Response from the Faculty of Advocates to Devolution and Exiting the EU

Introduction

The Faculty of Advocates is the Scottish Bar. We have prepared this response to the Call for Evidence issued by the Public Administration and Constitutional Affairs Committee of the House of Commons as part of its Inquiry into Devolution and Exiting the EU. In so doing, we have paid particular attention to the European Union (Withdrawal) ('EUW') Bill as it impacts on the devolution arrangements within the United Kingdom.

In our response below, we confine our observations to the provisions dealing with repatriation of legislative and executive competences concerning Scotland. This stems from our greater familiarity with Scots law and government. Broadly similar issues to those we highlight appear to arise in relation to Wales, particularly given the structural changes made by the Wales Act 2017. Some of the issues also arise in Northern Ireland although, structurally, devolution arrangements there are more complex.

1. What are the strengths and weaknesses of the provisions for the repatriation of powers in the EUW Bill, given the existing devolution settlements within the UK?

1.1 The principal relevant provision in the Bill is Clause 11, which modifies the existing restrictions regarding EU law in section 29 of the Scotland Act 1998. Rather than, as at present, prohibition on the Scottish Parliament legislating incompatibly with EU law, the amendment to be effected by Clause 11(1) will create a bar on the Scottish Parliament from legislating to modify 'retained EU law', that being EU law incorporated into the UK by Clauses 2 to 4 of the Bill, unless any such modification would have been within competence immediately before Exit Day. The only basis on which such legislative change might be possible is if provision is made by Order in Council to permit the Scottish Parliament to legislate in a particular specified area.

1.2 The first noteworthy point is that the provision for authorisation by Order in Council is devoid of criteria on which permission would be granted or refused. There is no proposal for any basis on which the grant or refusal of permission can be questioned, let alone challenged. The effect is therefore to freeze the body of EU law as at Exit Day and to confer on the Westminster government an absolute right in relation to any proposals to amend any Exit Day EU rules incorporated by the EUW Bill. It is difficult to envisage more rigid control over the Scottish Parliament's ability to legislate in the areas of law concerned.

1.3 Turning to address the areas of law involved, it is instructive to examine the basis on which the Scottish Parliament was set up in the late 1990s. The White Paper on devolution published in July 1997[1] – effectively the prospectus on which the people of Scotland voted in the referendum on 11 September 1997 – set out that the model would be one of reservation of certain powers to Westminster, with the Scottish Parliament able to legislate in all other, non-reserved, areas. The White Paper sets out the powers the Scottish Parliament would thereby gain, especially in areas of importance to Scotland and the people who live there, such as the environment, agriculture, forestry and fisheries.[2]

1.4 For the whole period since the Scottish Parliament was established in 1999, membership of the EU has meant that competence to make changes in certain areas of law has been shared with Europe. In its discussion of this element, the White Paper articulated the intention that the Scottish Executive would be involved 'as directly and as fully as possible' in the UK Government's decision-making on EU matters:

> 'Scottish Executive Ministers and officials should be fully involved in discussions within the UK government about the formulation of the UK's policy position on all issues which touch on devolved matters'.[3]

1.5 In similar vein, the 'Concordat on Co-ordination of European Union Policy Issues – Scotland', agreed between the UK government and the Scottish Ministers,[4] highlights as a key objective of the coordination mechanisms that

> 'they should provide for full and continuing involvement of Scottish Ministers and their officials in the processes of policy formulation, negotiation and implementation, for issues which touch on devolved matters' (B1.6).

The logic of this position would indicate that, once the UK has replaced the EU as the forum in which policy is made, full involvement of Scottish Ministers and officials in those processes should continue.

1.6 It is also difficult to foresee how Clause 11 will operate in practice, when a challenge is made by a party opposed to legislation of the Scottish Parliament. The recent case of *Scotch Whisky Association and others v The Lord Advocate and another*[5] provides an example against which to test the draft provisions**.** The first argument in the Supreme Court concerned Articles 34 and 36 of the Treaty on the Functioning of the European Union; it was alleged that the legislation of the Scottish Parliament on minimum pricing for alcohol had equivalent effect to a quantitative restriction on imports, contrary to Article 34. The Scottish Ministers argued that, as a measure justified on grounds of the protection of life and health, the legislation was permissible under Article 36. The second argument concerned the compatibility of the legislation with the CMO regulation, which established a common organisation of markets in agricultural products, including wine, all in furtherance of the Common Agricultural Policy.

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[1] 'Scotland's Parliament' Cmd 3658, 24 July 1997
[2] See, in particular, pages 3 to 7
[3] paragraph 5.4
[4] Published and to be read in conjunction with the Memorandum of Understanding (October 2013 edition), the current framework for cooperation among the Government of the UK, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee. Available at http://www.gov.scot/About/Government/Inter-Governmental/Memo-of-Understanding
[5] [2017] UKSC 76

1.7 Under Clause 11, the approach would appear now to be that the legislation would be argued to be a modification of retained EU law, more particularly that part of it represented by the obligation on the Scottish Parliament and the Scottish Government to refrain from imposing such a restriction on imports, incorporated into law in the UK by Clauses 3 and 4 of the EUW Bill. But any court adjudicating the dispute would be utilising the Treaty Articles and the Regulation stripped of their context. The relevance of the Articles and of the Regulation is as pillars of the Single Market of which the UK is currently part. Using them to regulate a different market – the internal market of the UK – whose rules are, at best, a matter of inference, would not be straightforward. Would the rules apply only to protect those seeking to import alcohol into Scotland from other parts of the UK, or would other types of business be able to mount a challenge, citing the apparent incompatibility with Articles 34 and 36 or the CMO regulation?

1.8 It appears to us that adjudicating such a dispute after Exit Day will be a complex exercise, conducted against a background of great uncertainty about the applicable rules. The practical consequence may be a chilling effect on the introduction and/or implementation of legislation at Holyrood.

1.9 We would also observe that, although little formal change is being effected to the suite of powers possessed by the Scottish Parliament and Government, the intended allocation to Westminster of all powers returning from the EU will greatly alter the balance of power between Edinburgh and London, in a way not envisaged when the Scottish electorate voted for devolution in 1997.

2. What arrangements could be put in place to repatriate, distribute and administer powers among the UK Governments?

2.1 There is already a large number of proposed amendments to Clause 11 which reflect different options for the repatriation, distribution and administration of powers among the UK governments. We do not seek to comment on the individual proposals made, and mention instead the general categories of approach which could be taken to amending Clause 11.[6]

2.2 Firstly, it would be possible to remove entirely the restriction on modification of retained EU law which Clause 11 proposes to insert. This would have the effect that the competences in all areas apart from those covered by the reservations in Schedule 5 to the Scotland Act 1998 would revert to the Scottish Parliament. Such an amendment could be accompanied by a provision granting the UK government a right of veto if proposed modification by the Scottish Parliament was inconsistent with an approach it was taking, or intending to take, to matters covered by the proposed Scottish legislation.

2.3 Alternatively, the proposal currently in Clause 11 could be time limited, by providing that it expires after a certain period has passed, either from the date of Royal Assent, or from Exit Day.

[6] In doing so, we have drawn on suggestions made by one of our members, former MP Mark Lazarowicz, in a post on the website of the Scottish Centre for European Relations, https://www.scer.scot/database/ident-3383

2.4 We note that there have also been attempts in draft amendments to fashion provisions dealing with so-called 'common frameworks', that is areas where it is envisaged that a common policy approach will be taken across the UK after Exit Day. These appear to build on the set of principles agreed at the JMC meeting on 16 October 2017 for determining the circumstances in which a framework is necessary.[7]

2.5 We consider that there are a number of difficulties with progressing this. First, it is almost impossible to imagine that common frameworks could be devised, when there is no detailed agreement as to the basis on which the 'internal market' of the UK is to operate in future. There appear to be two contrasting general approaches: to minimise divergence between the different administrations of the UK or to encourage policy-making at the lowest possible level, that is as close as can be to the people affected by such policy. This seems to be acknowledged in the expression of the first criterion for judging the need to create a framework:

> That a framework is necessary 'to enable the functioning of the UK internal market, while acknowledging policy divergence'.

The likelihood of disagreement about where, in practice, policy divergence is desirable and where it is inimical to the functioning of the UK internal market appears to us to be high.

2.6 Secondly, there seems to have been an attempt already to formulate a list of areas where common frameworks are thought to be required. This list, which contains 111 items for Scotland, has a number of drawbacks as a basis for any further work:

- Some references are difficult to comprehend (e.g. 'statistics');
- Other references pertain to areas already largely devolved and administered without common frameworks (e.g. 'forestry (domestic)', 'harbours', 'land use', 'provision of legal services');
- Further references are to areas which are clearly reserved and therefore controlled by the UK government anyway (e.g. 'equal treatment legislation'); and
- Still further references are to areas where the need for a common framework is difficult to fathom (for example 'efficiency in energy use', 'sentencing – taking convictions into account').

2.7 Insofar as areas can be comprehensibly described, and are agreed as appropriate for the negotiation of a common framework, the process whereby any such agreement is to be reached is not clear. Again, there appear to us to be two different approaches. First, the negotiating parties could be the devolved administrations and the UK government, but the difficulty with that is the absence of representation of England. There has been no exploration of which we are aware of how the interests of England can be represented in any such negotiation. Alternatively, a process for securing agreement among the constituent parts of the UK, including England, could be formulated. Design of such a process requires to recognise that the UK is a plurinational State: four different polities are involved.

3. What implications and opportunities arise from EU exit for the long term settlement of the territorial aspects of the UK constitution?

[7] https://beta.gov.scot/publications/joint-ministerial-committee-communique-october-2017/

3.1 We note the reference, in the bulleted questions elaborating this general query, to 'the anomalies which have arisen as a result of an ad hoc approach to devolution in the UK'. We are unsure what 'anomalies' are being referred to. That there is policy divergence in a range of areas does not seem to us to be anomalous, but rather to be illustrative of the benefits of localised policy-making already mentioned. We see no reason why the principle of subsidiarity should not be embraced in the post-EU UK, to locate the exercise of power as close to the citizen as possible.

3.2 It appears to us that the arrangements on which the constituent nations and regions of the UK relate to each other for the foreseeable future will necessarily become clearer once the ongoing negotiations in relation to the position of Northern Ireland have begun to generate practical proposals. This aspect of the first phase of negotiations with the EU may be the single greatest opportunity to create a template according to which arrangements for the other devolved administrations can be worked out.

4. How can the four UK Governments and Parliaments promote wider and deeper trust and understanding in their relationships?

4.1 We do not have any involvement in intergovernmental negotiations and are therefore unable to make any proposals for how relationships could be improved.

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Parliament House
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