THE EUROPEAN UNION (WITHDRAWAL) BILL AND SCOTLAND

THE ISSUES EXPLAINED

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Introduction

Last week saw a great deal of controversy and commentary on the changes made to the powers of the Scottish Parliament by the European Union (Withdrawal) Bill (EUWB). UK Government amendments made in the House of Lords, and to which the Scottish Parliament had refused consent, were debated only very briefly in the House of Commons before being approved on Tuesday evening, after the available time had been used up discussing other amendments.

There was concern that the amendments were passed without consent, and that the constitutional issues raised by the provisions of the EUWB were given such little time. Scottish National Party MPs walked out of the House of Commons chamber during Prime Minister's Questions the next day.

This briefing seeks to explain the constitutional issues behind this row.

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The European Union (Withdrawal) Bill – what is happening?

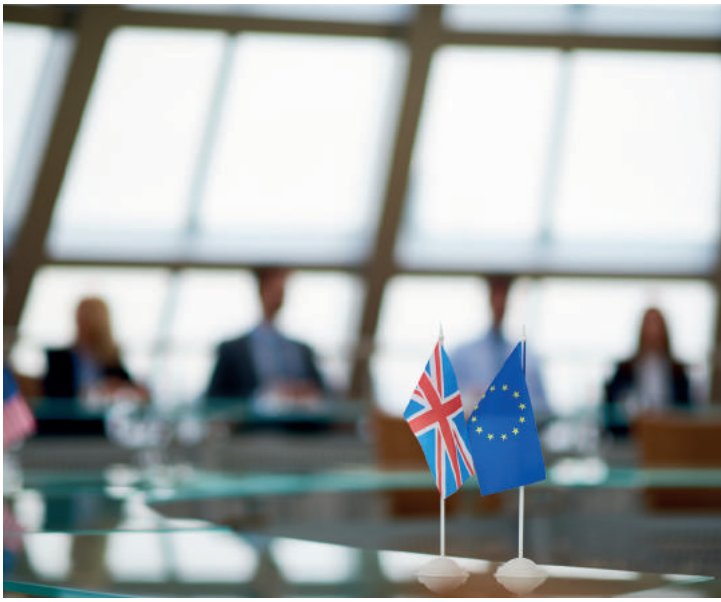
The EUWB returned to the Commons last week for MPs to vote on the amendments made to the EUWB in the House of Lords. Media attention focussed on Lords amendments that were opposed by the Government, and debate on these amendments took up most of Tuesday's debate. The Lords amendments that the Government continued to oppose were rejected by the Commons. However, the Commons accepted a range of other amendments, many of which were Government-sponsored.

From a Scottish perspective, the most important amendments accepted by the Commons relate to the modifications of the powers of the Scottish Parliament and Scottish Government.

When the EUWB was introduced, clause 11 would not only have removed the current limit on Holyrood's powers that prevent it from breaching EU law but would also have added a new restriction, preventing the Scottish Parliament from modifying any part of 'retained EU law' (i.e. the various parts of EU law that will become UK law on Brexit as a result of the EUWB) unless that modification could have been made anyway under current, pre-Brexit powers. So, for example, the Scottish Parliament would still have the power to pass laws about public procurement but only so far as EU law already allows. The EUWB did allow the UK Government to make exceptions to or lift this restriction in future, but the default position was to be that Holyrood could not legislate on matters currently handled at EU level even if the subject matter was devolved. This would include most or all of the law in areas including agriculture, fisheries, the environment, chemicals, consumer protection and food safety.

Both the Scottish and Welsh Governments (and their corresponding legislatures) opposed this approach on the basis that such a 'blanket' limitation was too wide. The UK Government agreed to amend the EUWB and tried to reach agreement with the Scottish and Welsh Governments on what should replace clause 11.

The negotiations centred around a general acceptance that in some key areas there should be UK-wide frameworks to replace current EU ones, so as to avoid new barriers to intra-UK commerce after Brexit. It was also generally accepted that it would be appropriate to 'freeze' retained EU law at the date of Brexit to allow time for such UK-wide frameworks to be agreed and implemented. However, there was no agreement on the mechanism for that, nor in particular on the extent to which the new arrangements should require the consent of the devolved institutions.



These negotiations continued for some time, with the EUWB ultimately being amended by the Government at Report stage in the House of Lords. The amendments reversed the default position from the original approach, so the devolved institutions would be generally free to legislate in devolved areas in relation to retained EU law and only prohibited from doing so in those areas specifically identified by the UK Government.

Accordingly, **clause 15** of the EUWB (formerly clause 11) now provides that the Scottish Parliament and Scottish Government will only be prohibited from modifying 'retained EU law' in specific areas to be identified in regulations to be made by the UK Government and approved by the UK Parliament. Similar provisions are made in the EUWB in respect of the devolved Welsh and Northern Irish administrations.

The UK Government would not require the consent of the Scottish Parliament or Government to make these regulations, but clause 15 does contain a mechanism designed to identify whether they do consent. That involves the UK Government sending draft regulations to the Scottish Government and telling the Presiding Officer of the Scottish Parliament that they have done so. The UK Government may not then submit the regulations to each House of Parliament for approval until either 40 days have passed or, if earlier, the Parliament has made a 'consent decision' (meaning a decision in relation to consent: i.e. whether to grant consent or to refuse it).

The EUWB then provides that if the UK Government introduces regulations without Holyrood's consent, it must make a statement to the UK Parliament explaining why it considers that to be appropriate. The Scottish Government will also be able to provide its own statement as to why it believes the Scottish Parliament refused consent. It would then be for each House of Parliament to decide whether to approve the regulations.

The UK Government has given a **political commitment** that it will seek agreement with the devolved administrations over the scope and content of clause 15 regulations, and will not normally ask the UK Parliament to approve regulations without the consent of the devolved legislature in question. However, it would retain the legal right to do so.

The power to make regulations 'freezing' devolved powers in relation to parts of retained EU law is therefore not conditional on Scottish Parliament consent. However, the statutory mechanism would force the UK Government to justify why it believed it was appropriate to make such regulations in those circumstances.

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There will also be a limit on how long the devolved institutions' powers could be 'frozen', as any regulations made under clause 15 will cease to apply after five years and the power to make regulations will itself expire two years after 'exit day' (probably, but not necessarily, the date the UK leaves the EU). While in theory this translates to the Scottish Parliament's powers being limited for up to seven years after Brexit, in practice it is very likely that most if not all regulations will be made prior to the date of Brexit. It is therefore probable that any clause 15 regulations will have expired within five years of the date of Brexit if not repealed earlier (and the intention is that they should last no longer than is necessary to get the relevant UK frameworks agreed and implemented).

The Government of Wales was **satisfied that its concerns** were addressed by the equivalent amendments the EUWB would make to the Welsh devolution settlement, and so recommended that the Welsh Assembly grant consent to the EUWB. However, the Scottish Government was not satisfied and the **Scottish Parliament voted to refuse consent to the EUWB.**

What are the Scottish Government's issues with the EUWB?

The Scottish Government's primary concern is that, notwithstanding the change in the default position and the political commitments given by the UK Government, clause 15 still allows for the Scottish Parliament's powers to be restricted without its consent.

The Scottish Government also objects to the fact that there will be no equivalent restriction on the UK Parliament's ability to legislate for England in those areas in which regulations prevent the devolved legislatures from acting, or to impose UK-wide frameworks without the consent of the Scottish Parliament. The UK Government has given a political commitment not to legislate unilaterally in respect of England, and has confirmed that the Sewel convention will continue to apply in respect of legislation introducing UK-wide frameworks. However, these can only be political controls given that the UK Parliament cannot bind itself (see below).

The Scottish Government has claimed that these arrangements show "an imbalance and lack of trust between governments of the UK", and proposed that either the mechanism for placing legislative restrictions on the Scottish Parliament be removed (i.e. leaving only equivalent political commitments not to legislate unilaterally in the key areas) or the consent of the Scottish Parliament should be a mandatory requirement for any regulations restricting its competence under clause 15. Neither proposal has been accepted by the UK Government.

In addition to the Scottish Government and SNP's complaints about these provisions being accepted by the House of Commons despite the Scottish Parliament's refusal of consent, they also have a procedural complaint about the very limited time given to debating the provisions in the Commons despite their practical and constitutional importance. Because of that lack of time there was no consideration of amendments that had been lodged by SNP and Labour MPs, and very little opportunity to debate whether it was appropriate to accept the Lords' amendments given the refusal of consent.

What is the constitutional issue?

The constitutional controversy stems from the House of Commons accepting clause 15 and the related provisions of the EUWB as amended in the Lords.

Notwithstanding the Scottish Parliament's refusal of consent, those provisions will appear in the legislation when it is enacted. The SNP and Scottish Government contend that, by keeping clause 15 in the EUWB, the UK Parliament has acted contrary to the Sewel Convention.

The Sewel Convention is named after a former UK Government minister, Lord Sewel, who during the passage of the Scotland Act 1998 through the House of Lords stated that:

> "We would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament."

The reason for this convention is that the UK Parliament cannot in legal terms bind itself not to legislate on any matter. To the extent the UK constitution has a fundamental principle, it is that one Parliament cannot bind future Parliaments (or indeed itself). Accordingly, the Scotland Act 1998 does not attempt to prevent the UK Parliament from legislating in devolved areas.

In practice the convention has meant that, where the UK Parliament proposes to legislate in devolved areas, the Scottish Government will place a motion before the Scottish Parliament to allow it to state whether it gives its consent. This is known as a legislative consent motion. While the Government's motion will usually recommend that consent be granted, a motion can also recommend that consent be refused.

The Sewel convention was put into statutory form in section 28(8) of the Scotland Act 1998 (as added by section 2 of the Scotland Act 2016), which states that "... it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament". However, this statutory re-statement of the Sewel convention does not make it enforceable through the courts: the UK Supreme Court in Miller v Secretary of State for Exiting the European Union confirmed that section 28(8) is not justiciable and so the convention retains political rather than legal status (including because the words "it is recognised" and "not normally" lend themselves to political rather than legal definition).

Having only political status does not mean a constitutional convention is unimportant – many of the conventions on which the UK constitution rests have only political status – but from a legal perspective it does mean that an Act of Parliament legislating for Scotland in devolved areas is valid whether or not it has received the consent of the Scottish Parliament.

In addition to the 'classic' Sewel convention as set out by Lord Sewel and in section 28(8), there is a further principle that consent should be sought for any change to the powers of the Scottish Parliament and the Scottish Government. This principle is currently best expressed in Devolution Guidance Note 10 (DGN 10) as issued by the UK Department for Constitutional Affairs in 2005.

The UK Government does not seem to accept this principle necessarily has the status of a constitutional convention, arguing in Miller that the only convention relating to consent was the one Lord Sewel had laid out in the House of Lords. However, as a matter of practice the UK Parliament has not altered the Scottish Parliament's competence without its consent. The Scottish Parliament has consented to a number of UK Parliament bills extending its legislative competence, including the Scotland Acts of 2012 and 2016. Indeed, the UK Government stated at paragraph 68 of the Explanatory Notes to the EUWB that it is the Government's practice to seek consent for legislation altering the powers of devolved legislatures.

How is the Sewel convention relevant to the EUWB?

While there was disagreement between the UK and Scottish Governments over whether certain parts of the EUWB engaged the legislative consent process, the UK Government did not dispute the need to seek legislative consent for Clause 15 and Schedule 3 on the basis that they will amend the Scotland Act 1998 in a way that both directly alters the powers of the Scottish Parliament and Scottish Government (by removing the requirement to act compatibly with EU law) and creates a mechanism for making further such alterations.

The reason for consent being sought in relation to the contentious provisions of the EUWB therefore appears to be in relation to the 'extended' version of the Sewel convention as set out in DGN 10, rather than the 'classic' version set out by Lord Sewel himself and appearing in section 28(8) of the Scotland Act 1998.

Has the UK Parliament breached the Sewel convention?

The UK Parliament's apparent intention to pass the EUWB, including clause 15 and the related provisions, despite the lack of consent from the Scottish Parliament is unprecedented. On the one previous occasion on which the Scottish Parliament withheld consent in relation to a UK Bill (the Welfare Reform Act 2012), the relevant provisions were amended out of the Bill before it was presented for Royal Assent.

However, and as noted above, the Sewel convention contains its own caveat, which is that the UK Parliament will "not normally" legislate without consent (the 'extended' version in DGN 10 has never been defined with quite the same clarity, but the general understanding is that the same caveat applies). The fundamental question is therefore: are the circumstances and context in which the UK Parliament is choosing to legislate 'normal', or sufficiently abnormal that the Sewel convention no longer applies?

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That is a political question rather than a legal one, and no court is liable to decide one way or another what the 'correct' answer is. It is therefore for each individual to decide whether they think the convention has been 'breached', and to take account of that conclusion when deciding how to vote in future elections. What is not in doubt is that there is no legal barrier to the UK Parliament enacting the EUWB without legislative consent.

What happens next?

The EUWB is back in Parliament this week but, as the Lords amendments affecting devolution were agreed to by the Commons, there will be no further Parliamentary consideration of clause 15 and the related provisions.

What remains to be seen is what use will be made of the regulation-making power. That will to some extent depend on how much progress can be made in agreeing UK-wide frameworks – if agreement can be reached on how to deal with a particular policy area

then clause 15 regulations are less likely to be needed. Regulations are more likely in those areas where agreement cannot be reached, or further time is needed to implement an agreement. In either case progress will depend on the UK and devolved governments being able and willing to co-operate with each other going forward.

Otherwise we may soon see the current arguments over consent (or the lack) thereof continuing in relation to the consent mechanisms provided for in clause 15 and Schedule 3 of the Bill. Those arguments would remain political rather than legal, but would move from abstract questions of high-level constitutional principle to more practical questions about what decisions should be made for key sectors of the economy, and who should be making those.

The regulations and frameworks that result from these political discussions and arguments will have significant legal consequences. Businesses and others who want to influence the decisions that have to be made should be making their voices heard now.

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