

Scotland & Wales

Background

UK ministers have promised that the EU (Withdrawal) Bill will lead to a 'powers bonanza' for the devolved institutions, but the Scottish and Welsh governments fear a Westminster 'power grab'. Because the bill affects devolved matters, the devolved legislatures will be asked to give it their consent. Without significant changes to the bill, there is a very real chance that such consent will be refused by the Scottish Parliament and the National Assembly for Wales.

What is the current situation?

The European Union (Withdrawal) Bill was introduced to the Commons on 13th July 2017, with second reading on 7th and 11th September. One of its primary functions is to convert the expansive body of EU law into domestic law. There is considerable ambiguity in the bill about the status and scope of 'retained EU law', adding to the uncertainty about its effect on the devolution settlements. One possible outcome is a change in the balance of power between Westminster and the devolved institutions, in favour of the former.

What has the British government indicated it wants?

The legislation which created the Scottish Parliament and the National Assembly for Wales required devolved laws to be compatible with EU law. In the absence of any other change, this requirement would be removed after Brexit, leaving these legislatures free to pass laws in devolved areas like agriculture that have hitherto been governed by EU law. However, the EU (Withdrawal) Bill would represent a significant change. Clause 11 substitutes 'EU constraints' on devolved legislation with a new one: devolved law must be compatible with 'retained EU law'.

The explanatory notes accompanying the bill suggest that these 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 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. The bill also creates a new default position; it suggests that failure to reach intergovernmental agreement would result in the powers remaining at Westminster.

What are the possible outcomes?

In an unprecedented degree of coordinated action, both the Scottish and Welsh governments have denounced the Withdrawal Bill in its current form. In one of several joint statements, the first ministers charged that the UK government's approach to withdrawal since the referendum has been *'a rejection of the principle of devolution'*, calling the bill *'an unashamed move to centralise decision making power in Westminster, cutting directly across current devolved powers and responsibilities'*. They do not reject the need for some common UK frameworks, but argue that these should be based upon negotiation and agreement between the four administrations.

There are three avenues open to the devolved governments to try to influence the bill. The first is via direct discussion and cooperation with the UK government, relying on persuasion and soft power diplomacy. The UK government is keen to conduct discussions separately with the Scottish and Welsh governments, but the latter have agreed to work together, including on the preparation of amendments to the bill. The recent experience of the Joint Ministerial Committee set up to agree a UK approach to Article 50 negotiations left the devolved governments deeply frustrated at the lack of discussion of, and their lack

of influence over, the UK government's Brexit priorities. The result has been a loss of trust between the UK government and the devolved governments, and a lack of confidence on the part of the latter in the capacity of intergovernmental relations to provide more than very limited opportunities for influence.

The second avenue is to seek to amend the bill directly, working with allies in the Westminster Parliament. There are 35 SNP MPs who can be relied upon to pursue the Scottish government's agenda in the House of Commons, while Ruth Davidson's 13 Tory MPs will come under pressure to challenge provisions within the bill if these are widely perceived as a threat to devolution. Carwyn Jones may be able to persuade his Labour colleagues in Westminster to seek changes to the bill in line with Welsh government preferences. The UK government's minority status makes it vulnerable to defeat in Commons votes. The Welsh government will also look to work with the Lords, building on recent successes in improving Welsh devolution legislation.

The third avenue is via the devolved legislatures. The UK government has already conceded that the Withdrawal Bill invokes the Sewel Convention. This provides that the Westminster Parliament will not normally legislate on devolved matters, nor alter devolved competence, without the consent of the devolved legislatures concerned. Cross-party committees within the Scottish Parliament and the National Assembly for Wales are undertaking their own inquiries on the bill's effect on their respective devolution settlements. Their reports will highlight perceived flaws, suggest improvements and ultimately recommend whether to grant or withhold consent. The cross-party Constitutional and Legislative Affairs Committee in the national assembly has already expressed concern that the bill could undermine devolution in Wales.

What are the potential consequences of these outcomes?

One or more of these avenues may produce some modifications to the bill. More substantial changes will depend upon the political will of the UK government to reach compromise with the devolved institutions. For their part, the devolved governments and legislatures have an opportunity to make the case for alternative ways forward that would avoid imposing new restrictions on their legislative competence. This includes proposing practicable and sustainable ways to agree and govern UK common frameworks, where these are deemed necessary.

Without significant changes, there is a realistic prospect that the devolved legislatures will refuse consent for the bill. That would not amount to a veto. As the Supreme Court made clear when ruling on the devolution issues raised in the Brexit appeal, the Sewel Convention acts as 'a political constraint on the activity of the UK Parliament', but it has no legal effect. Were the devolved legislatures to refuse consent, politics, not law, would determine the response. It would be for both the UK government and the UK Parliament, after strategic evaluations of the political costs and benefits, to consider whether and how to heed the will of the devolved legislatures. Decisions made in the short-term could have long-term effects on the vitality of the devolution settlements and the stability of the Union.

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