

Devolution after Brexit:

'Power Grab' or a 'Significant Increase in Decision-making Power'?

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One of the questions that arose very soon after the EU referendum was what would happen to the powers currently exercised by the EU over areas of government activity which would otherwise be devolved. The initial assumption in many quarters was that such powers would automatically be devolved to the Scottish parliament and other devolved legislatures. Indeed, even during the referendum campaign itself, some prominent Scottish 'Leave' campaigners made the argument that the UK leaving the EU would make the Scottish parliament much more powerful precisely because it would acquire such powers in that eventuality.

However, some suggested that such assumptions might be premature. I argued in a blog piece I wrote in February 2017 that there could be no assumption that such an extensive transfer of powers would necessarily take place. In March 2017, former PM Gordon Brown went so far as to warn that 'unless powers now with the European Union are repatriated from Brussels to the Scottish parliament, the Welsh assembly and the regions, Whitehall will have perpetrated one of the biggest power grabs by further centralising power'.

The UK government's Brexit devolution approach

Those words of caution were shown to have some validity when the UK government set out its proposed approach to the transfer of EU competences to the devolved legislatures and administrations in its white paper on 'Legislating for the United Kingdom's withdrawal from the European Union' published at the end of March[i]. It emphasised there that 'at EU level, the UK government represents the whole of the UK's interests in the process for setting...common frameworks', and that 'when the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the UK'. Only afterwards might there be further transfers of former EU competences to devolved administrations, after determining 'the level [of government] best placed to take decisions on these issues.'

The First Ministers of Scotland and Wales both expressed their concerns at the approach set out in that white paper, and more recently issued a joint statement describing the measures in the EU (Withdrawal) Bill on devolved powers as representing a 'naked power grab'. The Scottish and Welsh governments have now suggested a number of specific amendments to that bill which aim to ensure that EU competences relating to devolved matters are not retained by the UK parliament after Brexit.

The reason such issues have arisen is a consequence of the nature of the devolution settlement in Scotland (as for the other devolved administrations). The general principle adopted in that settlement, set out in the 1997 white paper 'Scotland's Parliament' [ii] is that 'what is not specifically reserved is devolved'. Therefore, powers not specifically retained at Westminster fall under the authority of the Scottish parliament and ministers. However, from the start, an important qualification to that general rule was that the

Scottish parliament and ministers have to comply with EU law in terms of passing legislation and day to day administration. On the basis that they would no longer be required to do so after Brexit, it might appear that all these EU competences should automatically be devolved at that point as they had not been specifically reserved by the 1998 Scotland Act.

The problem, of course, is that when the devolution settlement was constructed it assumed continued EU membership by the entire UK. It is therefore not unreasonable to argue that as it was never envisaged that the powers which fell within the authority of the EU at time of the 1998 Scotland Act would at some stage fall within the powers of the Scottish parliament and government, there should be no automatic transfer of those EU competences to the devolved institutions.

If there were to be such a transfer, it is argued, there would be a real danger of damaging policy divergence, and lack of coordination, between the different nations of the UK in important areas of former EU competence. In the words of the UK government white paper, 'it will be important to ensure that stability and certainty [after Brexit] is not compromised, and that the effective functioning of the UK single market is maintained'.^[iii]

Sequencing of repatriated powers

One solution to the problem might be found in the approach which both the Scottish and Welsh governments have indicated would be their preference. The principle of 'what is not reserved is devolved' would apply to all current EU competences, and then the administrations would agree (presumably before the date of Brexit) with the UK government which of these powers should then be exercised either by the UK government on its own, or jointly with the devolved administrations.

However, such arrangements would clearly put the devolved administrations in the driving seat in deciding the long-term allocation of former EU competences relating to devolved matters between the UK and the devolved nations, as those powers could only be allocated and exercised centrally with the consent of the devolved nations. The UK government has so far rejected such an arrangement, no doubt because of a fear that the devolved administrations might indeed prevent a UK-wide approach being adopted in significant areas of former EU competence.

Instead, as described above, the UK government's intention is that the powers over 'common policy frameworks' currently set by the EU will return to the UK in the first instance. Only thereafter will there be 'intensive discussions with the devolved administrations' to determine where such powers will not need to be retained at UK level in the future^[iv].

The current European Union (Withdrawal) Bill aims to put that approach into effect. It provides that current powers exercised by the EU will not fall within the competence of the Scottish parliament and government, and it will therefore be up to the UK parliament and government to exercise those powers after Brexit. Thereafter, the UK government can transfer, by Order in Council, powers previously exercised by the EU to devolved legislatures in such a manner and at such time as it seems fit. Such transfers will require the approval of both Houses of Parliament, and of the Scottish parliament itself.

Under the EU (Withdrawal) Bill, ministers in the devolved administrations will also be given limited powers to 'correct deficiencies' in their own legislation which arise from withdrawal from the EU, to remedy potential breaches of international obligations, and to implement the eventual withdrawal agreement. These are 'Henry VIII' powers, in that they can make 'any provision that could be made by an Act of Parliament'.^[v] However, those powers are restricted to matters that are within the devolved competence of the relevant ministers. Furthermore, devolved ministers will not have the power to modify 'retained direct EU legislation',^[vi] unlike their UK counterparts. They are also specifically prohibited from making regulations (except with the consent of a UK minister) about any quota arrangements.^[vii]

Obstacles to Brexit devolution to Scotland

As the EU (Withdrawal) Bill allows transfer of EU competences to devolved administrations to be undertaken by means of an Order of Council (subject to UK and the devolved legislature) it is undoubtedly the case that such transfers could be made speedily, as they would not require the lengthy parliamentary process necessary for the passage of an Act of Parliament. But from the perspective of the devolved administrations it should be noted that a major drawback is such 'release' of current EU competences from the authority of UK ministers into devolved competence requires a positive initiative by the UK government to take the steps necessary to transfer that competence.

If the UK government chooses not to, or if the UK parliament refuses to approve the necessary legislation, then the power concerned will not be devolved. This must increase the opportunity for anyone who is opposed to that transfer, be it within the government or elsewhere, to seek to obstruct its transfer. That might take the form of a positive decision by the UK government not to transfer that power, as a result of a specific political choice being made. But it might also take the form of delaying tactics within the government or by groups of MPs opposed to the particular transfer proposed; or it might just result from the immense legislative burden which will fall on the UK government and parliament in order to deal with the consequences of Brexit.

There will be a legislative and legal log-jam both before and after the date of Brexit: considering proposals for, consulting upon, drafting, and thereafter making legislation on the incorporation of EU law into domestic UK legislation. Taking steps to transfer areas of EU competence to devolved institutions may not be the top of the UK government's list of priorities.

That being so, there must indeed be a risk of a 'power grab', as much by default and inertia as by design. And the longer that returned EU competences remain untransferred to devolved institutions, the more likely will be the possibility that the political case will have to be made again on each time that a transfer of power over an area of EU competence is proposed to be made to a devolved institution. The dynamics of decision-making on the allocation of former EU competences to devolved nations will be in a very different position where it is those nations that have to make a case to the UK government for transfer of power from one where it is the UK government has to convince devolved administrations both of the need for a competence to be retained, and of the mechanism by which such a competence will be exercised and controlled at central level.

Proposals to give Scotland a greater role

The only certain way of preventing the claimed 'power grab' is by adopting the principle that EU competences are not added to the powers currently reserved to the UK parliament, so that they then transfer directly to the devolved administrations. The amendments proposed by the Scottish and Welsh governments to the EU (Withdrawal) Bill would have that effect. However, if the UK government rejects such proposals, as seems likely, there are other, if less far-reaching, steps that could be taken to give the Scottish parliament (and the other devolved administrations) a much stronger voice and role in the process which has now been commenced with the passage of the EU (Withdrawal) Bill through parliament.

There are a number of measures which could be put in place to give the Scottish parliament and government that greater voice and role:

1. It could be specified that the powers which the bill gives to UK ministers to modify 'retained EU law' can be only exercised, when they concern devolved competence, if the Scottish ministers give their consent. (Amendments of this nature have been proposed by the Scottish and Welsh governments).
2. It could be specified in the EU (Withdrawal) Bill that certain powers over 'retained EU law' will be devolved by the bill itself, rather than waiting for them to be subsequently 'released' from reserved competence by ministerial decision and secondary legislation. For example, certain environmental powers which currently rest with the EU could be transferred to devolved competence now. The Scottish and Welsh governments have identified many other areas where such transfers could be made.
3. The Scottish Parliament could be given the power in the EU (Withdrawal Bill) to legislate on retained EU law where it would have otherwise been transferred to the Scottish Parliament automatically, but with the qualification that any item of such legislation by the Scottish parliament could be vetoed by the UK government if it considered that it was inconsistent with its UK-wide approach to powers which were being returned from the EU.
4. A 'reverse sunset clause' could be put into the EU (Withdrawal Bill). The bill currently includes 'sunset clause' provisions to limit the powers of ministers to make changes through secondary legislation, so that they expire after two years after the UK's final exit from the EU. At that stage, unless those powers are extended, or replaced by similar mechanisms, it will therefore only be the UK parliament that can make further decisions about repeal or amendment of retained EU law.

Although UK ministers would presumably have the power, under section 30 of the Scotland Act 1998, to devolve further powers over 'retained EU law' to the Scottish parliament, this would still give the UK government and parliament the final say over whether any such powers should be transferred. Instead, the EU (Withdrawal) Bill could provide that, at the end of the two years, powers over 'retained EU law' would automatically be 'released' to the devolved administrations, unless the UK parliament specifically legislated for such competences to continue to be reserved. This would place a heavy onus on the UK government to make a positive decision about which, if any, EU competences should continue to remain within the competence of the UK parliament after the sunset clauses expired.

Avoiding the Brexit 'power grab'

No doubt other mechanisms could be proposed as to how to ensure the Scottish parliament and government can be given a greater role in the process of transferring EU law to the UK after Brexit. Some of the measures I have proposed above could perhaps be combined, or their extent limited, if it was considered that their effect would be too far reaching to be compatible with the wish to maintain that the UK's own internal 'common market'.

However, if some such mechanisms as those outlined above are not put in place, it seems quite possible that the Scottish parliament and other devolved legislatures will find that the increased range of powers that they might have expected to exercise after Brexit will not be transferred to them for some considerable time to come, notwithstanding the UK government's stated expectation^[viii] that 'the outcome of the process will be a significant increase in the decision making power of each devolved administration.'

That possibility of what has been described as a 'power grab' would exist even if there was political goodwill on all sides, given the procedural complexity of, and the inevitable bureaucratic delays that will emerge from, the arrangements currently proposed in the EU (Withdrawal) Bill. In the not unlikely absence of political goodwill on all sides, it is reasonable to surmise that the Scottish parliament might find it has to wait much longer for such transfers of power to be put into effect unless its role in the EU withdrawal process is considerably enhanced.

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[i] Legislating for the United Kingdom's Withdrawal from the European Union, Cm 9446, March 2017, chapter 4.

[ii] Cm 3658, chapter 2.4.

[iii] Cm 9446, chapter 4.3

[iv] Ibid., chapter 4.4

[v] See Sch 2

[vi] Sch 2, clause 15 (1)

[vii] Sch 2, clause 16 (1) (c)

[viii] Chap 4.5