) Bill: Implications for Scotland

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This briefing examines the proposals in the European Union (Withdrawal) Bill focussing on those which relate to the role and powers of the Scottish Parliament and Scottish Government.

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Executive Summary

The European Union (Withdrawal) Bill was introduced in the UK Parliament on 13 July 2017. The Bill sets out proposals to leave the European Union (EU) by:

- Repealing the European Communities Act
- Converting existing EU law into UK law on the date of the UK's exit from the EU (scheduled for March 2019). These laws are referred to in the Bill as "retained EU law"
- Creating temporary powers to allow UK (and devolved) Ministers to deal with any deficiencies, so that the legal system continues to function effectively

In the absence of any amendment to the Scotland Act 1998, additional powers in areas, which had previously been EU competences (for example in agriculture, fisheries and environment) would be devolved to Scotland in line with the scheme in Schedule 5 of the Scotland Act 1998.

The UK Government's view was that this would make it harder for the UK single market to function effectively, and for the UK to strike new trade deals.

Clause 11 of the Bill maintains the EU law limitation on the Scottish Parliament's legislative competence by providing that the Scottish Parliament may not legislate in a way which modifies 'retained EU law'. This means that initially, EU powers will return to the UK but will not devolve further until there is agreement on transfer of powers. The UK Government has said that this will be a transitional arrangement to provide certainty after exit and to allow discussion and consultation with the devolved administrations on where lasting common frameworks are or are not needed. The Bill also includes a power to remove the limitation on devolved competence in any policy area where it is deemed that a common approach is not required.

The Scottish and Welsh Governments issued a joint statement in response to the Bill. The Scottish Government suggested that common frameworks could be achieved through negotiation and agreement, whilst the Welsh Government stated that the Bill would reduce its power and flexibility.

The Scottish Parliament's Culture, Tourism, Europe and External Relations Committee has suggested using the UK's intergovernmental machinery to develop common UK frameworks and to support the negotiation of future trade deals.

The UK Government has indicated that it will seek legislative consent from the devolved legislatures for the Withdrawal Bill.

However, both the Scottish and Welsh governments have said they cannot support the Bill in its current form and have threatened to refuse to recommend giving legislative consent. The Sewel Convention contains an inherent caveat, in that legislation should only 'normally' involve seeking the legislative consent of the appropriate devolved legislature(s).

In a recent judgment, the Supreme Court has ruled that the Sewel Convention, which underlies the legislative consent process, provides purely political restrictions which cannot be enforced in the courts. Professor Michael Keating has suggested nevertheless that Legislative Consent Motions (LCMs) are a core part of the UK's "unwritten constitution"

whilst Dr Tobias Lock, has suggested that, whilst the UK Government might argue that it is justified in these circumstances in ignoring a refusal to grant legislative consent, this would lead to a “constitutional crisis”

An unprecedented volume of legal changes in the form of secondary legislation, will be required to implement Brexit, in a relatively short period. In order to deliver this and to provide the flexibility needed to support the Brexit negotiations, the Bill proposes ‘delegating wide legislative’ powers to UK (and devolved) Ministers. This means that much of the legislation which might in normal circumstances be introduced via primary legislation will instead be made by secondary legislation (through regulations). This increases the power of Ministers to act quickly and flexibly, but it also provides fewer opportunities for detailed parliamentary scrutiny. Clauses 7, 8 and 9 of the Bill contain the principal delegated powers of UK Ministers, whilst clause 10 and Schedule 2 contain the corresponding powers of the devolved administrations. A ‘sunset clause’ in the Bill, means that there is a two year window of opportunity from the date of leaving the EU for Ministers to make use of those delegated powers which enable them to correct deficiencies in retained EU law.

Legislating for leaving the European Union

The European Union (Withdrawal) Bill was introduced in the UK Parliament on 13 July 2017. The Bill outlines proposals for the process for converting EU law into domestic law required for the United Kingdom's departure from the European Union.

Prior to its introduction, the Bill had been known as the Great Repeal Bill or the Repeal Bill so the use of either of these titles should be taken to refer to the European Union (Withdrawal) Bill.

At the time of introducing the Bill, David Davis, the Secretary of State for Exiting the European Union said:

> " This Bill means that we will be able to exit the European Union with maximum certainty, continuity and control."
>
> UK Government Department for Exiting the European Union, 2017[1]

The proposals contained in the Bill are designed to achieve three aims:

- to repeal the European Communities Act 1972 and bring to an end the supremacy of EU law in the UK.
- to convert existing EU law on the date of the UK's exit from the EU into UK law - to be known as retained EU law.
- to create temporary powers to allow Ministers to correct UK laws that no longer operate appropriately as a result of Brexit so that the UK's legal system continues to function following Brexit and to enable regulations to be made to implement any withdrawal agreement.

The clauses contained in the Bill reflect the original policy proposals set out in the UK Government's White Paper, "Legislating for the United Kingdom's withdrawal from the European Union" which was published on 30 March 2017. These proposals were discussed in detail in SPICe Briefing SB 17-29 The White Paper on the Great Repeal Bill - Impact on Scotland.

This briefing examines the EU Withdrawal Bill as introduced, focussing on the proposals which relate to the role and powers of the Scottish Parliament and Scottish Government. Specifically, this briefing outlines the proposals contained in the Bill in relation to:

- the proposal to ensure competences which are repatriated from the EU become the initial responsibility of the UK Parliament before potentially being devolved;
- the proposal to seek Legislative Consent from the devolved legislatures;
- the proposal to give UK and Scottish Ministers delegated powers to make consequent changes to legislation as a result of Brexit; and,
- the proposals in relation to how Scots courts will interpret retained EU law following the UK's departure from the EU.

This briefing also includes analysis of the relevant proposals in the Bill.

Impact on the devolution settlements

The European Union (Withdrawal) Bill introduces the concept of “retained EU law” to describe the body of EU law which will continue to have effect in the UK on and after exit day. Retained EU law comprises the area of laws defined in clauses 2 to 4 of the Bill together with principles of interpretation of retained EU law as set out in clause 6 the Bill.

Accordingly, EU retained law will include:

- existing domestic law which has been enacted to implement EU obligations (defined in the Bill as “EU-derived domestic legislation”);
- EU law that has direct effect and applies to the UK immediately before exit day (defined in the Bill as “direct EU legislation”), and;
- directly effective rights under the EU Treaties as they are recognised and available in domestic law immediately before exit day.

The concept of retained EU law is an important one. It replaces the current statutory restriction that Acts of the Scottish Parliament are outside legislative competence if they are incompatible with EU law with a restriction based on incompatibility with EU retained law. As such, incompatibility with EU retained law is the new standard which applies to the limits on devolved competence.

The Withdrawal Bill proposes that competences which are currently exercised at EU level should be exercised by the UK Parliament and Government following the UK's departure from the European Union. To enable this, the Bill proposes amendments to the devolved settlements to ensure current EU competences do not become devolved competences upon Brexit.

The Bill also proposes that once an agreement has been reached within the UK on the need for common frameworks, exceptions could be made to the reservation on EU retained law which may be prescribed by Order in Council[i]. The use of Orders in Council is the method by which new powers are usually transferred to the devolved legislatures. This approach reflects the UK Government's commitment, outlined in the Department for Exiting the European Union factsheet on devolution, published alongside the Bill, which states:

> “ This will be a transitional arrangement to provide certainty after exit and allow intensive discussion and consultation with devolved authorities on where lasting common frameworks are or are not needed. Where it is determined that a common approach is not required, the Bill provides a power to lift the limit on devolved competence in that area [2] ”

The devolution settlement and EU powers

The devolution settlements as currently constituted - including the Scotland Act 1998 - reserve relations with the European Union but make provision for the devolved administrations to transpose and implement EU obligations in devolved policy areas.

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i Order in Council is a form of delegated legislation made by the Privy Council

Research for the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee by Professor Alan Page from the University of Dundee examined the implications of EU withdrawal for the devolution settlement and concluded that:

> " In the absence of any amendment to the Scotland Act 1998, the UK's withdrawal from the EU would not affect the distribution of legislative competences between the UK and Scottish Parliaments: the distribution would remain as set out in the Scotland Act 1998, as amended by the Scotland Acts 2012 and 2016. What in some cases are largely notional devolved competences, however, because of the impact of EU membership, would for the first time become real competences. It would thus be open to the Scottish Parliament to legislate in the devolved policy or subject areas currently governed by EU law."
>
> Page, 2016[3]

Professor Page concluded that, whilst most existing EU competences are reserved to the UK Parliament, several important ones are devolved, including those in respect of justice and home affairs, agriculture, fisheries and the environment, and that those would fall to the Scottish Parliament upon Brexit in the absence of any amendment to the Scotland Act.

The proposals relating to repatriated competences in the European Union (Withdrawal) Bill

In the White Paper Legislating for the United Kingdom's withdrawal from the European Union which was published on 30 March 2017, the UK Government addressed the issue of repatriated competences. The White Paper stated 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."
>
> UK Government, 2017[4]

The White Paper suggested that a key consideration in the repatriation of powers following Brexit will be to ensure that common UK frameworks are unaffected, allowing the single UK market to continue and making it easier for the UK Government to negotiate new trade deals:

> " 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."
>
> UK Government, 2017[4]

Given the desire of the UK Government, as set out in the White Paper, to ensure that UK-wide frameworks can continue to operate following withdrawal from the European Union, clause 11 of the Withdrawal Bill proposes amending the devolution legislation to remove

the requirement that Acts of the Scottish Parliament are compatible with EU law and replace it with a requirement of compatibility with 'retained EU law'. The Bill also provides that new powers may be transferred to the Scottish Parliament in the future by Orders in Council following the joint agreement of the UK and Scottish Governments.

In relation to the Scottish Parliament, clause 11 says:

> " (1) In section 29 of the Scotland Act 1998 (legislative competence of the Scottish Parliament) — (a) in subsection (2)(d) (no competence for Scottish Parliament to legislate incompatibly with EU law) for "with EU law" substitute "in breach of the restriction in subsection (4A)", and (b) after subsection (4) insert— "(4A) Subject to subsections (4B) and (4C), an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law. (4B) Subsection (4A) does not apply so far as the modification would, immediately before exit day, have been within the legislative competence of the Scottish Parliament. (4C) Subsection (4A) also does not apply so far as Her Majesty may by Order in Council provide.""
>
> UK Parliament, 2017[5]

The Bill's explanatory notes explain that subsection 1 of clause 11 amends the Scotland Act 1998 to define the competence of the Scottish Parliament in relation to retained EU law following EU withdrawal. Clause 11 subsection 1 means that the competence of the Scottish Parliament will be altered to prevent it from modifying retained EU law in a way "which would not have been compatible with EU law immediately before exit" [6] .

If enacted, the proposals contained in clause 11 of the EU Withdrawal Bill would leave the powers of the Scottish Parliament largely unchanged on the day the UK leaves the EU compared to the current situation, though constitutionally there is a change as those powers will now be exercised by the UK Parliament rather than at EU level. This approach was explained by Jack Simpson-Caird on the House of Commons Library blog Second Reading:

> " In practical terms, clause 11 may not amount to a major change to the scope of devolved competence. However, in constitutional terms the basis of the restrictions will have changed. While currently the restriction is based on each devolved legislature being in a Member State of the EU, this Bill highlights that post-Brexit, the restriction would instead only be based on an Act of Parliament enacted by the UK Parliament."
>
> Simpson Caird, 2017[7]

Following Brexit, the further devolution of retained EU powers from the UK to the devolved legislatures (through the use of Orders in Council) may depend on how UK wide frameworks are developed and operate.

UK Frameworks

At the same time as the Withdrawal Bill was introduced, the Department for Exiting the European Union also published a number of factsheets providing further information on aspects of the Bill. The factsheet on devolution stated that the key reason for the repatriated powers being retained at UK level is to ensure the UK's own single market is protected:

> “ At present, EU rules create a consistent approach across the UK in a range of policy areas. This protects the freedom of businesses to operate across the UK single market, and the UK’s ability to fulfil international obligations and protect common resources. As powers are repatriated from the EU, our guiding principle is that no new barriers to living and doing business within our own union are created when we leave the EU. We will therefore need to examine these powers carefully to determine the level best placed to take decisions on these issues. The Government expects that the return of powers from the EU will lead to a significant increase in the decision making powers of the devolved administrations.”
>
> UK Government, Department for Exiting the European Union, 2017[2]

The UK Government is also committed to replicating in UK law "the common UK frameworks created by EU law". According to the UK Government this approach would not affect the powers of the devolved legislatures as the scope of devolved decision making powers immediately after exit will be maintained, so ensuring that any decisions that the devolved authorities could take before Brexit could still be taken after Brexit. The UK Government also stated that:

> “ This will be a transitional arrangement to provide certainty after exit and allow intensive discussion and consultation with devolved authorities on where lasting common frameworks are or are not needed”
>
> UK Government, Department for Exiting the European Union, 2017[2]

Accordingly, the UK Government stated that where it was decided not to pursue common frameworks it would lift the limit on devolved competence in that policy area.

The Scottish and Welsh Governments' response

The Scottish Government's response to the introduction of the Withdrawal Bill primarily focussed on the proposals related to the repatriation of EU competences. A news release published on the day the Bill was introduced referred to a joint statement by the First Ministers of Scotland and Wales in which they criticised the contents of the Bill. [8] The First Ministers' said:

> “ Our two governments – and the UK government – agree we need a functioning set of laws across the UK after withdrawal from the EU. We also recognise that common frameworks to replace EU laws across the UK may be needed in some areas. But the way to achieve these aims is through negotiation and agreement, not imposition. It must be done in a way which respects the hard-won devolution settlements. “The European Union (Withdrawal) Bill does not return powers from the EU to the devolved administrations, as promised. It returns them solely to the UK Government and Parliament, and imposes new restrictions on the Scottish Parliament and National Assembly for Wales.”
>
> Scottish Government News Release, 2017[8]

Michael Russell, the Scottish Government's Minister for UK Negotiations on Scotland's Place in Europe, used a letter to MSPs to reiterate the Scottish Government's opposition to the proposals with regard to repatriated competences in the Withdrawal Bill:

> “ The Scottish Government has serious concerns about the Bill in a number of areas. Firstly, and most fundamentally, the competence restrictions imposed by the Bill are asymmetrical. The Bill lifts from the UK Government and Parliament the requirement to comply with EU law, but does the opposite for the devolved legislatures by imposing a new set of strict restrictions - restrictions which make no sense in the context of the UK leaving the EU. To put it simply, in reserved areas that are currently subject to EU law, the UK parliament regains the ability to legislate without restriction. In devolved areas, the Scottish Parliament does not - it will only be able to do so in future if the UK government grants permission by Order in Council. The result of those asymmetrical competence restrictions, will be to leave the ultimate decisions on UK-wide frameworks on matters that are otherwise devolved to the UK Government and Parliament. While the Scottish Government recognises that common frameworks to replace EU laws across the UK may be needed in some areas, the competence in matters that are otherwise devolved should revert to the Scottish Parliament, enabling the scope and content of any UK-wide frameworks to be agreed between the UK Government and the devolved administrations, rather than imposed.”
>
> Scottish Government News Release, 2017[9]

The Welsh Government has suggested that the proposals in the Withdrawal Bill will prevent the Welsh Assembly from tailoring Welsh solutions to the particular agricultural and environmental challenges in Wales, as has happened under devolution:

> “ The Bill as it stands means Wales will have fewer powers and flexibility than it had when in the EU. It would take away the Welsh Government's ability to interpret EU law and tailor it for Welsh needs. It will give the UK greater power over issues such as farm payments and animal health, which have been devolved to Wales for almost two decades.”
>
> Welsh Government News Release, 2017[10]

Implications of retaining powers at UK level

The UK Government has argued that UK frameworks need to be retained following Brexit to facilitate the negotiation of new trade deals. This is an issue which has been addressed by Professor Michael Keating from the University of Aberdeen in a blog for the UK in a Changing Europe programme. Professor Keating has argued that, whilst some of the powers repatriated from Brussels might be devolved, they will form important aspects of future international trade deals, the negotiation of which will be reserved:

> “ After Brexit, if nothing were done, these competences would revert to the devolved level. There is a broad recognition that there will need to be some UK-wide frameworks in the absence of European ones, and a linkage between the UK and devolved levels. Agricultural support and fisheries management are devolved but international agreements in these fields are reserved. If future international trade agreements include agriculture, there will be a need for provisions on permissible levels of support and subsidy. Agreements in fisheries will include the management of stocks. There will need to be arrangements for a level playing field across the UK in industrial aid and agriculture support. Environmental policy spills over the borders of the UK nations, calling for cooperation.”
>
> Keating, 2017[11]

Although the UK Government has indicated that it wishes to develop common frameworks, it is not currently clear how policy within those frameworks might be agreed, though it is possible for instance that a similar approach might be followed to that which currently operates for energy consents in Scotland (see SPICe Briefing Electricity Generating Stations: Planning and Approval).

It has been suggested by Professor Keating that the development of common UK frameworks, where responsibility for making policy rests at UK level, but where the devolved governments are responsible for the administration, would be a fundamental change to the devolution settlement:

> " The administrative responsibility, however, will remain with the devolved administrations as they have the machinery in place. This introduces a principle that has, so far, been applied sparingly in the UK, of administrative devolution without legislative powers. It moves us closer to a hierarchical model of devolution, in which the broad principles are set in London and the details filled in across the nations."
>
> Keating, 2017[11]

In practical terms, Professor Keating's suggestion of a hierarchical model of devolution is not that different from the current system of EU competences where the broad principles of policy are set at EU level and Scottish Ministers are responsible for administering those policies. However, between the UK Government and Scottish Government, it will alter the balance of control in a significant number of areas.

Inter-governmental relations

The introduction of common UK frameworks and negotiation of future international trade deals may also require amendments to the UK's inter-governmental machinery established to manage relations between the UK Government and the devolved administrations. For instance, it is possible that the UK Government might use the inter-governmental machinery to seek agreement of the policies to deliver common frameworks. This position would reflect a proposal from the Welsh Government that policies should be negotiated between the four nations in the same way as the EU's Council of Ministers operates.

In relation to agreeing international trade deals, the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee recommended in its report Determining Scotland's future relationship with the European Union, that:

> " a means is found to involve the Scottish Government in bilateral and quadrilateral discussions on future trade deals. This could include the creation of a Joint Ministerial Committee on International Trade. This could also include government officials and organisations such as Scottish Development International meeting regularly with their UK counterparts."
>
> Scottish Parliament Culture, Tourism, Europe and External Relations Committee, 2017[12]

A Memorandum of Understanding (MoU) and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee were originally produced in 1999. These deal with the issues arising from the devolution of powers to the Scottish Parliament and National Assembly for Wales, and subsequently the Northern Ireland Assembly.

The latest version of the MoU and Supplementary Agreements was published in October 2013. A new, updated, version of the MoU is currently being prepared by civil servants

(officials), to reflect the fact that the constitutional landscape has changed fundamentally since 1999.

The MoU, together with bilateral concordats, set out the principles underlying inter-governmental relations (IGR) between the UK and devolved administrations. They are not legal documents. Rather, they describe the need for, and the practical benefits in, the four administrations working together bilaterally and multi-laterally. They should be regarded as working tools to guide the four governments.

The working of IGR in light of Brexit, especially the latest forum, the Joint Ministerial Committee (European Negotiations) (JMC (EN)), was the focus of a blog by Dr Nicola McEwen from the University of Edinburgh. Dr McEwen suggested that it is difficult to make an impartial assessment of the current quality of IGR, due to the lack of transparency:

> " But the reactions of the governments involved suggest that intergovernmental relations had become a dialogue of the deaf, with UK ministers on the one side and devolved government ministers on the other talking past each other, failing – wilfully or otherwise – to see or respect the others' viewpoint. The JMC (EN) raised expectations of joint agreement on a UK approach prior to the triggering of Article 50. But there was no intergovernmental discussion of the UK Government's Brexit position prior to the Prime Minister's Lancaster House speech, or the publication of the White Paper or the triggering of Article 50."
>
> McEwen, 2017[13]

In a paper on Brexit and Devolution, published after the 2017 election, the Welsh Government called for '*deeper and more sustained cooperation*' between the UK and devolved administrations, including more shared governance, co-decision and joint delivery. The paper also called for an overhaul of the inter-governmental machinery, with the JMC being replaced by a Council of Ministers acting as a decision-making body.

Commenting on the Welsh Government proposal, Dr McEwen suggested that:

> " This imaginative proposal *might* find favour with the devolved governments (although the absence of a veto power would be problematic). It is difficult to foresee the UK Government agreeing, however, given the added complexity and reduced authority it would entail. Besides, a structure of shared governance may need to be underpinned by mutual trust, shared purpose and commitment to the Union, but these can't be taken for granted."

Scottish Parliament scrutiny of IGR

In Session 4 of the Scottish Parliament (2011-2016), the Devolution (Further Powers) Committee – as part of its scrutiny of the passing of the Scotland Act 2016 – put forward a proposal for a Written Agreement on Parliamentary Oversight of Intergovernmental Relations .

The proposal was agreed with the Scottish Government on 10 March 2016 and a written agreement produced.

The Written Agreement on Inter-Governmental Relations represents the agreed position of the Scottish Parliament and Scottish Government on the information the Scottish

Government will, where appropriate, provide to the Scottish Parliament with regard to its own participation in formal, ministerial-level inter-governmental meetings (multilateral and bilateral), concordats, agreements and memorandums of understanding.

Three principles govern the relationship between the Scottish Parliament and Scottish Government on inter-governmental relations (IGR) matters:

- Transparency
- Accountability
- Respect for the confidentiality of discussions between governments.

The Scottish Government should provide to any relevant committee of the Scottish Parliament:

- advance written notice of meetings, either at least one month prior to scheduled relevant meetings, or, as soon as possible after meetings are scheduled for meetings with less than one month‘s notice
- a written summary of the issues discussed at each inter-governmental ministerial meeting (within the scope of the Agreement) within two weeks, if possible
- an annual report on IGR summarising the key outputs.

In line with the pre-existing protocol the Scottish Government has also agreed to attend relevant Committee meetings when invited to provide oral evidence on IGR.

However, it is not clear in practice if the Scottish Parliament receives sufficient information on IGR to carry out effective scrutiny. Greater scrutiny of the IGR process is likely to be necessary both during the negotiation of the UK's withdrawal from the EU and then in negotiating future international trade agreements and common UK frameworks in areas such as fisheries and agriculture.

Legislative Consent

The explanatory notes to the Withdrawal Bill state that the UK Government will seek the legislative consent of the Scottish Parliament (and other devolved legislatures) in relation to certain provisions of the Bill. The background to the legislative consent procedure is discussed in more detail below.

Although the UK Parliament has the power to legislate in devolved areas, the Sewel Convention has sought to ensure that any such legislation should normally be passed with the legislative consent of the appropriate devolved legislature.

The Supreme Court's Miller Case judgment outlined the background to the introduction of the Sewel Convention:

> " The convention takes its name from Lord Sewel, the Minister of State in the Scotland Office in the House of Lords who was responsible for the progress of the Scotland Bill in 1998.In a debate in the House of Lords on the clause which is now section 28 of the Scotland Act 1998, he stated in July 1998 that, while the devolution of legislative competence did not affect the ability of the UK Parliament to legislate for Scotland, "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament""
>
> The Supreme Court, 2017[14]

The principle of legislative consent was first embodied in the Memorandum of Understanding between the UK Government and the devolved governments in December 2001 and has remained in each revised Memorandum of Understanding. The most recent Memorandum of Understanding was agreed in October 2013. In relation to legislative consent it states:

> " The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government. "
>
> UK Government Cabinet Office, 2013[15]

The Scotland Act 2016 amended Section 28 of the Scotland Act 1998 to recognise "that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament." [16]

This amendment put the Sewel Convention on a statutory footing, although as discussed later on in this briefing, the Convention cannot be enforced legally through the courts.

It should be noted that the requirement for legislative consent refers to primary legislation and does not extend to secondary legislation made by the UK Government which affects devolved competences.

The Withdrawal Bill - the Scottish Parliament's role

The Explanatory notes to the Bill state that the UK Government will seek legislative consent from the devolved legislatures for the following provisions in the Bill:

- The preservation and conversion of EU law, because some areas in which laws are being preserved and converted would be within devolved competence.
- The replication of the EU law limit on the devolved institutions and the power to vary that limit, because this will alter the competence of the devolved institutions.
- The conferral on the devolved administrations of the power to make corrections to the law, the power to implement a withdrawal agreement, the power to implement international obligations, as well as the power to incur preparatory expenditure and the powers to impose and modify fees and charges as this will also alter the competence of the devolved administrations or give them the power to act in relation to devolved matters.
- The repeal of the ECA, as the devolution statutes refer to the ECA (via the Interpretation Act 1978) to impose an EU law limit on devolved competence, a limit that the repeal of the ECA will alter. [6]

The following procedure will be followed in the Scottish Parliament for considering whether to give legislative consent to the Bill:

The Scottish Government will normally lodge a legislative consent memorandum, and other member of the Parliament may do so too. The legislative consent memorandum should summarise what the Bill does and its policy objectives and explain the provisions which it is considered give rise to the need for legislative consent. The memorandum may include the text of a legislative consent motion, but in the case of a memorandum lodged by the Scottish Government, need not do so. The memorandum will be assigned to a lead Committee and to the Delegated Powers and Law Reform Committee for scrutiny.

If a legislative consent motion is subsequently lodged, the Scottish Parliament will then make a decision on the motion based on the report on the memorandum by the lead Committee. This decision usually takes place before the last amending stage in teh House where the Bill was introduced, in this case the House of Commons, but there have been occasions when such a decision has been deferred until later in the Bill's progress.

There have been no examples so far of the Scottish Parliament refusing to agree to legislative consent, although there have been examples of qualified consent.

The wording of a legislative consent motion may include a qualification to the Scottish Parliament giving its full consent to the UK Parliament legislating on its behalf, e.g. the motion on the Welfare Reform Bill 2010-12 (S4M-01638 as amended) did not provide full legislative consent and urged the UK Government to reconsider the Welfare Reform Bill.

The Supreme Court view on legislative consent

The Supreme Court's consideration of the Miller Case also examined the requirement for legislative consent from the devolved legislatures during the Brexit process. The Supreme Court ruled that the Sewel Convention was a political restriction and could not be legally enforced through the courts. The effect of the ruling was to confirm that the devolved legislatures did not have a legal veto to stop Brexit [14] .

Whilst the Supreme Court's ruling on whether there was a need for legislative consent related to a jugement of whether there was a requirement for consent to allow the triggering of Article 50, it can equally be applied to the effect of refusing legislative consent for the Withdrawal Bill. The Supreme Court ruling makes clear that the devolved legislatures cannot block the Withdrawal Bill by refusing legislative consent. However, reflecting the political sensitivity of the issue, Professor Michael Keating has argued that failure to get the consent of the devolved legislatures might test the UK constitution:

> " The UK Supreme Court, in the Miller case, on the role of Parliament in Brexit, insisted that the Sewel Convention is not legally enforceable. In fact, we knew this already. The more relevant question is the status of Sewel in our unwritten constitution and in underpinning the institutional balance of devolution. Much of the UK constitution is based on conventions. These are not, as the Supreme Court suggested, mere matters of political convenience but are part of the rules of the political game. From this perspective, 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."
>
> Keating, 2017[11]

The Scottish and Welsh Governments' views on legislative consent

Reacting to the publication of the Withdrawal Bill, both the Scottish and Welsh First Ministers indicated that they would not be able to recommend giving consent to the Bill in its current form largely as a result of the proposals to repatriate EU powers in devolved areas to the UK Government and Parliament [8] . On the issue of legislative consent, the Welsh First Minister, Carwyn Jones said:

> " If the Bill is not amended, there is no prospect of my government recommending the National Assembly should give legislative consent to it. We will instead investigate ways in which we can use our existing legislative powers to help defend devolution. We will also work closely with the other devolved administrations; indeed, the Scottish First Minister and I will issue a joint statement today, in which we will make clear that we cannot support the Bill in its current form."
>
> Welsh Government press release, 2017[17]

In his letter to MSPs, Michael Russell, the Scottish Minister for UK Negotiations on Scotland's Place in Europe, reiterated Nicola Sturgeon's view that the Scottish Government would not be able to support the Withdrawal Bill in its current form [9] .

On 9 August, Scottish and UK Government Ministers met in Edinburgh to discuss how powers which are currently EU competences will be dealt with following Brexit. The Deputy First Minister, John Swinney and the Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell, met with First Secretary of State Damian Green and the Secretary of State for Scotland David Mundell. Following the meeting, Michael Russell reiterated the Scottish Government's view that it could not recommend giving legislative consent to the Bill as it stands [18] .

Refusal of Consent

Given the indications of both the Scottish and Welsh Governments that they would not be minded to recommend giving consent to the Bill as currently drafted, Dr Tobias Lock from the University of Edinburgh has speculated as to what might happen if consent was refused. He suggested that one approach would be for the UK Government to amend the Bill so as to exclude its effects for Scotland as far as devolved subject matters are concerned. According to Dr Lock this would leave the Scottish Parliament needing "to pass its own legislation salvaging the EU law concerned" though he concludes this would be an unlikely course of action [19] .

In the event consent is refused, a decision by the UK Government to exclude the Bill's effects on Scotland would be unlikely to lead to the orderly transparent and workable statute book upon exiting the EU that the UK Government is aiming for.

Dr Lock suggested that, if legislative consent is refused, Westminster might choose to ignore the refusal. According to Dr Lock this would be possible for two reasons

> “ First, the Sewel Convention only applies ‘normally’ and the UK government could argue that the Brexit process and the Repeal Bill pose unique challenges that cannot be considered normal. Second, even if this view is not shared by the devolved administrations and legislatures, the convention remains not justiciable. As confirmed by the UK Supreme Court in the *Miller* case concerning the need for parliamentary approval for the Article 50 notification, judges ‘cannot give legal rulings on [a convention’s] operation or scope, because those matters are determined within the political world.’[10] This quote shows on the one hand that the Sewel Convention is not legally binding; on the other hand it suggests that there are political consequences of ignoring it, which in the case of Brexit might amount to a constitutional crisis.”
>
> Lock, 2017[19]

Delegated Powers

When the UK leaves the EU, existing EU law will be converted into UK domestic law. Although much of the EU law being transferred will be fit for purpose, the UK Government has stated that some legislation will not be appropriate to the UK's post EU world. According to the Withdrawal Bill's explanatory notes:

> " A significant proportion of retained EU law for which Government departments and devolved administrations are responsible contains some provisions that will not function effectively once the UK leaves the EU."
>
> UK Parliament, 2017[6]

Clause 7 of the Withdrawal Bill will allow UK Government Ministers to make secondary legislation that corrects deficiencies in retained EU law. These deficiencies may be in either primary or secondary domestic legislation, or direct EU legislation.

To accompany the Withdrawal Bill, the UK Government has published a memorandum concerning the Delegated Powers in the Bill. The memorandum provides further information about the purpose of the proposals for delegated powers in the Bill, along with some examples of how the delegated powers might be used [20] .

A further provision, clause 9 of the Bill, will give UK Ministers power to make regulations to implement the withdrawal agreement between the EU and the UK. Regulations made using this power are restricted to implementing only those measures which Ministers consider should be in place for exit day, and the power will not be available after exit day.

It has been suggested that the proposed reliance on delegated law making powers for tidying up retained EU law will limit the opportunities for parliamentary scrutiny at Westminster. Professor Steve Peers has suggested that, whilst the government's use of these powers could in principle be constrained by parliament's scrutiny procedures for dealing with secondary legislation, the likely volume of legislation, the parliamentary time available for scrutiny and the inability to amend secondary legislation will present scrutiny challenges [21] .

As a result of the concerns expressed about the proposed delegated powers approach and the limited opportunities for parliamentary scrutiny, the UK Government has used the memorandum to set out a number of justifications for using delegated powers to change retained EU law. These include the pressures of the two year timetable ahead of Brexit, the impracticality of amending legislation on the face of the Bill and issues over flexibility, given changes may be required as a result of the negotiated withdrawal agreement:

> " Many of the potential deficiencies or failures in law arise in areas in which the UK is considering pursuing a negotiated outcome with the EU. The UK must be ready to respond to all eventualities as we negotiate with the EU. Whatever the outcome, the UK Government and devolved authorities, with the appropriate scrutiny by Parliament and the devolved legislatures, must be able to deliver a functioning statute book for day one post-exit."
>
> UK Parliament, 2017[20]

The powers granted to UK Ministers extend to the whole of the UK and relate to both reserved and devolved matters. The powers allow UK Ministers, acting alone to correct

deficiencies in devolved policy areas. This approach mirrors the current arrangements outlined in Section 57 of the Scotland Act, 1998 which provides UK Ministers with concurrent powers with Scottish Ministers to implement EU law as regards Scotland and in respect of matters within devolved competence.

Ministers of the devolved administrations have been granted similar powers to address deficiencies in retained EU law. These are set out in Schedule 2 of the Bill. Part 1 of Schedule 2 provides the powers for Ministers of the devolved administrations, acting individually or jointly with UK ministers, to deal with legislative deficiencies arising from withdrawal. These powers are broadly equivalent to UK Ministers' powers under clause 7, although with additional and important limitations.

The powers granted to devolved administration ministers relate only to making corrections within their areas of devolved competence. In addition, sub-paragraph (1) of paragraph 3 of Schedule 2 expressly prohibits devolved administration ministers from making regulations which "modify any retained direct EU legislation (*for example, EU Regulations*) or anything which is retained EU law by virtue of section 4 *(for example, directly effective rights contained within the EU treaties)".* This means that the devolved authorities can only use their powers to amend EU-derived domestic legislation. Sub-paragraph (2) prohibits the devolved administrations from using the power "in ways that would create inconsistencies with any corrections to retained direct EU law which the UK Government has made" [20] .

The powers in Part 3 of Schedule 2 enable Ministers of devolved administrations to make regulations for the purposes of implementing the withdrawal agreement, corresponding to UK Ministers' power under clause 9, but subject to similar limitations to the powers in Part 1.

Clause 8 gives Ministers of the Crown the power to make secondary legislation to enable continued compliance with the UK's international obligations. A similar power is provided to devolved ministers in Paragraph 13 of Part 2 of Schedule 2.

Part 1 of Schedule 4 gives Ministers of the Crown and devolved authorities a power to make secondary legislation to enable public authorities to charge fees and other charges, such as levies.

Procedures for making delegated legislation

Part 1 of Schedule 7, sets out which parliamentary scrutiny procedures apply to regulations made to correct deficiencies in retained EU law:

- Scrutiny of regulations made by a Minister of the Crown or devolved authority acting alone
- Scrutiny of regulations made by a Minister of the Crown and devolved authority acting jointly
- Scrutiny procedure in certain urgent cases.

The scrutiny procedure which applies depends on the content of the regulations, which authority is exercising the power and whether, in the case of regulations made by a UK Minister, the Minister considers that the regulations require to be made urgently.

The text box below sets out the various scrutiny procedures which apply in the UK and Scottish Parliaments. Equivalent negative and affirmative procedures are also provided for regulations laid in the National Assembly for Wales and the Northern Ireland Assembly.

Draft affirmative resolution procedure (paragraph 1(1) and 2(3) of Schedule 7): These instruments cannot be made unless a draft has been laid before and approved by both Houses of the UK Parliament.

Negative resolution procedure (paragraphs 1(3) and 2(4) of Schedule 7): These instruments become law when they are made (they may come into force on a later date) and remain law unless there is an objection from either House of Parliament. The instrument is laid after making, subject to annulment if a motion to annul (known as a 'prayer') is passed within forty days.

Affirmative procedure in the Scottish Parliament, as provided for in section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010 (paragraph 1(4) and 2(5) of Schedule 7).

Negative procedure in the Scottish Parliament, as provided for in section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010 (paragraph 1(5) and 2(6) of Schedule 7).

Made affirmative resolution procedure (paragraph 3 of Schedule 7): These instruments can be made and come into force before they are debated, but cannot remain in force unless approved by both Houses within one month. This procedure can only be used by UK Ministers. The Government believes that the exceptional circumstances of withdrawing from the EU *might* necessitate the use of the made affirmative procedure so the Bill allows for this as a contingency.

Part 2 of Schedule 7 sets out the scrutiny procedures which apply to other delegated powers under the Bill.

In its report, The 'Great Repeal Bill' and delegated powers, the House of Lords Constitution Committee recommended that, instead of the Repeal Bill stating which procedure the secondary legislation should follow, the UK Government should issue an explanatory note for each piece of secondary legislation which makes a recommendation as to the appropriate level of parliamentary scrutiny that it should undergo.

The Government has not followed this recommendation. Instead it has set out, in the delegated powers memorandum, that all explanatory memoranda accompanying statutory instruments made by Ministers of the Crown under powers provided for in the Withdrawal Bill must:

- explain what any relevant EU law did before exit day,
- explain what is being changed or done and why, and
- include a statement that the minister considers that the instrument does no more than what is appropriate [20] .

It will be for the Scottish Ministers to decide whether to make a similar commitment in relation to their use of the delegated powers.

Sunset clauses

Clauses 7(7) and 8(4) and paragraph 13 (6) of Schedule 2, propose that the delegated powers given to Ministers and devolved authorities, allowing them to introduce secondary legislation to address deficiencies in legislation created by EU withdrawal, should lapse two years after the day on which the UK has left the EU.

Clause 9(4) and paragraph 21(6) of Schedule 2 propose that the powers of Ministers and devolved authorities to implement the withdrawal agreement should lapse after exit day.

The use of a so-called 'sunset clause' was initially proposed by the House of Lords Select Committee on the Constitution which suggested its inclusion would be an important tool with which Parliament could scrutinise the withdrawal process:

> " But if the Government seek discretion to domesticate and amend significant elements of the body of EU law by secondary legislation, then it is essential Parliament consider how that discretion might be limited over time. The Government would need to present a very strong justification for not including sunset clauses in relation to extensive powers conferred for the purpose of transposing UK law into EU law. In addition, if it is clear that parliamentary scrutiny of particular issues will be curtailed during the transposition process—perhaps as a result of time pressures close to the day of Brexit—then we would expect that sunset provisions be used to ensure that those provisions were brought before Parliament again for proper consideration after the UK's exit from the EU."
>
> UK Parliament, House of Lords Select Committee on the Constitution, 2017[22]

In including sunset clauses in the Withdrawal Bill, the UK Government explained that this was in response to the Committee's recommendation and reflected the Government's view that the wide power granted to Ministers in clause 7 should be curtailed:

> " The correcting power is therefore curtailed by a sunset provision in subsection (7). Although the power is wide, it is time limited and cannot be used more than two years after we leave the EU. Government is seeking a time-limited power to deal with a unique set of circumstances: it is designed to allow corrections to the statute book so that it functions effectively and appropriately; it is not designed to provide government with long-term flexibility, or to set a precedent. The sunset provision reflects this."
>
> UK Parliament, 2017[20]

The continuing role of European Court of Justice case law in Scotland

Section 3 of the European Communities Act requires UK courts to follow rulings of the Court of Justice of the European Union (CJEU).

Clause 1 of the Withdrawal Bill proposes repealing the European Communities Act, which will remove the UK from the jurisdiction of the European Court of Justice, a consequence of which will be to remove the supremacy of EU law in the UK and the requirement of UK Courts to follow EU law.

However, clause 6 of the Withdrawal Bill proposes a continuing relationship between CJEU case law and retained EU law in the UK including an approach to domestic courts consideration of CJEU case law delivered before and after the day the UK leaves the EU.

Subsection (1) sets out that decisions of the CJEU made after the UK has left the EU will not be binding on domestic courts. In addition, it states that UK courts will no longer be able to refer cases to the CJEU following the UK's departure from the EU. Subsection (2) proposes that domestic courts:

> " need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so."
>
> UK Parliament, 2017[5]

Subsection (3) addresses how retained EU law should be interpreted by UK courts after the UK has left the EU. It provides that any question as to the meaning of retained EU law will be determined in UK courts in accordance with relevant pre-exit CJEU case law and general principles (subject to an exception for the Supreme Court and the High Court of Justiciary, as explained in the next section below). The Bill's Explanatory Notes summarise how CJEU case law will be used following the UK's departure from the EU:

> " Where retained EU law has not been amended on or after exit day then it will be interpreted in accordance with pre-exit CJEU case law and the retained general principles of EU law (insofar as relevant). Non-binding instruments, such as recommendations and opinions, are still available to a court to assist with interpretation of retained EU law."
>
> UK Parliament, 2017[6]

As a result of clause 6, following the UK's departure from the EU, CJEU case law relating to retained EU law will have the same binding, or precedent status in domestic courts as existing decisions of the UK Supreme Court (the Supreme Court) and the High Court of Justiciary - Scotland's supreme criminal court.

Although subsection (3) suggests that Courts cannot take account of CJEU case law where retained EU law has been amended, subsection (6) allows for the determination of amended retained EU law to take into account CJEU case law where that is consistent with the intention of the amendments to the retained law.

Exceptions to the use of CJEU case law following Brexit are also provided in the Bill. These include where retained EU law is amended after the UK has left the EU and where the EU has no competence over a policy area.

The Supreme Court president, Lord Neuberger, has said that during its consideration of the Bill, the UK Parliament must be "very clear" in telling the judges what to do about decisions of the CJEU after the UK leaves the EU [23] . His comments specifically related to Parliament's intentions as to whether it wished UK courts to take into account decisions of the CJEU which have been made after the UK has left the EU.

The role of the Supreme Court and the High Court of Justiciary

Although UK lower courts and tribunals will be required to interpret retained EU law in accordance with pre-exit CJEU case law, subsections (4) and (5) provide that the Supreme Court and the High Court of Justiciary in Scotland are not bound by any such pre-exit CJEU case law. In the case of the High Court of Justiciary, this does not apply where there is the option of a further appeal to the Supreme Court of a High Court judgment.

Subsections (4) and (5) allow the Supreme Court and the High Court of Justiciary to depart from previous CJEU case law when considering unamended retained EU law. However according to the Explanatory Notes:

> “ In doing so, the UKSC and the HCJ are required to apply the same tests as they would when considering whether to depart from their own previous decisions. The test the UKSC uses is set out in an existing practice statement which sets out that it may depart from previous decisions ‘where it appears right to do so’. The HCJ will apply its own tests in deciding whether or not to depart from inherited CJEU case law.”
>
> UK Parliament, 2017[6]

In the White Paper on the Great Repeal Bill, which preceded the introduction of the Withdrawal Bill, the UK Government set out its expectations that the Supreme Court would rarely deviate from the case law of the CJEU in the same way as it is very rare for the Supreme Court to deviate from one of its own decisions:

> “ 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.”
>
> UK Government, 2017[24]

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