

Constitutional Issues and Constitutional Developments

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1 The Brexit timetable

29 March 2017	UK gave Article 50 notification
June 2017- November 2017	First six rounds of Brexit Negotiations
July 2017	EU (Withdrawal) Bill published
December 2017	EU27 agrees that talks can move on to post-Brexit trade deal.
October/November 2018	Time by which the 'deal' must be agreed between UK and EU Council
November 2018- March 2019	EU Parliament & UK Parliaments must approve the 'deal'
29 March 2019	UK leaves the EU (subject to extension of timetable/transitional deal)

2 The parties in the negotiation

The UK

Responsibility for negotiations and preparation for Brexit is divided between three UK departments:

- The Department for Exiting the EU (DExEU)
- The Foreign and Commonwealth Office
- The Department for International Trade

The EU

- Chief Negotiator (Michel Barnier)
- The European Parliament
- The Commission
- 27 Member States

3 UK internal processes and requirements

- The UK Parliament is sovereign; there are no ultimate constraints on its legislative power.
- Responsibility for negotiations and preparation for Brexit is divided between three UK departments
 - The Department for Exiting the EU (DexEU)
 - The Foreign and Commonwealth Office
 - The Department for International Trade
- Devolution adds complications

4 The European Union (Withdrawal) Bill

- EUWB is primarily concerned with the consequences of Brexit for domestic law in the UK's legal systems;
- Repeals the European Communities Act 1972;
- Continues in force EU-derived laws;
- Confers extensive powers on Ministers to deal with the complexities arising;
- Alters devolved competence and confers powers on devolved governments.

5 Continuity of EU-derived laws

The Bill “converts EU law as it stands at the moment of exit into domestic law before the UK leaves the EU”

See the European Union (Withdrawal) Bill Explanatory Notes, para 11.

Creates concept of ‘retained EU law’ – defined by reference to sources:

- EU-derived domestic legislation (clause 2)
- Direct EU legislation (clause 3)
- Other EU law (clause 4).

EU-derived domestic legislation includes:

- delegated legislation made under s. 2(2) ECA to implement the UK's EU obligations
- Any legislation made (i) to implement the UK's EU obligations, or (ii) which operates for such a purpose and
- A miscellaneous category relating to the EU/EEA.

5 Continuity of EU-derived laws

Exceptions and clarifications:

- The Charter of Fundamental Rights (but note recent government concession)
- The General principles of EU law

The general principles remain part of UK law but no one will be able to sue anyone for breach of one of those general principles. This limits their role to being guides to the interpretation of statutes and other rules of EU-derived law.

- State liability (*Francovich* liability)

The status of 'retained EU law'

- Retained EU law will continue to have effect.
- a statute passed *after* exit day may change any rule of retained EU law.
- Where there is a conflict between retained EU law and legislation passed *before* exit day, the retained EU law will prevail.

- EUWB will create a new hierarchy within the UK's legal systems.
- 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.

5 Continuity of EU-derived laws

Interpretation of retained EU Law (Clause 6)

- UK courts and tribunals are not bound by any principles laid down, or any decisions made by the Court of Justice of the EU on or after exit day; but
- may have regard to them “if they consider it appropriate.”
- Any question as to the validity, meaning or effect of any retained EU law is to be decided in accordance with any retained case law and any retained general principles of EU law; but
- the UK Supreme Court is not bound by any retained EU case law.

Some implications of EUWB provisions:

- An increasingly complex hierarchy of sources of law
- The breadth of the new supremacy principle.
- Interpretive difficulties
- The authority of EU case law
- Modified and unmodified retained EU law

6 Delegated Powers

“7. (1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—

(a) any failure of retained EU law to operate effectively, or

(b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.”

- allows for the modification and repeal of primary legislation (a ‘Henry VIII’ clause), and
- creation, abolition or modification of public authorities and their (re)allocation within (or the creation of new) domestic regulatory regimes, but
- is subject to a two year sunset clause.

6 Delegated Powers

“9. (1) A Minister ... may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day, [subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union.]”

(2) Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act).”

- Regulations may not (a) impose or increase taxation, (b) be retrospective (c) create a relevant criminal offence, or (d) amend, repeal or revoke the Human Rights Act 1998
- No regulations may be made under this section after exit day.

6 Delegated Powers

“17. (1) A Minister ... may by regulations make such provision as the Minister considers appropriate in consequence of this Act.”

- Includes power to the amend or repeal primary legislation.
- Clause 17 does not have a sunset clause, but may not be used to modify primary legislation made or passed after the parliamentary session in which EUWB is passed.

- The constitutional issues raised by the delegated powers are the limitations on scrutiny of law-making and the balance of power between the executive and legislature.

- EUWB deals with internal consequences of Brexit and does not affect the negotiations.
- Negotiations are for HMG but Ministers have promised there will be an EU Withdrawal Agreement and Implementation Bill which will legislate for the withdrawal arrangements and planned implementation period.
- This will cover the contents of the Withdrawal Agreement, including, e.g. the agreement on citizens' rights, any financial settlement and the details of the implementation period agreed with the EU27.
- “Bringing forward this Bill means that Parliament will be given time to debate, scrutinise and vote on the final agreement we strike with the EU. It comes over and above the undertaking the Government has already made that it will give Parliament a vote on the final deal as soon as possible after the deal is agreed.” David Davis (13/11/17)

- The General election result has undermined the credibility of the PM and reduced the ability of Ministers to control Parliament.
- The Conservative party remains badly split.
- The Labour party is also split (but less so and the leader seems to be shifting his position)
- Many MPs and Members of the Lords would prefer the UK to have a close relationship with EU-post Brexit.
- Does the PM's Mansion House speech on 2/3/2018 indicate a softening of the government line?

- There is no legal requirement to obtain the consent of devolved institutions to the Brexit deal.
- Nor does constitutional convention require such consent.
- There is no requirement in law or convention that the devolved governments participate in negotiations with the EU over Brexit.
- But, the Sewel convention may require consent to consequential legislation changing domestic law.

8 Devolution: changes to devolved competence

EUWB “maintains the current scope of devolved decision making powers in areas currently governed by EU law.”
See The European Union (Withdrawal) Bill Explanatory Notes, para 11.

- Removes EU law limitation of competence from Scotland Act 1998
- Replaces it with new limitation based on ‘retained EU law’
- powers may be released from the ‘retained EU law’ restriction by Order in Council.

8 Devolution: changes to devolved competence

- Clause 11 of EUWB inserts new s. 29 (4A) to Scotland Act 1998:

“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.”

- This will prevent SP or NAW changing laws required to comply with EU law e.g. farming subsidies.
- They will still have competence to change the law where they currently have that competence.

8 Changes to devolved competence - concerns

- UK Govt. says this is intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed;
- new co-ordination mechanisms may be needed but does this justify the allocation of all repatriated EU competences to the UK level?
- UK government will be able determine unilaterally (as a matter of law) whether (and, if so, when) particular competences should be retained or devolved.
- clause 11 undermines the reserved powers model for the allocation of powers to devolved institutions
- Clause 11 greatly increases the complexity of determining the boundaries of devolved competence.

8 Devolution: changes to devolved competence

- Is this a power grab by Westminster?
- Will UK Govt. and devolved governments reach agreement on this?
- The changes to competence do engage the Sewel convention.
- Scottish and Welsh Governments have indicated they will not consent to EUWD unless amended to their satisfaction.

8 Devolution: Inter-governmental relations

- Inter-governmental relations are legally informal, i.e. largely unregulated by statute.
- Before the EU referendum, the input of the devolved governments to EU matters was governed by non-statutory MoUs and concordats e.g. the *Devolution: memorandum of understanding and supplementary agreement* (September 2012) and the *Concordat on Co-ordination of EU Policy Issues*:

<https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>

- Joint Ministerial Committee
- System of concordats

8 Devolution: Inter-governmental relations

- There is now a Joint Ministerial Committee on EU Negotiations (JMC(EN)) chaired by the Secretary of State for Exiting the EU
- members include ministers from each of the UK devolved administrations.
- JMC(EN) seeks to agree a UK approach to, and objectives for, negotiations, and to consider proposals put forward by the devolved administrations.
- The PM has emphasised that the interests of all parts of the UK will be taken into account and that the devolved administrations will be full involved.

<https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>

