

Evidence - EU Withdrawal Bill

Dr Ludivine Petetin and Dr Annegret Engel
Cardiff University, School of Law and Politics

Empty rights

According to Clause 4 on 'Saving for rights etc. under section 2(1) of the ECA' (and Explanatory Notes pages 24 to 26), EU rights such as free movement of persons, trade, services and capital will be preserved and maintained after Brexit. However, these rights will be effectively empty on the day of exit because the UK will no longer be part of the EU. The EU and its EU Member States will have no obligation to act on and offer these rights to UK citizens, companies and other relevant parties. Further, any international agreement (such as the EU treaties) is based on reciprocity. This principle of reciprocity implies that when two or more States sign and ratify an international agreement, all the States parties to it agree to be bound by its rights and obligations. On the day of exit, the UK will no longer honour its part of the EU treaties and the EU will therefore be under no duty to fulfil its part of the treaties either.

Risk of fossilisation and regulatory ossification

The modification of retained EU law after the day of exit is also critical. Clause 7 and schedule 7 acknowledge that there will be some legal and practical implications on the day of exit. Implementation and institutional gaps must be addressed to guarantee the evolution of the law with the times and not to create unfairness in society.

The interpretation of retained EU law under Clause 6 also calls for concerns in the event of a too rigid adherence to not departing from retained EU law. This may lead to injustice – in particular in the lower courts – as rights and obligations could be negated.

No binding effect

The main ambiguity lies in the *de-facto* non-binding effect of EU-derived legislation after the UK's exit from the EU. While the EU Withdrawal Bill envisages an incorporation of direct EU legislation into the national legal framework (clause 3) which is intended "to have effect in domestic law on or after exit day" (clause 2), it does not bind a national court or tribunal (clause 6).

This gives rise to several questions: What type of effect does a piece of legislation have which, although incorporated into the legal framework, does not carry any binding effect

once challenged? What is the benefit of domesticating such laws in the first place when they can be repealed at any time?

It seems, the whole point of this 'exercise' is to engage in some window dressing which ultimately carries no legal weight. It may give the impression of not departing too far too quickly from the European position, but the consequences of such a loss in legal certainty will be severely affecting businesses and individuals alike in due course.

Race to the bottom

The diversion from the often contested high EU standards, e.g. in environmental law, consumer protection or human rights, may lead to a race to the bottom if there are no legally binding and clearly defined minimum standards established in such areas.

The UK's main concern after Brexit may likely find suitable trading partners quickly at almost any cost. This may prove crucial, however prudence is the better part of valour. While the UK may become more attractive for some with lower standards, it may very well alienate others who rely on a continued upholding of certain standards with their investments and trade.

A cautious approach in order to avoid a race to the bottom should therefore be the recommended pathway in order to attract trade which can flourish in the UK without jeopardising its values.

Devolution

Pre-emption

The EU Withdrawal Bill poses a real threat to the continued operation of devolution as it currently stands and the powers held by the devolved administrations. According to Schedule 2, paras 2(1) and 14(1), "no regulation may be made (...) by a devolved authority unless *every provision* of them is within the devolved competence of the devolved authority" (emphasis added).

In other words, even if a regulation's content merely touches upon powers held by the central UK government devolved administrations will be denied their competence in the matter. Ultimately therefore, devolved powers may be pre-empted in a post-Brexit UK to the very detriment of sensitive region-specific concerns, such as the environment or agriculture.

Recentralisation of powers

Clause 11 amends the devolution legislation. It diminishes the powers of the devolved areas by stating that the modification of retained EU law will fall outside devolved competence.

Schedule 2 paras 3 and 15 further decrease devolved powers in relation to both withdrawal from the EU and compliance with international obligations. The provisions indicate that devolved authorities cannot legislate to modify 'any retained direct EU legislation or anything which is retained EU law'. This would mean that powers which are currently devolved, such as the environment and agriculture, would no longer belong to the devolved authorities but to central Government. Practically, the devolved administrations would not be able to legislate on or amend provisions and matters that do encroach on previously devolved powers if these fall under the remit of retained EU law.

Retained EU law

The category of 'retained EU law' proposes to return powers centrally to Westminster – not to Wales, Scotland or Northern Ireland. To undertake this, the bill unilaterally revises the devolution statutes for Scotland, Wales and Northern Ireland so that powers remain with Westminster. After central government retains powers that should have returned to the devolved administrations, the government will have a wider umbrella of powers available to draft and put in place the various UK-wide bills/frameworks to the detriment of devolved authorities. This unilateral decision to modify the competences of the devolved administrations highlights the voluntary nature and legal status of the Sewel Convention. The convention is simply a constitutional, a political convention and accordingly non-justiciable. This was confirmed by the UK Supreme Court in the 'Article 50' case, *R. (on the application of Miller and another) v Secretary of State for Exiting the European Union*. The weak legal status of the convention places the devolved administrations on an unequal footing vis-à-vis central Government. The lack of a proper, written constitution is truly visible here. There are no safeguards to protect devolved powers.

Resulting uncertainty

Resulting from the above issues raised, the EU Withdrawal Bill in its current draft creates further uncertainty in an already more than uncertain road ahead. Instead of providing some clarity on the legal side it leaves rather obvious gaps for (mis-)interpretation and allows for possible negative side effects, such as a race to the bottom and powers taken away from the devolved administrations. The bill appears to worsen the *status quo* by creating further complication and insecurity.

Ludvine Petetin and Annegret Engel

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