The European Union (Withdrawal) Bill and the Intergovernmental Agreement: Briefing by Cytûn's National Assembly Policy Officer

This briefing represents the personal assessment of Cytûn's Policy Officer and has not received the approval of Cytûn or its Wales & Europe Working Party

Introduction

On Tuesday 15 May 2018 the National Assembly for Wales gave Legislative Consent to the European Union (Withdrawal) Bill which the following day received its Third Reading in the House of Lords. In the Assembly vote, the Welsh Government (Labour/LibDem/Independent) had the support also of the Welsh Conservatives and UKIP, with only Plaid Cymru opposed. On the same day, the Scottish Parliament voted to refuse legislative consent. The SNP minority Government on this matter had the support of the Scottish Greens, Scottish Liberal Democrats and Scottish Labour, and was opposed only by the Scottish Conservatives.

This series of events was the result of the Welsh Government accepting the Intergovernmental Agreement (IGA) drawn up between the UK, Welsh and Scottish Governments on 24 April, and the Scottish Government rejecting it. It may not be the end of the story, as the House of Commons consideration of Lords amendments to the EU Withdrawal Bill (including those relating to devolution) has been postponed until after the Whitsun recess, and it is understood that talks with the Scottish Government are continuing.

What follows is written on the basis of the EU Withdrawal Bill and the Intergovernmental Agreement being implemented in the form agreed on 15/16 May.

Is this still a power grab?

The EU Withdrawal Bill as originally introduced to Parliament would have ensured that all powers returning from the EU after departure would have been exercised by the UK Government, even in areas otherwise devolved such as agriculture, the environment, etc. Powers could be gradually devolved, by Orders in Council, over an indefinite period. The UK Government indicated that devolution would happen as 'UK frameworks' were drawn up for each policy area. In the meantime, the devolved legislatures would be prevented from altering "retained EU law". The UK Government always resisted the description of this as a "power grab", as the Bill explicitly stated that this restriction on legislative competence "does not apply to any modification so far as it would, immediately before exit day, have been within the Assembly's legislative competence." (new Clause 109A(2)) of the Government of Wales Act). However, the restrictions on executive competence in Schedule 3 did not contain an equivalent clause, and it appeared that the freedom of the devolved governments to act would be more constrained than currently.

The new Clause 11 (subsequently renumbered clause 15) and related schedules tabled as part of the agreement in April and passed by the Lords on May 16, reversed the 'burden of proof' as to where legislative powers currently held by the EU should settle after exit. All powers in areas not reserved by the Wales Act 2017 will be exercised by the National Assembly and/or Welsh Government, except for a list of areas which will be drawn up by stages over the two years following exit. Areas will "not normally" be included on this list without the consent of the National Assembly (IGA, clause 6). In each area, powers may be retained at UK level for up to five years in order to allow for the creation of UK frameworks. The powers would then be devolved (but subject to the constraints of the frameworks). During the period of retention, the UK Government says that it would not seek to legislate in these areas for England while the National Assembly could not legislate for Wales, and Clause 5 of the Intergovernmental Agreement states that this would be a period of "temporary preservation of EU law" – i.e. the existing situation would continue, rather than new constraints being introduced. This is not stated on the face of the legislation, but if adhered to will meet a key concern raised by Cytûn and many other observers at earlier stages. The Welsh Government has argued that this constraint on legislating for England will encourage the UK Government to seek agreed frameworks swiftly.

A second aspect of the EU Withdrawal Bill as introduced which has attracted the term "power grab" relates to the conferral of powers on UK ministers to modify retained EU law in devolved areas, including modifying legislation passed by the devolved parliaments. The Welsh Government had argued that this power should be removed. The revised Clause 15 retains the power for the UK Government to act in this way, but the Memorandum attached to the Intergovernmental Agreement states that "it will not normally do so without the agreement of the devolved administrations. In any event, the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency" (para 8).

During its passage, the EU Withdrawal Bill has been amended in various other ways to try to meet devolved concerns – for example, the scope for UK ministers amending the Government of Wales Act by secondary legislation has been reduced (although not completely removed). The Agreement and Memorandum set out various other areas in which the devolved administrations will be consulted before UK Government ministers use their powers under the EU Withdrawal Bill.

How will the Bill and Agreement work?

Para 7 of the Memorandum sets out a reasonably clear process under which "Clause 11 [now Clause 15] Regulations" (that is, adding subject matters to the list of areas where EU law will be temporarily preserved across the UK) will be proposed and approved. This process involves seeking the consent of the National Assembly and Scottish Parliament for inclusion on the list. However, if consent is withheld, the UK Government may still lay the regulation before the UK Parliament, but will have to lay also a statement of its reasons for proceeding and a statement from the devolved administration setting out why the legislature concerned has refused consent.

The Welsh and UK Governments have made much of this extension of the requirement for seeking consent to secondary legislation (the 'Sewel Convention' included at Section 2 of the Wales Act 2017 currently applies only to primary legislation). It does, however, have some weaknesses:

- The requirement to *seek* consent is not a requirement to *obtain* consent. Section 157ZA of the Withdrawal Bill makes it clear that the UK Parliament can proceed to legislate without consent, and the Supreme Court judgement in the *Miller* case[1] made it clear that this could not be challenged in the courts.
- The requirement to lay a statement by the Welsh Government explaining the reasons for refusing consent is not a requirement to lay a statement by the Assembly itself, and there is no guarantee that the government would accurately reflect – or could even know in full – the reasons for failure to consent. This would be particularly true when there is a minority government which might not be fully in control of votes in the Assembly.
- Regulations of this kind are voted on in the UK Parliament in a whipped vote. They are not amendable. When there is a majority government at Westminster it is most unlikely that a regulation laid by the government would be defeated. There are large numbers of regulations laid, and MPs do not have the time to read the statements laid with them. The right of the devolved administration to write such a statement is not, therefore, likely to be particularly significant unless there is major public controversy which affects MPs in England as well as those in the devolved nations. (It is true that the current parliamentary situation could offer the theoretical possibility of the Government being defeated should the DUP agree with the opposition of the devolved administrations and other opposition parties in Westminster to a particular regulation).

Although debate in the National Assembly has focussed heavily on this procedure, in practice the areas where EU law are likely to be temporarily preserved have already been agreed by the governments and are listed in Annex A to the Agreement. They include the matters currently covered by EU law with regard to agriculture and animal health and welfare; chemicals regulation including pesticides; reciprocal healthcare;

[1] Paras 136-151

environmental quality; fisheries management; food safety; mutual recognition of professional qualifications; plant health; public procurement and the services directive. There is continuing dispute as to whether food geographical indicators and state aid rules are currently devolved or not.

The mechanism for creating the frameworks themselves is largely unclear, although it appears that the Joint Ministerial Committee mechanism will be used. The Agreement states that the Sewel Convention will "continue to apply" to primary legislation (IGA para 8) – although it does not confirm that secondary legislation will also be included. In the House of Lords debate on proposed amendments to Clause 11 of the European Union (Withdrawal) Bill (later withdrawn), Lord Keen stated[2] that most frameworks would be introduced through primary legislation, requiring Assembly consent.

The most serious complications are likely to arise when working out the interaction of the current devolved competence in these areas (which will be preserved) with the "temporarily preserved" EU law and the simultaneous evolution of devolved and UK policy. The most obvious example relates to agricultural support payments. Administration of these payments is currently devolved, and the Welsh Government has some flexibility as to how to apply the current EU rules. The UK Government currently has equivalent flexibility with regard to England only. The UK Government has just finished consulting on its proposals for future arrangements; the Welsh Government has announced that it will retain the current system for 2018 and 2019, and will shortly consult on a rather different set of proposals for arrangements after 2020. The content of any future 'UK framework' is not, of course, yet known. Neither the UK Government consultation nor the Welsh Government announcement addressed how the Intergovernmental Agreement would impact these consultations. Similar issues arise with regard to the current UK Government consultation regarding an Environmental Principles and Governance Bill which will, it appears include both UK frameworks and measures specifically for England. It is this uncertainty for the recipients of governmental policy, such as farmers, which is of greatest concern.

The Agreement also leaves open the possibility that UK frameworks could change devolved competence, either by agreeing a tighter framework than the current EU arrangements (thus constraining devolved competence), or by agreeing a looser framework (thus expanding devolved competence). It is at this point that renewed accusations of "power grabs" in particular policy areas could be made.

Wales and Scotland

Until April 24, the Welsh and Scottish Governments had been working closely together in the negotiations with the UK Government. It is understood that negotiations are continuing, and that any further changes to the Agreement or to the EU Withdrawal Bill will apply to Wales as well as to Scotland. However, the speech by the UK Cabinet Secretary, David Lidington, on May 11, entitled Protecting the vital UK common market, implied strongly that the agreement available to the Scottish Government is the current agreement rather than an enhanced one.

In a speech in Glasgow on the same day, Jeremy Corbyn indicated that he opposed the agreement with regard to Scotland, and Scottish Labour voted against it in the Scottish Parliament (but Labour supported it in the House of Lords). However, Welsh Labour spokespeople within the Welsh Government have continued to maintain that the agreement was the best deal available.

The Welsh Continuity Bill

The Law Derived from the European Union (Wales) Bill was passed by the National Assembly on 21 March, but on 16 April was referred to the UK Supreme Court by the Attorney General for England and Wales, acting on behalf of the UK Government. This Bill would have allowed the functions in devolved areas covered by the EU Withdrawal Bill to be carried out by devolved ministers and the National Assembly. The Intergovernmental Agreement states that this Bill will be repealed. Oddly, this requires that the challenge

[2] https://hansard.parliament.uk/Lords/2018-03-21/debates/BF5D8A3E-05C4-4EB4-ACC2-0029BB0C8A21/EuropeanUnion(Withdrawal)Bill col. 337

in the Supreme Court be withdrawn and that Royal Assent be given, as the repeal powers are contained within the Bill itself!

It appears that the Welsh Bill will be repealed in its entirety. The Welsh Government has given no indication that it would seek to re-enact any of the clauses not covered by the Intergovernmental Agreement, such as the provision (in Clause 11 of the Welsh Bill) enabling Welsh Ministers to shadow changes in EU legislation in devolved areas even after Brexit.

The Scottish equivalent bill, the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, contains a similar clause, and additional clauses added during Parliamentary debate, such as incorporating EU environmental protections and the EU Charter of Fundamental Rights into Scottish law. The Scottish Government has indicated that, even if the Bill is repealed or struck down by the Supreme Court in its current form, it may yet seek to implement these provisions in Scotland.

Other Brexit legislation

The issues around devolved competence which arise with regard to the EU Withdrawal Bill arise with regard to other Brexit related legislation. In particular, the Trade Bill and the Taxation (Cross-Border Trade) Bill currently before the UK Parliament, contain clauses relating to devolution similar to the original Clause 11 in the EU Withdrawal Bill. These bills are currently paused for reasons which the UK Government has not publicly explained.

Cytûn has been concerned throughout this process that legislation enabling future international trade agreements would need to include clauses allowing the amendment of devolved legislation without devolved consent in order for the UK Government to negotiate on devolved areas such as environmental protection or agricultural support mechanisms when coming to trade agreements with other nations who would wish to see changes to arrangements within the UK as part of such a deal. Such powers need be legislated by Westminster only once in order to come into force.

In presenting the Intergovernmental Agreement to the Assembly on April 25, Mark Drakeford AM said (in answer to a question) “everything we have agreed about consent and so on, will cascade forward into the Bills that the UK Government will now bring forward, such as the Trade Bill.”[3] However, neither the Intergovernmental Agreement nor any statements by UK Government ministers confirm this claim. Until it is confirmed officially, it is unclear whether this assurance can be relied upon.

What happens next?

The Lords’ amendments to the EU Withdrawal Bill will be considered by the House of Commons on a date to be announced following the Whitsun Recess. This will be followed by ‘ping pong’ between the two houses until an agreed version of the Bill is passed and can obtain Royal Assent.

The current approach of the Scottish Government and Parliament means that this could be followed by a Supreme Court hearing around the provisions of the Scottish Continuity Bill, and their compatibility with the EU Withdrawal Bill as passed, as well as with other legislation. This case would involve the Scottish and UK Governments, but would inevitably have effects on Wales.

Only once this was resolved, could the UK and Welsh Governments proceed with confidence to lay regulations before the UK Parliament and the National Assembly seeking to incorporate current EU law into UK and Welsh law, making the necessary ‘corrections’ to allow it to operate smoothly. This will lead to a major workload for both parliaments as a committee in each place ‘sifts’ the regulations to see which need further scrutiny, scrutinises those which require it, and then pass them into law.

The volume of legislation required will be unprecedented, so most parliamentarians – whatever their views on Brexit – will be glad that the ‘standstill’ implementation/transition period which is likely to continue

[3] http://record.assembly.wales/Plenary/4978#A43203 para 336

until 31st December 2020 will give them at least some time properly to consider this legislation, and for the two Governments to implement it prior to EU law ceasing to apply in the UK.

Gethin Rhys 21.05.18