CONSULTATION: THE EUROPEAN UNION (WITHDRAWAL) BILL

Response from the Learned Society of Wales

The Learned Society of Wales (LSW) is an independent, all-Wales, pan-discipline educational charity that was established in 2010. As Wales's first National Academy of science and letters, the Learned Society of Wales, like similar societies in Ireland and Scotland, brings together the most successful and talented Fellows connected with Wales, for the shared purpose and common good of advancing and promoting excellence in all scholarly discipline across Wales.

1. The Learned Society of Wales thanks the National Assembly's Constitutional and Legislative Affairs Committee and its External Affairs and Additional Legislation Committee for the opportunity to contribute to their consideration of this important piece of proposed legislation.

Introduction

2. The Bill's long title states that it is "A Bill to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU".

3. The repeal of the European Communities Act 1972 is dealt with in clause 1 of the Bill. The whole of the remainder of the bill is concerned with making the 'other provision' referred to in the long title.

4. The withdrawal of the UK from the EU poses a number of questions for the UK as a whole and for each of the devolved nations. Some answers to some of these questions are to be found in the bill. With regard to others, however, the bill is silent. The 'other provision' it proposes to make 'in connection with the withdrawal of the United Kingdom from the EU' does not provide for the future governance arrangements between the United Kingdom, as the former EU member state, and the devolved governments of its component nations.

Retention of EU law

5. Clauses 2 to 6 of, and schedule 1 to, the bill, provide for the continued application of EU law within the UK following withdrawal. The policy choice has therefore been made that there should be no change to the application of this law simply as a consequence of withdrawal. This is to be the case with regard to:

- those laws made by the EU itself which are binding in the UK (direct EU legislation),[1]

[1] Clause 3.

- laws made within the UK to give effect to obligations arising from EU membership (EU-derived domestic legislation),[2] and
- rights, powers, liabilities, obligations, restrictions, remedies and procedures which are recognized and available in domestic law as a consequence of EU membership and enforced, allowed or followed accordingly.[3]

EU-derived domestic legislation includes laws enacted by the devolved nations to implement EU law under, for instance, section 2(2) of the 1972 Act.[4]

Retained EU Law

6. The body of EU law which will be retained by the UK on withdrawal will be the body of EU law as it exists on the day of withdrawal, referred to as 'exit day'.[5] On exit day, EU law will be a body of developing law which will continue to develop as law applicable in the member states of the EU. The retained EU law within the UK, however, will no longer develop in the same way. Retained EU law will be a 'freeze frame' of EU law on exit day. Subsequent development of the rules contained within retained EU law will be the preserve of law-making agencies within the UK – legislatures, legislators and courts. Subsequent development of EU law by the EU law-making agencies will have no effect within the UK unless an appropriate UK law-making agency decides otherwise.

The Devolved Legislatures and EU Law

7. Currently, under the conferred-powers model of Welsh devolution, the National Assembly cannot enact provisions which are incompatible with EU law.[6] The same restriction will apply to its legislative competence when it moves to the reserved-powers model of devolution enacted by the Wales Act 2017.[7] It is important to stress that the requirement for the Assembly's legislation to be compatible with EU law in order to be within competence is a limit upon the use of its devolved competence. It is not the case that the subjects in relation to which it may currently legislate exclude matters regarding which the UK is bound by EU law. Nor is it the case that those matters, in future, would be reserved. Where otherwise devolved, they are within the subject-matter competence of the Assembly, but the Assembly is limited when legislating in relation to them to doing so in a manner which is compatible with EU law. When EU law, therefore, ceases to be law within the UK on exit day, that limit will be removed and the devolved legislatures, in the absence of any further provision, will be competent to legislate in relation to those subjects free of that restriction.

The Devolved Legislatures and Retained EU Law

8. From the above, it follows that, without more, the devolved legislatures should be free on and after exit day to make such changes to retained EU law in relation to devolved issues as was otherwise within their competence as previously approved by the British Parliament in successive devolution

[2] Clause 2.
[3] Clause 4.
[4] Clause 2(2).
[5] Clause 14 (1) and (2).
[6] GoWA 2006, s.108(6)(c).
[7] GoWA 2006, s.108A(2)(e), inserted by Wales 2017, s.3(1).

statutes. This is not what the bill envisages. Instead, it replaces the restriction concerning compatibility with EU law with a new restriction requiring that provisions enacted by the devolved legislatures should not be incompatible with retained EU law.[8] In that retained EU law on exit day is a static set of rules as opposed to the developing body of EU law, this changes a limitation to the legislative competence of the devolved legislatures. The change is significant for a number of reasons. Not least is the fact that it asserts the supremacy of laws made by the UK Parliament in all of the areas, many of which are devolved, where before exit day supremacy had been accorded EU law, a supremacy untrammelled by any convention requiring the consent of the devolved legislatures for intrusions into their legislative space.

9. Retained EU law will therefore constitute a distinct body of law within the UK, a body of law defined by its history, being a legacy of the UK's membership of the EU, approved by Westminster and not amendable by the devolved legislatures.

10. The supremacy which the UK has been prepared to accord EU law during its membership reflects the acceptance that the appropriate level for laws to be made in relation to certain matters is at EU rather than state level. In many instances, for example aspects of environmental protection, this recognizes that action at the international level is necessarily more effective than action by a state acting alone. In others, such as internal trade, the underlying logic rests on what is required to allow a single market in goods and services to work effectively without tariffs or non tariff barriers. In yet others, dealing with for instance the rights of individuals, the basis is a shared commitment to respect fundamental values.

11. Regardless of the various rationales underlying the supremacy of EU law, if one upholds the view that such decisions are better made at a higher rather than a lower level of government, it is logical to accept that following withdrawal some decisions will be better made at the UK level or taken separately on a coordinated basis previously agreed by the governments involved.

12. Given the devolution of powers, the devolved nations should have a say in such decision making. While a member of the EU, the UK has not been able to make changes to EU law of its own motion. Such changes require for their enactment the support, in most cases, of a weighted majority of the member states or, in some cases, their unanimity. While withdrawal certainly envisages that in future retained EU law can be changed freely within the UK, there is no necessity that such changes should be the exclusive preserve of the UK state. Indeed it is undesirable that such power should be unilateral if it covers a devolved matter. Given that the legislative powers being resumed by the UK as a consequence of withdrawal are being resumed by a state which has embraced legislative devolution, it is arguable that the mechanisms put in place for the future development of retained EU law should reflect that constitutional context.

13. This is perhaps particularly important given that, over matters which are devolved, the UK government is also acting as the government of England and therefore suffers from a possible conflict of interest. At times the interests of England and the rest of the UK will not necessarily coincide. There is no recognition of this in the Bill, and it marks therefore another missed opportunity to show a strategic approach to, and some respect for, the rights of the democratically-elected legislatures of the devolved nations and their respective governments. It threatens to be a further example of the sort of

[8] Clause 11. Subsection (2) deals with the Assembly, amending GoWA 2006, s.108A.

ad hoc constitutional intervention that has marred the progress of devolution and harmed relations between the nations of the UK.

Modifying Retained EU Law for Withdrawal

14. The Bill recognizes that there are elements contained within EU law which contemplate its application to a member state and which therefore cannot continue to apply in that form following withdrawal. The Bill refers to such elements as 'deficiencies'.[9] It gives Ministers of the Crown a power 'to make such provision as the Minister considers appropriate' to prevent, remedy or mitigate such deficiencies. The power is to be exercised by means of the making of regulations, which regulations can make any provision which could be made by an Act of Parliament. It is therefore a 'Henry VIII power'. Its exercise in certain circumstances, defined in Schedule 7 to the Bill, requires affirmative procedure in both Houses of Parliament. One of the circumstances is the creation or amendment of the power to legislate.

15. The Bill recognizes that there will be items of retained EU domestic law which were enacted or made by the devolved nations. In relation to these items, it confers on the relevant devolved authorities – in Wales the Welsh Ministers – a similar power to that conferred on Ministers of the Crown to cure deficiencies arising from withdrawal.[10] The power conferred can only be exercised within devolved competence and cannot override modifications made to retained EU law by a Minister of the Crown. Modifications made by the Welsh Ministers are to be made by regulations subject to approval by the National Assembly.[11] The Bill also provides for modifications which need to be made jointly by a UK Minister and the Welsh Ministers, and modifications which require either the consent of, or consultation with a Minister of Crown to be made. These provisions acknowledge and respect the existing devolution boundaries.

The Test of 'Appropriateness'

16. The discretion given to Ministers of the Crown to adjust retained EU law is however very wide. Arguably, it is wider than is necessary. A Minister can 'make such provision as the Minister considers appropriate',[12] and modifications made by such provisions are beyond the reach of the devolved authorities to adjust. The breadth of the discretion effectively makes it impossible to challenge its exercise other than by internal procedures within the UK Parliament. There is no opportunity to challenge the content of a modification before the courts – other than if the modification is so manifestly unreasonable that no reasonable person could regard it as appropriate. The same would not be the case if the discretion had been narrower. Under the reserved-powers model provided for Wales in the 2017 Wales Act, the National Assembly is permitted to enact provisions which modify the law on reserved matters where the modification 'has no greater effect on reserved matters than is necessary to give effect to the purpose of provision'.[13] Given that the purpose of the power which the Bill proposes to confer upon Ministers is to cure deficiencies in retained EU law arising from withdrawal, it is submitted that a power drawn in similar terms to that in the Wales Act 2017 would be

[9] Clause 7.
[10] Clause 10 and Schedule 2, Part 1.
[11] Schedule 7, Part 1.
[12] Clause 7(1).
[13] GoWA 2006, Schedule 7B, para. 2(1)(b), inserted by Wales 2017, Schedule 2. See also GoWA 2006, s.108A (3), inserted by Wales Act 2017, s.3, providing a similar test in relation to ancillary provisions.

sufficient to meet the need. A test drawn that narrowly would open the modifications made to the possibility of legal challenge by interested parties including the devolved authorities, and the test of whether the modification was necessary to meet the purpose would be an objective one even allowing for a margin of appreciation. Arguably, the question posed when asking whether a modification to retained EU law is necessary to cure a deficiency arising from withdrawal is not as difficult to answer as that of whether a modification to the law on reserved matters is necessary to give effect to the purpose of a provision in an Assembly Act.

Effective Scrutiny

17. The greater the discretion given to Ministers to make such modifications, the less is the opportunity for successful challenge regarding its exercise before the courts, and therefore the greater the need for effective scrutiny of its exercise within the legislative process. The proposed test of 'appropriateness' gives great discretion to Ministers. Therefore, a high level of scrutiny should complement it.

18. As has been noted, the regulations made by Ministers of the Crown in order to modify retained EU law to cure deficiencies upon withdrawal will be subject to scrutiny before both Houses of Parliament either according to the affirmative procedure or negative procedure depending upon the content of the regulations. Regulations made for the same purpose by devolved authorities will be subject to similar scrutiny by the devolved legislatures – in Wales, the Welsh Ministers and the National Assembly respectively. Where the regulations are made jointly, both legislatures will participate in the scrutiny process.[14]

19. Retained EU law will extend to and apply in all of the constituent nations of the UK. Certain of its subject matter is and will remain within the competence of devolved authorities albeit that they cannot and will not be able to legislate incompatibly with it. The devolved authorities therefore have a legitimate interest in any modification to that body of law however necessary or appropriate the modification.

20. In the absence of any realistic opportunity of legal challenge to such modifications, it is crucial that the scrutiny of proposed modifications allows the voices of those with a legitimate interest to be heard. The Bill limits formal involvement in the scrutiny process to members of the respective legislatures involved, and only involves them when the Minister or Ministers making the regulations is accountable to them. This is arguably insufficient.

21. It is submitted that a strong case can be made for sharing the scrutiny of these regulations or at least having enhanced scrutiny of them. Shared scrutiny could involve joint meetings of committees from Westminster and the devolved legislatures – meetings of a kind which have proved useful and effective on past occasions. Enhanced scrutiny could be employed, for example by use respectively of super-affirmative and enhanced-negative procedures requiring the relevant regulations to be laid in draft with a suitable opportunity for interested parties – even if limited to the devolved authorities – to comment and suggest amendments. Regardless of the Ministerial response to the suggestions, the report of the views of the devolved authorities would be available to the Parliamentary committees charged with the final scrutiny to inform their work and increase the chances of due regard being had

[14] EU (Withdrawal) Bill, Schedule 7.

to the views from the devolved nations. Given the current composition of the House of Commons, failure to show such due regard might well lead to the withholding of approval for, or the annulment of, the statutory instruments containing the proposed modifications.

Retained EU Law and the Future: Interpretation and Application

22. The existing case law of the European Court of Justice on exit day will be part of retained EU law, but it will be open to the Supreme Court to depart from it on terms similar to which it may depart from its own previous decisions. Decisions of the ECJ on and after Brexit day will not be binding upon courts in the UK, even when the decision relates to EU law which corresponds to retained EU law within the UK.[15] The Bill however permits courts and tribunals in the UK to have regard to things done by the Court or other EU institutions if they consider it appropriate to do so.[16]

23. The approach taken to these issues is potentially productive of serious difficulties. UK courts will be called upon to apply and interpret rules of retained EU law which correspond to rules of continuing EU law over which the ECJ has jurisdiction. UK interpretations of retained EU law may differ from subsequent ECJ interpretations of the same rule in EU law. The result is unlikely to be satisfactory, particularly in later cases containing an issue of foreign law involving the rule in question and its application to contractual arrangements between parties in the UK and EU member states. Allowing the courts to decide on a case by case basis whether regard should be had to post exit day decisions of the ECJ is tantamount to delegating to the courts a policy decision which rightly belongs elsewhere.

Retained EU Law and the Future: International Obligations

24. The Bill makes no provision with regard to the position of the devolved nations as the UK proceeds to create new trading links with the EU and other entities. While a member of the EU, the forging of such trading relationships was a matter for the EU, and the relevant terms of agreements reached became binding in the member states as part of EU law. Laws made by the devolved nations have to be compatible with that law in order to be valid. Questions regarding the compatibility of such devolved legislation are questions of law to be determined by the courts.

25. It is not clear therefore from the bill how the requirements of future trading deals will be incorporated into UK domestic law and how such incorporation will affect the legislation of the devolved nations. Will the UK Parliament legislate to amend retained EU law, for example, to preserve correspondence with developments within the EU where that is required by a future trading arrangement? Will the devolved nations be allowed to implement such laws within their territories as they currently can with EU law? Will Wales be treated any differently to Scotland and Northern Ireland because it is not a distinct jurisdiction?

26. With regard to trade deals outside of the EU, and possibly with the EU itself, the deals made by the UK are likely to be a source of international obligations. As such, while incompatibility with such obligations does not currently affect the legislative competence of the devolved legislatures, it is open to the Secretary of State to intervene. The Secretary of State can intervene to prevent an Assembly Bill being submitted for Royal Assent if he has reasonable grounds to believe that it contains provisions

[15] Clause 6.
[16] Clause 6(2).

which 'would be incompatible with any international obligation'.[17] Unlike the current question regarding compatibility with EU law, this question is not one of law for the courts but one of political judgment. The Secretary of State's view prevails unless his order prohibiting submission for Royal Assent is annulled in one or other House of Parliament. It is unclear from the Bill as introduced what approach will be taken in future regarding incompatibility with the terms of international trading obligations. The position of the devolved legislatures *vis-à-vis* the UK government is however weakened if what is currently a question of law to be determined by the courts as a devolution issue following a full hearing becomes instead an exercise of political discretion by a Minister of the Crown. Moreover, the issues involved underline the crucial importance of a real coordination and consultation between the governments involved before international agreements are concluded.

Retained EU Law and Future Modifications

27. The Explanatory Notes to the Bill note that not all changes to existing devolution legislation have been included in the Bill on introduction, citing as an example changes to the lists of reserved matters in the relevant Acts, including those in the recently enacted Schedule 7A inserted into the Government of Wales Act 2006 by the Wales Act 2017.[18] It is stated that this is because the UK Government intends to discuss these changes with the devolved administrations before finalising the amendments. While consultation with the devolved administrations is highly desirable, it is nevertheless undesirable to introduce incomplete Bills that will be amended by the Government, possibly at a late stage in the Parliamentary process and therefore without proper scrutiny.

28. There is also a disturbing lack of clarity with regard to the proposed mechanism by which the devolved legislatures may in time be released in part from the ban on their modifying retained EU law. Clause 11 of the Bill envisages such release being achieved by an Order in Council procedure, but it is not clear how the amendments to legislative competence wrought by such Orders will fit into the existing devolution settlements. One possibility is that they might list matters within retained EU law in relation to which some or all of the devolved legislatures might in future legislate, thus in effect incorporating elements of a conferred-powers model of devolution within the reserved-powers models currently enacted. This is admittedly only one possibility, but it is unsatisfactory that such an important factor for the future competence of the devolved legislatures should be lacking in clarity and certainty when scrutiny of the Bill begins.[19]

Conclusion

29. The above analysis makes a series of pertinent points on issues arising from the detailed provisions of this Bill. The Learned Society understands and shares the logic that there should be legal certainty with regard to retained EU law after British withdrawal from the EU. The Acts providing for devolution within the UK assumed British membership of the EU and the devolved legislatures have been required to comply with EU law in exercising the powers devolved to them. It is those Acts which have determined the distribution of powers within the UK. In creating a body of retained law, to be legislated by Westminster for the UK as a whole, the Bill amends the powers already devolved to the three nations. Moreover it is not clear whether this is a temporary measure or one which would

[17] GoWA 2006, s.114.
[18] Explanatory Notes, ¶195.
[19] The relevant Explanatory Notes, ¶¶36–38, do not assist.

permanently change the distribution of powers. It is therefore a matter of considerable constitutional import. Currently EU law creates an internal market among 28 states, and by definition an internal market within the UK. After withdrawal there will need to be an internal market in the UK. Achieving this and delivering the necessary policy coherence between the four nations must take account of the constitutional and political considerations. This underlines the vital need for real consultation between governments to achieve agreed and implementable outcomes acceptable to all. It is not apparent that this has been the case in the drafting of this Bill.

30. The Learned Society of Wales hopes that the Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee will find these comments of use in their deliberations on the European Union (Withdrawal) Bill and its effects on devolved government in Wales.

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