

Cynulliad Cenedlaethol Cymru / National Assembly for Wales

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

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

EUWB 19

Ymateb gan Yr Athro Nicola McEwen / Evidence from Professor Nicola McEwen

## 1. General Observations on the Bill

1.1 The primary function of the EU (Withdrawal) Bill is to repeal the European Communities Act 1972 while preserving the expansive body of EU law. This is to be achieved by converting EU law into domestic law by creating an apparently new category of 'EU retained law'. The Bill also gives broad powers to the UK Government and (to a lesser extent) the devolved administrations to '*deal with deficiencies arising from withdrawal*'. Governments will have two years after exit day to make changes to retained EU law, including through secondary legislation, to alleviate deficiencies and '*prevent, remedy or mitigate*' any failures resulting from the conversion of EU law into domestic law.

1.2 There is widespread concern that the Bill is highly complex, ambiguous, and its scope and purpose are often uncertain. In particular, there is considerable ambiguity in the Bill about the status and scope of 'retained EU law'. This adds to the uncertainty about its effect on the devolution settlements. These ambiguities, coupled with the UK Government's precarious parliamentary position, increase the likelihood that the Bill will be amended during its passage.

## 2. Devolution Implications

2.1 The legislation underpinning the devolution settlements across the UK require the legislatures and executives to take decisions and exercise their functions in ways which are compatible with EU law. Paragraph 80 (8) of the Government of Wales Act (2006) stipulates that Welsh ministers have '*no power to make, confirm or approve any subordinate legislation*', or to '*do any other act, so far as the subordinate legislation or act is incompatible with EU law or an obligation*'.

2.2. In the absence of any other intervention, this requirement would be removed after the repeal of the European Communities Act, once EU law and obligations ceased to

apply to the UK. That would leave the devolved authorities free to make legislative and executive decisions in devolved areas like agriculture and the environment that have hitherto been governed by EU law.

2.3 However, the EU (Withdrawal) Bill is a significant intervention. Clause 11 substitutes 'EU constraints' on devolved legislation with a new constraint: legislative and executive decisions of the devolved authorities must be compatible with 'retained EU law'. An Act of the National Assembly and the other devolved legislatures would be outside legislative competence if it modified, or conferred power to modify, retained EU law.

2.4 The Explanatory Notes accompanying the Bill note that this provision will maintain the current parameters of devolved competence. By contrast, the repeal of the European Communities Act (1972) will enhance the competences of the Westminster parliament and UK Government ministers. Consequently, the balance of power between the Westminster institutions and the devolved institutions will change.

2.5 The Explanatory Notes also suggest that the new restrictions on devolved competence are '*intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed*'. The UK Government has initiated informal bilateral discussions with the devolved governments '*to rapidly identify... areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power*'. The implication is that, where common UK frameworks are deemed necessary to replace common EU frameworks, powers to determine them will be retained by Westminster.

### **3. Devolution and Common Frameworks**

3.1 The Prime Minister has repeatedly stated her view that the process of the UK's withdrawal from the European Union should avoid creating new barriers to living and doing business across the UK. That means, as set out in her [Lancaster House speech](#), '*maintaining the necessary common standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world, and protecting the common resources of our islands.*'

3.2 Both the Welsh and Scottish Governments have accepted, in principle, the need for UK-wide frameworks in some areas of devolved competence after Brexit, provided these are arrived at after negotiation and agreement.

3.3 There are a variety of different ways in which common frameworks can be agreed and maintained. These include:

- **centralizing the authority to make laws in areas deemed necessary to uphold common frameworks:** In the UK context, this would imply increasing the scope of existing reserved matters or creating new ones.
- **establishing areas of concurrent jurisdiction, or shared competence, within which UK law would have supremacy:** In the UK, this would mean an Act of the UK Parliament would establish a framework setting the broad parameters within which the devolved institutions could legislate and/or carry out executive functions.
  - Some federal states adopt framework arrangements by design or by practice. For example, in Germany, the Länder governments implement national law, but have direct input into making national legislation within the Bundesrat. In Spain, formal concurrent competences in fields like education and health mean that the autonomous communities can pass laws in these fields but these must be within legislative frameworks set by the Spanish parliament.
  - The Transfer of Functions Orders) made under GOWA 1998 transferred executive authority to the National Assembly within legislative frameworks set at Westminster.
- **conditional funding:** In some areas which have benefited from/depended upon EU funding (e.g. agricultural payments, regional development), fiscal transfers can be made conditional upon meeting specified national standards.
  - Conditional funding is commonplace in many federal systems, e.g. Australia and Canada. Because it is often viewed as ‘interference’ in state/provincial jurisdiction, conditional funding can be a source of intergovernmental tension. In UK territorial finance, the block-grant system has meant most funding comes without conditional strings.
- **binding intergovernmental agreements:** These may or may not be subject to the consent of their respective legislatures. This is the model preferred by the Welsh Government in its [Brexit and Devolution](#) paper.
  - Binding intergovernmental agreements are common in federal systems where the states have extensive constitutional authority, e.g. the United States, Canada and Switzerland.
  - While there has been a tradition of concordats and intergovernmental agreements in the UK, these are focused mainly on fostering good

communication and cooperation rather than co-decision, and they are binding in honour only.

- **legislative consent:** Without altering the distribution of powers or imposing conditions, by agreement and consent, common frameworks can be established through granting permission on a case by case basis to enable a central parliament to pass laws in areas that fall within the jurisdiction of devolved/regional parliaments. The Sewel convention enables such a process already in the case of primary legislation.

3.4 We might expect future Bills, e.g. the forthcoming Agriculture Bill, to conform more closely to framework legislation, setting the parameters within which devolved powers over agriculture, etc, can be exercised.

3.5 Whichever process is adopted to establish UK common frameworks, EU withdrawal can be expected to create a more complex system of devolution, with more jagged edges and interdependencies between devolved and reserved competences. In the Welsh case, this could mean a return to some of the complexities that the reserved powers model of the Wales Act 2017 was supposed to address. The new complexities also suggest a need for a more robust and effective system of intergovernmental relations than is currently in evidence.

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