



# The Civil Society Brexit Project

Expert information and advice on Brexit  
for organisations in Scotland.

## Brexit and Devolution

### **About the Civil Society Brexit Project**

The Civil Society Brexit Project is a collaboration between the Scottish Universities Legal Network on Europe (SULNE) and the Human Rights Consortium Scotland, and funded by the Legal Education Foundation.

We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their service users.

### **Who is this Civil Society Brexit Project: *Information for?***

This briefing is written for civil society organisations working in Scotland. It is written for those with no or little knowledge of policy and law. If there is any aspect of the briefing or around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us via [hrcscotland@gmail.com](mailto:hrcscotland@gmail.com)

### **What does this Brexit Information briefing cover?**

- This briefing covers the implications of Brexit on the devolution settlement with a particular focus on Scotland. It takes into account the provisions regarding devolution in the European Union (Withdrawal) Act, the UK Supreme Court's judgment in the case on the Scottish Continuity Bill, and the likely implications for devolution of the draft Withdrawal Agreement between

the EU and the UK as well as the Political Declaration setting out a framework for the future EU-UK relationship.

### **How does Brexit affect the devolution settlement?**

- The EU can currently pass legislation in a number of areas which are devolved to Scotland. These include agriculture, the environment, inshore fisheries and certain aspects of private and criminal law and procedure. Where there is EU legislation in these areas, the Scottish Parliament is currently unable to legislate in contravention to it.<sup>1</sup>
- After the Brexit referendum, the question arose to what extent these powers will become exercisable by the Scottish Parliament. The European Union (Withdrawal) Act (EUWA) has provided a partial answer to this: Westminster will be able to 'freeze' these powers for a period of up to five years. However, the domestic implementation of the draft Withdrawal Agreement through the European Union (Withdrawal Agreement) Bill and any legislation implementing the treaty on the future EU-UK relationship might still change this. Furthermore, there is talk of 'common frameworks' to be adopted on devolved subject matters where differences in regulation might undermine the UK's own internal market.

### **What are the implications of the European Union (Withdrawal) Act?**

- The European Union (Withdrawal) Act (EUWA) is a key piece of Brexit legislation. It ensures that the many pieces of EU law that currently apply in the UK and Scotland by virtue of the UK's EU membership continue to apply after Brexit as so-called 'retained EU law', a category that includes both devolved and non-devolved legislation. In the absence of the EUWA, there would be huge gaps in the law of the UK after Brexit: for instance, there would be big holes in environmental law, labour law, rules on food standards, consumer protection, and so on.<sup>2</sup>
- From a devolved perspective, the key question before the passage of the EUWA was whether the Scottish Parliament would be in a position to freely legislate in those devolved areas currently (largely) filled by EU legislation (and thus outwith the powers of the devolved legislatures). The original European Union (Withdrawal) Bill (introduced by the Government in late 2017) aimed to prevent this from happening by keeping the current restrictions on the legislative powers of the Scottish Parliament in place. This would have meant that the UK Government and Parliament, rather than the Scottish Parliament, would have been able to amend or repeal those pieces of retained EU law that would otherwise be devolved. This was met by

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<sup>1</sup> See section 29 Scotland Act 1998: <https://www.legislation.gov.uk/ukpga/1998/46/section/29>

<sup>2</sup> For more information on the EUWA, see the separate CSBP briefing: <https://hrcscotland.files.wordpress.com/2018/08/final-euwa-briefing-21-aug-2018.pdf>

resistance in the Scottish Parliament and in the Welsh Assembly, who both refused to give their legislative consent to the EU Withdrawal Bill.

- The UK Government subsequently introduced a compromise amendment, which was accepted and can now be found in section 12 EUWA.<sup>3</sup> According to this amendment, there is **no longer a blanket restriction** on devolved legislatures when it comes to legislating on retained EU law that falls into devolved competence. Instead the UK Government **has the power to designate** which bits of retained EU law shall be outside the competence of the Scottish Parliament and thereby amendable by the UK Government.
- While in practice the UK Government could choose to do this with regard to all retained EU law that is devolved, there are procedural hurdles that may make this difficult. **First**, the UK Government must seek a consent decision from the Scottish Parliament (though importantly, it can ignore it if the Scottish Parliament does not consent); **second**, the power to reserve retained EU law can only be used for two years from exit day; and **third**, any such restriction ceases to have effect five years after its entry into force. **This means that, at the latest, seven years after Brexit the Scottish Parliament will have full powers to legislate on all devolved matters currently dealt with by EU law.**

### What are common frameworks?

- The UK Government has conducted a frameworks analysis,<sup>4</sup> which concluded that out of all devolved policy areas, there were 24 policy areas where 'legislative common frameworks' were required and a further 82 requiring 'non-legislative common frameworks'. 'Common frameworks' are a shorthand way of saying that policies and/or legislation relating to particular issues are done in the same way across all four parts of the UK, with no difference in devolved areas.
- The key rationale for UK-wide common frameworks in devolved areas is the protection of the UK's internal market because divergent rules in the four parts of the UK might lead to market distortion. Examples include different levels of agricultural subsidies or different food labelling standards. Other rationales include the common management of natural resources, compliance with international obligations, and security.<sup>5</sup>
- The devolved governments agree in principle that UK-wide common frameworks will be needed after Brexit. The concept of common frameworks remains ill-defined, however. It is clear that the UK Government envisages

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<sup>3</sup> This compromise was accepted by the Welsh Assembly; but not by the Scottish Parliament. Westminster chose to legislate despite Holyrood not having consented to this legislation, which raised question marks over the future of the so-called Sewel Convention.

<sup>4</sup> <https://www.gov.uk/government/publications/frameworks-analysis>.

<sup>5</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/minutes/2017/10/joint-ministerial-committee-communique-october-2017/documents/954f2bef-d7f1-4170-b2ba-6596d5c3d19b/954f2bef-d7f1-4170-b2ba-6596d5c3d19b/govscot%3Adocument>.

there to be legislative and non-legislative frameworks. In either instance, there is likely to be political controversy over the question of **consent**: will such frameworks be adopted consensually – in effect resulting in powers for the devolved legislatures or governments to block them – or will Westminster assert its right to impose them centrally?

- Further question marks exist over **transparency and accountability**, in particular where non-legislative frameworks are concerned. Will civil society and other stakeholders be in a position to make their views known and inform decision-making; and if so, how?
- Taking into account s. 12 EUWA (discussed in the previous section), common frameworks can be adopted centrally for a period of up to seven years after exit day. This means that new procedures for adopting common frameworks in the future will need to be developed.

### **What about the Scottish Continuity Bill?**

- The Scottish Parliament passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill on 21 March 2018. The Continuity Bill broadly mirrored the effects of the EUWA, but was limited to devolved areas. The UK Government challenged the compatibility of the Scottish Continuity Bill with the Scotland Act 1998 before the Supreme Court arguing that the Scottish Parliament was not competent to pass it. On 13 December 2018 the Supreme Court held that large parts of the Bill had been adopted outwith the legislative competence of the Scottish Parliament.<sup>6</sup>
- The future of the remainder of the Bill is currently uncertain. One clause that the Supreme Court allowed to stand gives the Scottish Government powers to make provision corresponding to EU law after Brexit day. This would allow Scotland to keep track with developments at the EU level in devolved areas after Brexit; a similar power does not exist under the EUWA. Whether this clause will become operable is, however, unclear at this point.
- The Lord Advocate also stated that ‘The Scottish Government will consider ways in which the values that are reflected in the charter of fundamental rights can continue to be given effect in Scots law, should the UK leave the European Union.’<sup>7</sup>

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<sup>6</sup> It should be noted that – with one exception – this was the case because the UK Parliament subsequently adopted the EUWA, which is protected from modification by the Scottish Parliament.

<sup>7</sup> Scottish Parliament Official Report, 13 December 2018:

<https://www.parliament.scot/parliamentarybusiness/report.aspx?r=11843&i=107174>

## What are the likely implications for devolution of the draft Withdrawal Agreement and implementing legislation?

- The draft Withdrawal Agreement<sup>8</sup> between the EU and the UK deals with the modalities of Brexit, but not with the future relations between the EU and the UK. In terms of substance, it deals with four main questions: citizens' rights, the financial settlement between the EU and the UK; technicalities of withdrawal; and a transition period. In addition, it contains three protocols, the most important – and contentious – of which is the Protocol on Ireland/Northern Ireland, which contains the so-called 'backstop'.
- The Withdrawal Agreement will need to be implemented domestically in the UK by way of the European Union (Withdrawal Agreement) Bill. That Bill has not yet been published but will need to be passed before the UK can officially ratify the Withdrawal Agreement.
- The Withdrawal Agreement will need to be given the same effects in UK law as EU law. This means that if there is a conflict between the Withdrawal Agreement and an Act of Parliament, the EU (Withdrawal Agreement) Bill will need to make sure that the Withdrawal Agreement prevails. The question is how this effect will be achieved in the devolved parts of the UK. At present, the Scotland Act makes it impossible for the Scottish Parliament to legislate in contravention to EU law. If it does, the relevant Act of the Scottish Parliament 'is not law'. Similar constraints are placed on the Scottish Government. It is possible that the EU Withdrawal Agreement Bill will put similar constraints in place as far as conflicts with the Withdrawal Agreement are concerned.
- The same goes for transition. During the transition period – until 31 December 2020, but extendable for up to two years – with very few exceptions EU law would continue to operate in the UK as it does now. This means that provision will need to be made for EU law to continue to prevail over UK law. Again, it is unclear whether the constraints on legislative competence placed on the Scottish Parliament will be retained.
- The Protocol on Ireland/Northern Ireland contains the so-called 'backstop'. It will only enter into force 'unless and until' the future relationship between the EU and the UK ensures that there is no hard border between Ireland and Northern Ireland. Should the 'backstop' begin to operate, it will result in the UK and the EU forming part of a single customs territory. In addition, the UK will have to agree to comply with certain 'level playing field' obligations in the fields of tax, labour law and social standards, environmental law, and state aid. As the environment is devolved, the backstop might result in UK legislation placing constraints on the devolved legislatures and governments. Furthermore, there is a dispute between the UK Government and devolved governments over whether state aid – viz. subsidies – are a devolved or a

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<sup>8</sup> [https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-uk-eu-agreed-negotiators-level-14-november-2018-including-text-article-132-text-subject-final-legal-revision-coming-days\\_en](https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-uk-eu-agreed-negotiators-level-14-november-2018-including-text-article-132-text-subject-final-legal-revision-coming-days_en).

reserved matter. In any event, if the ‘backstop’ comes into operation it will probably result in constraints on devolved competences in this field as well.

- In addition, the ‘backstop’ envisages a much deeper regulatory alignment between the EU and Northern Ireland. While this will have no immediate consequences for Scotland, two aspects should be noted: first, it would make the UK’s devolution settlement even more asymmetrical than it already is; and second, there will likely be calls for Scotland to be given the ‘same deal’ as Northern Ireland.

### **How might the future EU-UK relationship affect devolution?**

- The draft Withdrawal Agreement does not deal with the future relationship between the EU and the UK. That relationship will only be negotiated after Brexit has taken place. There is however a political declaration on the future relationship,<sup>9</sup> which contains some hints as to what the relationship could look like. It is envisaged that the overall relationship will take the form of an association agreement, which will rest on two main pillars: trade and security. As far as the latter is concerned there may be devolution implications further down the line, but these are currently difficult to predict.
- As far as trade is concerned, this is a reserved matter. However, both the draft Withdrawal Agreement and the political declaration make it clear how trade matters are linked to an agreement on fisheries. Inshore fishing is devolved, so that a fisheries agreement – which the political declaration envisages to be concluded by 1 July 2020 – might impinge on devolved competence. The linkage with trade is obvious from the ‘backstop’ as contained in the draft Withdrawal Agreement: it excludes fishery and aquaculture products from the single customs territory, which would mean that unless a fisheries agreement is reached customs tariffs would be levied on Scottish fish and aquaculture products exported to the EU.

### **What do we *know* will happen?**

- Brexit – whether there is a deal or no deal – would affect the devolution settlement. The European Union (Withdrawal) Act would remain operable in either scenario and only minor changes or delays in the operation of some of its provisions are likely.

### **What do we *not know* will happen?**

- We do not know whether the Withdrawal Agreement will be ratified; in order for the UK Government to do so, the House of Commons will need to approve the agreement and the political declaration, the House of Lords will have to ‘take note’, and the European Union (Withdrawal Agreement) Bill will need to

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<sup>9</sup> [https://ec.europa.eu/commission/publications/political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom\\_en](https://ec.europa.eu/commission/publications/political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom_en).

be passed. Furthermore, the EU Parliament and the Council of the EU must approve the agreement as well.

- We do not yet know what precise common frameworks there will be and how they will be agreed.
- We do not yet know whether the Scottish Continuity Bill will be repealed or whether those parts that were within the powers of the Scottish Parliament will be enacted.
- We do not know what the future relationship between the EU and the UK will look like and what precise implications for devolution it will have.

*Dr Tobias Lock, January 2019*

#### **Where can I get more information?**

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at [hrcscotland@gmail.com](mailto:hrcscotland@gmail.com)

There is also information available online at [www.hrcscotland.org/brexit](http://www.hrcscotland.org/brexit)

