

FINANCE AND CONSTITUTION COMMITTEE INQUIRY INTO THE EUROPEAN UNION (WITHDRAWAL) BILL

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In this submission, we address three sets of issues raised by the European Union (Withdrawal) Bill (EUW Bill), which have implications for the devolution settlement and for the Scottish legal system, namely: the continuity of European Union (EU) law; ministerial powers; and future powers to legislate in areas currently governed by EU law.

Continuity of EU Law

One of the key aims of the Bill is securing continuity of what it terms “retained EU law” after Brexit. A number of problematic issues arise concerning the definition of retained EU law, its status in the domestic legal system, and the interpretation of retained EU Law.

Defining retained EU law

The Bill has to specify which laws are to have their effect extended beyond Brexit. It does so by reference to their sources in EU or domestic law, distinguishing three categories:

1. *EU-derived domestic legislation* (clause 2) includes:
 - (i) delegated legislation made under section 2(2) of the European Communities Act 1972 (ECA) in order to implement the UK’s obligations under EU law;
 - (ii) Any legislation, whether primary or delegated, made in order to implement the UK’s obligations under EU law, or which operates for such a purpose (*i.e.* legislation which predated the relevant EU law, but which has been relied on to secure compliance with it) ; and
 - (iii) A miscellaneous category of legislation relating to the EU/EEA.
2. *Direct EU legislation* (clause 3) gives domestic legal effect to EU legislation which has not been translated into UK law by specific UK legislative instruments but which is directly applicable in the UK. This includes:
 - (i) any EU regulation, EU decision or EU tertiary legislation (with certain exceptions), to the extent that it has effect in EU law immediately before exit day;
 - (ii) any Annex to the European Economic Area (EEA) agreement, as it has effect in EU law immediately before exit day but only to the extent that it relates to anything in paragraph (i) above which does not form part of domestic law as EU-derived domestic legislation (above); and
 - (iii) Protocol 1 to the EEA agreement (which adapts the EU instruments covered by the agreement).
3. *Other EU law* (clause 4). This is a catch-all provision designed to sweep up any remaining EU rights and obligations which do not fall within the categories of EU- derived domestic legislation and Direct EU legislation. This category includes, for example, directly effective rights contained within EU treaties. Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day (a) are recognised and available in domestic law

by virtue of section 2(1) of the European Communities Act 1972, and (b) are enforced, allowed and followed accordingly, continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

There are, however, a number of important exceptions to, and clarifications of, the principle of the continuity of EU-derived law contained in clause 5 and schedule 1.

1. *The Charter of Fundamental Rights* will not be part of domestic law on or after exit day. However, fundamental rights or principles which exist as part of the general principles of EU law irrespective of the Charter will continue to form part of domestic law by virtue of clause 4. Which rights this includes is not made clear.
2. *The General principles of EU law* include recognition of fundamental rights, proportionality, legal certainty, due process, equality and subsidiarity. Although these are given effect in domestic law by virtue of clause 4, Schedule 1 makes clear that there will be no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law. Nor will it be permissible for a court or tribunal or other public authority, on or after exit day to disapply or quash any legislative enactment or other rule of law, or (b) to quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law. In other words, no one will be able to sue anyone for breach of one of the general principles of EU law. These qualifications effectively limit the role of the general principles to acting as guides to the interpretation of statutes and other rules of law which count as EU-derived law for purposes of the Bill.
3. *Francovich* liability refers to the liability of a Member State to pay compensation to individuals who have suffered loss by reason of failure properly to implement EU law ('state liability'). Schedule 1 makes it clear that there will be no right to claim damages in domestic law on or after exit day on this basis.

The status of retained EU Law

Retained EU law as defined in the Bill will continue to have effect. This means that this will be the law which governs the rights and obligations of persons. It will be the measure of the legality of many transactions and other actions and will be enforceable in court or by other legal mechanisms in the normal way. But what happens if there is an incompatibility between a piece of retained EU law and another rule of domestic law which is not derived from EU law?

The Bill states in clause 5 that "The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day." It goes on to say that, "... the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day." This means that a statute passed *after* Brexit may change any rule of retained EU law in accordance with the normal processes of legislation. However, in the case of a conflict between retained EU law and legislation passed *before* Brexit, the retained EU law will prevail. This remains the case even if retained EU law is subsequently modified (by primary or secondary legislation), so long as the application of the supremacy principle is consistent with the intention of the modification.

Clause 5 also affects the status of domestic case law. Any rule created by case law *before* Brexit may be overridden by a statute passed *after* Brexit. However, where there is a conflict between pre-

Brexit case law and any rule of retained EU law, the retained EU law will prevail. Retained EU law will also constrain post-Brexit case law. If a new question of interpretation of a pre-Brexit statute arises after Brexit, any interpretation made by a court must be compatible with retained EU law. The post-Brexit development of common law rules may also be constrained in a similar way.

Accordingly, the EUW Bill will create a new hierarchy within the UK's legal systems in which in order to advise persons as to their legal rights and obligations it will be necessary to distinguish between:

- Enactments and other rules of law passed or made *after* Brexit;
- Retained EU law as defined in the Bill;
- Enactments and other rules of law passed or made *before* Brexit.

Interpretation of retained EU Law

Clause 6 lays down a number of rules for the interpretation of retained EU law.

- (i) UK courts and tribunals are not bound by any principles laid down, or any decisions made, on or after exit day by the Court of Justice of the EU. Nor can any court or tribunal refer any matter to that Court on or after exit day.
- (ii) Courts and tribunals need not have regard to anything done on or after exit day by the Court of Justice, another EU entity or the EU but may do so if they consider it appropriate. This means that UK courts and tribunals are not bound by decisions of the Court of Justice or other EU institutions but may take them into account.
- (iii) Any question as to the validity, meaning or effect of any retained EU law (so far as that law remains unmodified since exit day) is to be decided in accordance with any retained case law and any retained general principles of EU law, and having regard (among other things) to the limits, immediately before exit day, of EU competences.
- (iv) But, the Supreme Court is not bound by any retained EU case law, nor is the High Court of Justiciary in Scotland when sitting as a court of appeal or considering a Lord Advocate's reference.
- (v) In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.
- (vi) Where any retained EU law has been modified on or after exit day, it will be permissible to interpret that law or to decide on its validity in the light of any retained case law and any retained general principles of EU law if to do so would be consistent with the intention of the modifications made to that law.

Implications of the provisions on the continuity of EU Law

We have gone into some detail in explaining the definition, status and interpretation of retained EU law because these will have an important impact on devolved competence (discussed further below) and because of their wider implications for the Scottish legal system.

As regards the latter, our main concern is that the EUW Bill is likely to lead to both substantially greater complexity in Scots law and a substantial increase in legal uncertainty. This complexity and uncertainty affects reserved as well as devolved matters but both are matters of concern for the Committee and the Parliament given the Parliament's responsibility for the courts and the Scottish legal system as a whole. We draw attention to five issues:

1. *An increasingly complex hierarchy of sources of law.* Understanding and advising on legal questions affected by the hierarchy of laws will be more complex after Brexit than it was

before. Currently, in order to advise a client in areas where there are both domestic and EU rules, a lawyer has to consider whether a domestic rule conflicts with an EU rule of law, but in most cases it does not matter when either the EU rule or the domestic rule was made as in most cases of conflict, the EU rule prevails.. The post-Brexit regime set up by the EUW Bill involves a much wider range of possibilities varying according to whether the relevant EU rule was made before or after Brexit, whether the relevant domestic rule is contained in case law or legislation and, in the case of domestic legislation, whether it was made before or after Brexit. In considering whether retained EU law prevails over a domestic rule, lawyers will also have to distinguish between the authoritative sources of EU law. Most rules of retained EU law will benefit from supremacy but the Charter of Fundamental Rights, and the principle of state liability will cease to have any legal effect in domestic law and the general principles of EU law will have effect only as guides to the interpretation of other legal sources. It must be admitted that the application of the principle of supremacy by the UK courts has become more nuanced in the last few years but this only adds to the uncertainty involved in applying the new supremacy principle. A further layer of complexity and uncertainty is added by the fact that there are two perspectives on supremacy – that of the UK courts and that of the Court of Justice of the EU - which are not the same, and the Bill does not make clear which is being recognised as authoritative.

2. *The breadth of the new supremacy principle.* The revised supremacy principle will also apply to a wider range of domestic laws than has perhaps been realised. That is because it applies not only to legislation clearly made for the purpose of implementing EU obligations but also to legislation “operating” for the purpose of implementing an EU obligation. In practice, this means that the supremacy principle will arguably apply to all domestic rules of law (and not just to legislation) which deal with the same subject matter as any pre-Brexit EU rule imposing an obligation whether or not the rule was made with the intention of implementing an EU obligation. It will also, perhaps surprisingly, change the relationship between UK and devolved legislation; a devolved statute passed for the purpose of implementing an EU obligation would prevail over a later (but pre-Brexit) UK statute with which it was inconsistent.

A similar issue arises with the third category of EU-derived domestic legislation – referred to above as a miscellaneous category of legislation relating to the EU/EEA. This category is legislation “related to” legislation falling under the first two limbs. The explanatory notes state that this provision covers enactments which are connected to, but do not fall within, the definitions of domestic legislation and is designed to ensure that provisions which are tied in some way to EU law, or to domestic law which implements EU law, can continue to operate properly post exit. Thus, for example, it will ensure that a provision which goes beyond the minimum needed to comply with requirements under EU law (a “gold-plated” provision) will be regarded as being EU derived domestic legislation. If all instances of gold-plating are covered that will extend the reach of the new supremacy principle even more widely. Moreover, “related to” is a very open-ended term and its limits may be difficult to determine, gold-plating being merely one possibility.

3. *Interpretive difficulties.* There are also a number of interpretive difficulties arising from the definition of EU-derived domestic legislation. The meaning of the first limb - delegated legislation made under section 2(2) of the European Communities Act 1972 - is reasonably precise. The scope of the second limb which covers legislation “passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act” may be less clear.

Where legislation has been passed or made with the intention of implementing an EU obligation that should be reasonably clear from its terms or the legislative history. However, there may not be clear answer to the question whether a specific provision of legislation is “operating” for the purpose of implementing an EU obligation. There will be nothing in the terms of the legislation which refers expressly to EU law, nor is there likely to be a clear indication in the legislative history. If there were either of these things, then the legislation would be “passed or made” for purpose of implementing an EU obligation. We suggested above that the concept of “operating” for the purpose of implementing an EU obligation would cover to any domestic rule of law dealing with the same subject matter as any pre-Brexit EU rule. But the courts might prefer to take a narrower view, i.e. that it covers only domestic legislation which is “necessary” for the purpose of implementing an EU obligation. Until the scope of the term “operating”, is decided by the courts there will be doubt as to how to make the decision as to whether or not a whether a domestic statute is subject to the new supremacy rule. Even after the courts have settled the question of what “operating” means in general, there will continue to be uncertainty as the test will have to be applied to each specific statute where there is arguably a corresponding EU rule as disputes arise.

4. *The authority of EU case law.* Further uncertainty is created by Clause 6. Courts and tribunals in general will be bound by pre-Brexit case law of the Court of Justice of the EU when considering the meaning and effect of retained EU law but not by its post-Brexit case law. But they may take post-Brexit EU case law into account in making decisions if they consider it to do so. Whereas now there are merely arguments about what EU case law means, post-Brexit we can expect to see argument about whether EU case law should be considered or not. This will add to the cost of litigation as well as creating uncertainty as to what the law is until the appellate courts lay down principles for deciding the question of appropriateness as the Supreme Court did in the case of the Human Rights Act 1998 (*R v. Special Adjudicator, ex parte Ullah* [2004] UKHL 26). Even then, there may be scope for argument about whether it is appropriate in each case in which post-Brexit case law might be relevant.

However, neither the UK Supreme Court, nor the High Court of Justiciary in Scotland when sitting as a court of appeal is bound by any retained EU case law. Those courts may in effect change the law by novel interpretations but lower courts may not. Therefore, lawyers may have to consider advising clients that they have a weak case according to the law as it would be applied in the sheriff court or Court of Session, but might have a better chance in the Supreme Court who might be willing to depart from established case law. Of course, the possibility of the final court of appeal changing the law is always present, but this will more often be a realistic possibility in the context of EU law than in litigation generally and so this provision adds to the uncertainty of interpretation.

5. *Modified and unmodified retained EU law.* The final interpretive difficulty we draw attention to arise from the fact that, in terms of clause 5, the supremacy principle may be applied to retained EU law even if that law has been modified post-Brexit. Supremacy applies to the unmodified aspects of the law and may also be applied to a post-Brexit modification if the application of the principle of supremacy is consistent with the intention of the modification. As it is likely that many of the relevant statutes will be amended in the years after Brexit, this means that in every case where a pre-Brexit statute which meets the definition of EU-derived domestic legislation has been amended, lawyers must consider before advising their clients, not only what the amendment appears to intend by way of changing the law, but also whether the amendment is broadly compatible with the purpose and effect of the

underlying EU rules. This is an equally, if not more difficult, task for judges who will have to decide broadly speaking, whether the new policy represented by the amendment is compatible with the pre-existing EU rules.

The uncertainty is compounded by the related provision in Clause 6 which states that questions as to the validity, meaning or effect retained EU law are to be decided in accordance with any retained case law and any retained general principles of EU law *only so far as the retained EU law remains unmodified*. Where a statute which implements an EU obligation is amended, EU case law will be authoritative with respect to unamended provisions but may or may not be treated as authoritative with respect to amended provisions.

The changes proposed by the EUW Bill add up to a massive increase in legal complexity and legal uncertainty for the Scottish legal system. This may have the following adverse consequences. First, either individuals, businesses and public authorities will devote more of their limited resources to legal advice and litigation or they will forgo much needed legal advice and/or remedies. Secondly, the increased legal risk created in some contexts may discourage individuals, businesses and public authorities from taking action. Third, judges will find their work increasingly difficult and possibly increasingly contentious. The Bill requires careful scrutiny to establish whether there are better ways to achieve its objective of ensuring the continuity of EU law. The alternative approaches which might be considered include:

- Narrowing the over-broad definition of retained EU law, e.g. by excluding the third limb (legislation “relating to” legislation which implements EU objectives and relying instead on the rule-making power under Clause 7 to deal with technical difficulties arising from Brexit.
- Giving the courts more guidance as to the application of the supremacy principle, e.g. adopting a practice when amending EU-derived domestic legislation of stating whether it is the UK Parliament’s (or a Minister’s) view it is appropriate for the courts to apply the supremacy principle to a modified enactment.
- Setting out a more structured test for the Supreme Court or the High Court of Justiciary in Scotland to apply in deciding whether to depart from any retained EU case law.
- Applying a sunset clause to the concept of “retained EU law”, thereby requiring EU-derived rules to be replaced by or consolidated into ordinary domestic legislation after a given period of time.

Delegated Powers

There is broad acceptance that an extensive delegation of powers to the UK and devolved governments is necessary in light of the scale of the task of withdrawing from the EU within the two year period prescribed by Article 50(3) TFEU. There is broad acceptance too that – as the outcome of the ongoing withdrawal negotiations is unknown (and, given the public statements made on both sides about the progress of those negotiations to date, is likely to be unknown for much of the withdrawal period) – those powers must grant to the UK and devolved governments the capacity to react quickly and flexibly in order to implement any agreement which arises as a result and to amend domestic laws as required. For the UK government in particular a third concern underpins the delegation of power from parliament to the executive: to protect the sensitive and confidential nature of the withdrawal negotiations which might be compromised if the government is required to show its hand with the preparation and introduction of primary legislation or which might be undermined by amendments made to – or by the defeat of – any Bill during the legislative process.

Beyond this broad agreement about the need for recourse to delegated powers, however, the Bill has been subject to heavy criticism with regard to both the scope and the content of those powers. The [House of Lords Constitution Committee](#), with reference to the “number, range and overlapping nature” of the powers contained in the Bill, has said that those powers are “effectively unlimited” and as such constitute an “unacceptable” transfer of competence from Parliament to the executive. The [devolved governments](#) too have raised objections to powers that, in their view, “cut across the devolution settlement” and allow UK Ministers to modify the law in devolved areas “without any formal mechanism for accountability to the Scottish Parliament or consent from the Scottish Ministers.”

The [Delegated Powers Memorandum](#) (DPM) which accompanies the Bill lists 14 delegated powers. Concerns relating to those powers have been well rehearsed [elsewhere](#) and so we will focus here on the inadequacy and the vulnerability of safeguards to secure against the abuse of certain of these powers, where there might be a particular impact on devolved governance.

What the Bill purports to do

The most significant of the powers for present purposes are Clauses 7, 9 and 17.

Clause 7 is a so called “correcting power” which grants to UK Ministers a power, to be exercised as they deem “appropriate”, to cure any “failure of” or “deficiency in” retained EU law which arises from withdrawal. This power specifically allows for the modification and repeal of primary legislation (it is a so-called Henry VIII power) as well as for the creation, abolition or modification of public authorities and their (re)allocation within (or the creation of new) domestic regulatory regimes. The analogue provision for devolved ministers is to be found in Schedule 2 Part 1. Clause 7 is subject to a sunset clause: being exercisable for up to two years from the period beginning on exit day.

Clause 9 confers an extremely broad power upon UK Ministers to take such measures as they deem “appropriate” to implement any withdrawal agreement signed under Article 50(2), including the amendment or repeal of primary legislation. The breadth of this power – which, as the [House of Commons briefing paper](#) on the Bill notes, is likely to involve such high stakes elements of retained EU law as the rights of EU citizens living in the UK and the status of the Irish border - has been defended by the UK Government as affording it the maximum flexibility to attend to the (as it stands unknown and unpredictable) outcome of exit negotiations. Unlike Clause 7 this power expressly permits the modification of the Withdrawal Bill once enacted. The devolution analogue is found in Schedule 2 Part 3. The powers in Clause 9 are also subject to a sunset clause, being exercisable up to and including exit day.

Clause 17 is something of a “catch all” provision which in Part 1 confers an additional Henry VIII power upon UK Ministers to “make such provision as the Minister considers appropriate in consequence of this Act”, including the modification or repeal of primary legislation and in Part 5 confers similarly broad power to make any such “transitional, transitory or savings provision” as the Minister considers to be “appropriate” for the purpose of bringing the Act into force or for the appointment of “exit day”. There is no devolution analogue to this power. Clause 17 is time limited only in so far as regulations made under the Act may not modify primary legislation made or passed after the parliamentary session in which the Withdrawal Act itself is passed. There is no sunset clause attached to consequential amendments to primary legislation made *before* (and during) that session (which of course includes the devolution statutes).

Limitations on these powers and their vulnerabilities

The powers contained in the above listed provisions (as well as others contained in the Bill) are limited in various ways. Each of the limitations, however, gives rise to serious concerns about the robustness of these safeguards against the abuse of power.

1. *Substantive limits on the face of the Bill.* The powers contained in the Bill are subject to a number of substantive limitations. Neither Clause 7 nor Clause 9 can be used to impose or increase taxation, to make retrospective provisions, to create relevant criminal offences or amend, revoke or repeal the Human Rights Act 1998 (HRA). Clause 7 is subject to additional limits in that it cannot be used to implement the withdrawal agreement (which is the subject of Clause 9) nor to amend or repeal the Northern Ireland Act (NIA) (a limit excluded from Clause 9 as the status of Northern Ireland will be an important subject of the withdrawal negotiations and any resulting agreement).¹ However, read literally, the specific inclusion of constitutional legislation (the HRA and NIA) within these exceptions leaves open the possibility that Clauses 7 and 9 might be used to modify (and even to repeal) non-listed constitutional legislation, including the Scotland Act 1998. This possibility is constitutionally inappropriate and additional safeguards should be sought on the face of the Bill in order to protect the devolution statutes (as well, it might be argued, other forms of constitutional legislation) from the scope of these powers.

Clause 17 contains *no* such substantive legal limits, and Schedule 7 Part 3 paragraph 14 confirms that where the scope of powers overlap (e.g. where a power could be exercised by way of Clause 7 or Clause 17) the express limits contained in one Clause (e.g. the 7(6) limit against amendment/repeal of the HRA) are *not* to be read across to the other. These are therefore extremely broad and ill-defined Henry VIII powers that – given their constitutional import and the difficulty of stretching adequate parliamentary scrutiny across the withdrawal process - require much more by way of justification and of prescription and/or proscription on the face of the legislation.

The threshold for the exercise of these powers by UK and by Scottish Ministers (as well as in others, such as in Clause 8, where the language is replicated) – the relevant minister deems their exercise to be “appropriate” – should be replaced by a higher threshold of “necessity”, that both reflects the technical and transitory nature of the powers and demands more by way of justification for their use.

Clause 9 (explicitly) and Clauses 7 and Clause 17 (implicitly) leave open the possibility of using powers in one part of the Bill to undo substantive and/or time limits contained elsewhere (e.g. a power in Clause 9 to amend the Act before exit day might be used to modify the sunset clause in relation to Clause 7 or to remove a substantive limit on that power). This capacity for safeguards to be circumvented through the navigation of overlapping but differentially limited powers creates a near unlimited power at the centre, of a sort that is extremely problematic. For example, any safeguards sought and won to protect devolution legislation from the abuse of those powers are practically meaningless without further amendments to guard against their circumvention.

A final substantive limitation on delegated powers on the face of the Bill are those specific limitations placed on devolved ministers who, in addition to the substantive limits found in

¹ Clauses 7(6) and 9(3).

Clause 7 and Clause 9, (1) may only exercise powers within their respective spheres of devolved competence, and (2) may not ‘correct’ deficiencies in retained direct EU law. Scottish Ministers are therefore conferred a more limited and complex suite of powers which (as with the limits relating to *legislative* competence) frees UK Ministers from the constraints of EU law in a way that is not replicated at the devolved level. These powers are additionally constrained by the requirement that modifications made by Scottish Ministers must be consistent with UK modifications of direct EU law and by requirements to consult UK Ministers before exercising certain powers (e.g. for corrective obligations coming into force before exit day). These constraints constitute a significant centralisation in relation to areas such as agriculture and fisheries where much of the relevant regulation is by way of direct EU law and therefore beyond the scope of the powers of the devolved ministers.

2. *Ministerial and other statements of intent.* The Secretary of State for Exiting the European Union, David Davis MP, has given an undertaking to the House of Commons Exiting the European Union Committee that the “excessively” (perhaps even “unacceptably”) wide powers conferred by the Bill will not be used to give effect to substantive policy choices but only to make changes of a “technical” nature to the body of retained EU law. This is not a claim that survives careful analysis. To take two clear examples:
 - a. The creation, abolition, replacement of public authorities and consequential choices as to the most appropriate regimes to regulate the exercise of public functions are inherently political choices masked as technical changes by their express provision in Clause 7(5).
 - b. The (re)allocation of devolved competences from the body of retained EU law is a political decision of a fundamental nature which should not be left to (more or less unilateral) decision making on the part of the executive.

Whilst the task of withdrawal is such that Davis’s distinction is all but impossible to sustain, the Scottish Government and Parliament should be alert to the *inevitable* overlap of policy choices and technical amendments to the law. An important (and onerous) task for the Scottish Parliament will therefore be to sift the potential use of those powers to determine where the political stakes are most high and to require [enhanced political scrutiny](#) of their exercise by *both* UK Ministers (acting in devolved areas or to amend the devolution settlement itself) and the Scottish Ministers. Whilst the transfer of legislative competence by way of delegated legislation is not new – even where that transfer is of a constitutional nature² - most significant transfers of competence have been made by way of primary legislation (see the Scotland Act 2012 and the Scotland Act 2016). Given that the category of retained EU law creates a new *sui generis* limit to the competence of the Scottish Parliament it might be thought more appropriate on constitutional grounds for any transfer of competence back to the Scottish Parliament to be made by way of primary rather than by secondary legislation.

Additionally (and in terms that mirror the Sewel Convention), the DPM commits UK Ministers “normally” to seek the consent of the devolved ministers when exercising their powers in devolved areas. Whilst UK Ministers might see in a formal requirement for

² See, for example, the use of a section 30 order under the Scotland Act 1998 to put the legality of the Scottish Independence Referendum 2014 beyond doubt.

consent as being a significant barrier to the flexibility that they claim to need in order to give effect to withdrawal, legislative and executive consent provides (1) an important tool for engendering legitimacy in devolved nations that have either rejected withdrawal at the ballot box (Scotland and NI)³ and/or that have expressed disappointment with the centripetal force of the process thus far (Scotland and Wales), and (2) a necessary mechanism for the accountability of the Scottish Government (exercising its discretion to grant or to withhold consent) to the Scottish Parliament for the exercise of those powers. As such a formal requirement for UK Ministers to seek consent for the use of powers in devolved areas should be sought on grounds of political practice and constitutional principle. Indeed, the model that is currently used for the transfer of legislative competence under section 30 of the Scotland Act 1998, which requires draft orders to be approved by both Houses of the UK Parliament and by the Scottish Parliament – and which worked so effectively in facilitating the Scottish Independence Referendum in 2014 – provides a useful starting point from which to build. As this experience of section 30 demonstrates, formal mechanisms for consent, even where the constitutional stakes are high, can be established in a way that engenders co-operation rather than conflict.

3. *Common Law limits*. In recent years the UK Supreme Court has required the executive to do more to justify the exercise of (or the failure to exercise its) delegated powers. In *RM v Scottish Ministers*⁴ a failure by the Scottish Ministers to exercise discretion (here to designate certain state hospitals as ‘qualifying’ hospitals in order to create a right for patients held in secure conditions to appeal the conditions of their detention) was said to have frustrated the aim of the statutory scheme (to confer such a right of appeal) and was therefore unlawful (so-called ‘*Padfield*’ illegality).⁵ In the *Public Law Project* case⁶ Lord Neuberger said that “the more general the words by Parliament to delegate a power,” even, he said, very broadly conferred Henry VIII powers, “the more likely it is that an exercise within the literal meaning of those will nevertheless be outside the legislature’s contemplation” and therefore unlawful. This, he said, strengthened the arm of Parliament by requiring the executive to act squarely within the purposes for which a statutory power had been conferred. In *UNISON*⁷ the Court developed the now well-established principle that even broadly conferred powers must be exercised not only according the express terms used by Parliament but also “the constitutional principles [the protection of fundamental rights and the rule of law] which underlie the text, and the principles of statutory interpretation which give effect to those principles” in holding that a Fees Order establishing fees to access the Employment Tribunal encroached unlawfully upon the common law principle of access to the courts. The Scottish Government is correct therefore to be cautious of the increased legal risk and exposure to litigation that accompanies the transfer of broad powers within complex statutory schemes. The Scottish Government and the Scottish Parliament must also take care not to pass the buck (and the expense) of scrutiny to the public in the form of post-legislative challenges (a form of scrutiny that by its nature is not systematic but which is contingent upon a challenge first being raised). Putting

³ The issue of legitimacy is particularly stark in Northern Ireland where ministerial powers are (as it stands) to be conferred upon a UK Government that depends for its confidence and supply on a party – the DUP - from one side of the community.

⁴ [2012] UKSC 58.

⁵ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

⁶ *R (on the application of The Public Law Project) v Lord Chancellor* [2016] UKSC 39.

⁷ *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

the two together: by arguing for a “simple and flexible” allocation of delegated powers as between the UK and Scottish Ministers in order to reduce that risk the Scottish Parliament should be careful to demand more from the Scottish Government as to how it interprets and intends to use those powers as well as to demand enhanced political scrutiny of their justification and exercise.

Legislative Competence Post-Brexit

The EUW Bill as Currently Drafted

While the EUW Bill seeks to preserve the continuity of EU law in the immediate aftermath of Brexit (subject to any necessary amendments), the central point of withdrawing from the EU is to allow retained EU laws to be freely amended in future (subject to the terms of any future relationship with the EU or future trade deals).

The Bill secures this objective for the UK Parliament by repealing the European Communities Act 1972 and declaring (in clause 5(1)) that legislation enacted after exit day will not be subject to the principle of supremacy of EU law.

The assumption had been that Brexit would also increase the legislative competence of the devolved legislatures by freeing them from their current obligation to legislate compatibly with EU law. However, while clause 11 of the Bill does remove this obligation from the devolution statutes, it replaces it with a new provision which prohibits the devolved legislatures from modifying (or conferring power by subordinate legislation to modify) retained EU law. A similar restriction is applied to the executive competence of the devolved governments by virtue of Schedule 3, Part 1. This new restriction is subject to the proviso that any modification that would have been within devolved competence immediately before exit day will continue to be within competence. And it is also subject to a power for UK ministers via Order in Council (with the consent of the relevant devolved legislature) to remove particular elements of retained EU law from the scope of the restriction.

The Scottish and Welsh governments have objected to this as a “power grab”, since it means– at least initially – that all competences currently exercised at the EU level will be repatriated to the UK level, even if their subject-matter is one which is in other respects currently within devolved competence, and with no guarantee (on the face of the Bill) that the devolved institutions will gain any additional competences as a consequence of Brexit. The approach taken in the EUW Bill also creates some anomalous effects. For instance, where EU directives have previously been implemented via devolved primary or secondary legislation, the devolved institutions will in future be prohibited from amending that legislation because it falls within the definition of “retained EU law”. Similarly, devolved ministers may be able to amend legislation in areas within devolved competence under the ministerial powers conferred by the EUW Bill, but those amendments will subsequently become immune from further amendment by the devolved legislature because they too will fall within the definition of “retained EU law”.

The UK government rejects the allegation of a power grab, arguing that scope of devolved competence will *de facto* be unaffected, and that more powers will in future be transferred to the devolved level.

The UK Government is correct to say that the devolved institutions will be no more restricted in their competence than they are at present if the Bill is enacted in its current form. However, this does not mean that the approach taken by the Bill has no impact on the devolution settlement. There are a

number of objections, both principled and practical, which can be made to clause 11 as it is currently drafted.

1. It involves a shift from a system in which *both* the UK and devolved levels are subject to the constraints of EU law to a system in which only the devolved levels continue to be so constrained. This fundamentally affects the balance of power between the two levels.
2. While there are good arguments in principle for the development of new mechanisms to ensure co-ordination between the UK and devolved levels in order to replicate the unifying force currently exerted by EU law, this does not justify the allocation of all repatriated EU competences to the UK level. It is implausible to suggest that common UK frameworks are required in all areas currently governed by EU law. Moreover, if sufficient co-ordination could be achieved to secure compliance with EU law without allocating all competences affected by EU law to the UK level, it is not clear why this should be necessary to secure co-ordination after Brexit.
3. The approach taken by clause 11 would enable the UK government to determine unilaterally (as a matter of law) whether (and, if so, when) particular competences should be retained or devolved. The devolved institutions would have a right of veto over the transfer of competences, but no right of initiative. This contrasts with the co-operative approach to EU decision-making which has developed since the advent of devolution. Although participation in EU decision-making is in formal terms reserved to the UK level, the sharing of implementation powers in devolved areas has necessitated close co-operation between governments over the establishment of UK negotiating positions.
4. Clause 11 would also alter the framework of the devolution settlements by replacing a cross-cutting constraint on devolved competence with what is effectively a new set of reservations. It would also overlay the current reserved powers model of devolution with a conferred powers model in relation to retained EU law. This is not a mere technicality; rather the reserved powers model is a central element of the constitutional strength of the current devolution arrangements.
5. The approach taken in clause 11 would greatly increase the complexity involved in determining the boundaries of devolved competence. In areas previously within EU competence, determining whether the devolved institutions had competence to act would involve a regard to five separate issues:
 - i. Whether the subject matter generally fell within reserved or devolved competence;
 - ii. The terms of any retained EU law, including any subsequent amendments by primary or secondary legislation;
 - iii. The appropriate interpretation of retained EU law, by reference to the general principles of EU law (including, potentially, but not necessarily, post-Brexit decisions of the CJEU on the meaning of the underlying EU law instruments);
 - iv. The extent of the obligations imposed on the devolved institutions by EU law as at Brexit day;
 - v. The effect of any Orders in Council made under the EUW Bill to remove particular measures from the scope of the clause 11 restriction.

This is likely to create a legal minefield, which may encourage further resort to UK rather than devolved legislation in order to avoid the risk of subsequent legal challenge (a challenge which may arise at any time, and in any proceedings, and which may be made by any party with an interest in the legislation).

6. The highly particularistic approach taken in clause 11 is also inappropriate in a constitutional division of powers, which ought to proceed on the basis of broad allocations of reserved and devolved powers, relying upon a robust system of intergovernmental relations to sort out inevitable overlaps and spillovers. Instead, the approach in clause 11 pegs the limits of devolved competence to the way in which EU level competences *had been exercised at a particular point in time* (exit day). This is not only inherently arbitrary and likely to become increasingly out-dated, but it is almost certain to have unintended and unpredictable consequences for both the devolved and UK governments.
7. There are further uncertainties regarding the effect of the Bill on the *vires* of devolved legislation. One issue is concerns *when* the limits of devolved competence are to be determined. In relation to devolved legislation enacted before exit day, but subject to challenge after exit day, are the *vires* of the legislation to be determined by the scope of devolved competence at the time the legislation was enacted or at the point at which the challenge is raised? Further, what is the relationship between clause 11 and the provisions of Schedule 1? If no challenge can be made to retained EU law on the basis that the underlying EU law instrument was invalid (Schedule 1, para 1), does this mean that the devolved legislatures are bound by retained EU law even if prior to Brexit they could resisted a challenge to the competence of legislation on the basis of the invalidity of the relevant EU law instrument? Similarly, does the provision in Schedule 1 para 3 that there is no right of action in domestic law based on a failure to comply with the general principles of EU law apply to the devolved institutions? Or is there such an action based on breach of the new prohibition on modification of retained EU law which will be inserted into the devolution statutes?

Alternative Approaches

The UK Government accepts that, because it alters the scope of devolved competence, clause 11 requires the consent of the devolved legislatures under the Sewel Convention. The Scottish and Welsh Governments have stated that they will not consent to the Bill as it is currently drafted. Northern Ireland currently has no devolved government, but if the institutions become operational again before the Bill is enacted, it seems likely that the Northern Ireland Assembly would also refuse to grant consent.

If devolved consent is to be secured, some form of compromise over clause 11 would appear to be essential. A number of alternative approaches are possible:

- The preferred approach of the Scottish and Welsh Governments is simply to remove the requirement to comply with EU law. This would mean that the repatriation of EU competences would be determined by the current division between reserved and devolved (or excepted/reserved and transferred) matters in the devolution statutes. They accept that some common frameworks would be necessary, but argue that these should be established by negotiation. They could then be implemented either by parallel legislation in the UK and devolved parliaments, or by UK-wide legislation subject to devolved consent. In order for this approach to work effectively, it would require the UK and devolved governments to

trust one another and appropriate intergovernmental machinery to promote appropriate co-operation. Neither condition appears to be satisfied at present.

- A second option would be for specific alterations to be made to the devolution statutes to re-reserve powers in areas where common frameworks are considered to be necessary. This would give the UK institutions unilateral powers to establish new common frameworks, but it would be in keeping with the general approach taken in the devolution statutes whereby powers fall to the devolved institutions by default, unless there is a good reason to reserve them to the UK level.
- A third option would be to replace the cross-cutting obligation to comply with EU law with new cross-cutting obligations, for instance to preserve the UK's single market or to comply with international trade obligations. This approach would have the advantage of flexibility, but there would be concerns about the unpredictable and potentially far-reaching nature of the constraints these might impose on devolved competence.⁸
- A final option would be to retain clause 11 as it currently stands, but to make it subject to a sunset clause. One difficulty in determining how repatriated EU competences ought to be divided between the UK and devolved levels is the uncertainty arising from the fact that the UK's future relationship with the EU, and the obligations imposed by future trade deals, are not yet known, and may not be finally settled for some time after exit day. The approach proposed in clause 11 could therefore be regarded as a transitional arrangement pending a more permanent recalibration of the devolution settlements. However, a decision would still have to be made on what long-term approach was most suitable, and the transitional period could potentially last for a considerable time.

If no agreement is reached, and the devolved legislatures refuse to consent to the EUW Bill, the UK Parliament has the choice to respect their views and withdraw those aspects of the Bill which affect matters within devolved competence, or alternatively to ignore the absence of consent and enact the Bill anyway. *R (Miller) v Secretary of State for Exiting the European Union*⁹ confirmed that the Sewel Convention is politically binding only notwithstanding its recent statutory recognition in the Scotland Act 2016 and the Wales Act 2017. Nevertheless, the fact of that recognition confirms that it would be a major constitutional step to override a refusal of devolved consent. It might be argued that such a step would be justifiable as Brexit constitutes an abnormal situation falling outwith the scope of the Sewel Convention. There is no clear constitutional understanding as to what circumstances are sufficiently abnormal to justify ignoring a refusal of devolved consent as the situation has never arisen before. However, it is at least arguable that, given the seriousness of the constitutional issues at stake, lack of devolved consent should only be overridden in cases of necessity. Clearly, it is *not* necessary that the EUW Bill be enacted in its current form in order to secure an orderly Brexit.

If a refusal of consent were to be respected, the devolved legislatures would have to enact their own legislation to secure continuity of effect of EU law relating to devolved matters, and to enable the statute book to be corrected in the light of Brexit. This would present no great conceptual

⁸ See further memorandum of evidence by Aileen McHarg to the Finance and Constitution Committee, *Repatriation of Powers from the European Union and Common United Kingdom Frameworks*, available at: http://www.parliament.scot/S5_Finance/Meeting%20Papers/FCC_PAPERS.pdf.

⁹ [2017] UKSC 5.

challenges, but it could cause significant practical difficulties if a different approach to continuity of laws were to be adopted in relation to devolved and reserved matters.

A further complication is that the devolved legislatures do not have the competence to amend the devolution statutes to remove their obligation to comply with EU law. Arguably, those obligations would fall away automatically once the UK ceased to be a member of the EU. However, it would at the very least be untidy to leave the obligation on the statute book and to do so might create a risk of future litigation.