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The repatriation of exclusive competences from EU in post-Brexit United Kingdom

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I. Abstract

EU law making involves areas as diverse as banking regulation, agriculture, the environment, consumer protection and employment rights. With the UK's proposed withdrawal from the EU, these powers will be repatriated to the UK. The UK today differs from the UK which joined the European Economic Community in 1973, so the question arises as to where in the UK will powers be repatriated? The corollary to that question is; what is the UK today?

Emerging from the political debate on post-Brexit repatriation of competences from the EU is a tension; between the UK Government's unitary-state position and the effect and spirit of the respective devolution settlements in each of the Nations. From a legal perspective these very settlements contain within them a continuing conundrum, which the UK Government is attempting to side-line. The conundrum is that these settlements were built upon the UK's continuing membership of the EU. The settlements give effect to the supremacy of EU law, by specific provisions prohibiting the devolved parliaments and assemblies (in Scotland, Wales and Northern Ireland) from legislating contrary to EU law. The terms of the settlements reveal not a one-to-one relationship between the UK Government and the devolved governments, but a three-sided relationship, in which many key powers and competences are exercised not in Westminster, nor in Edinburgh, Cardiff and Belfast, but by the EU.

Alongside that conundrum is another. A common feature of all the devolved settlements, and subsequent amendments, is that significant policy competences are transferred to the devolved parliaments and assemblies. This paper suggests that Brexit will remove some of the foundations of these devolution settlements and

effectively return the UK to a unitary state, with uncertain and potentially destabilising constitutional consequences.

This paper explores constitutional arrangements within the United Kingdom. It considers the competencies of the legislatures within the UK; the Bill before the UK Parliament for exiting the European Union and provides a commentary on the Brexit negotiation process in relation to the legislatures within the UK. The position explored is that at the end of December 2017.

II. Brexit poses constitutional challenges to the devolved settlements

Brexit presents fundamental constitutional challenges to the United Kingdom as a whole. In the absence of changes to the devolution settlements, responsibility for policy areas that are already devolved, but are in practice exercised largely at EU level (notably agriculture, fisheries and the environment), should fall automatically to the devolved jurisdictions at the moment of Brexit. However, is this assumption sustainable in light of the UK Government's apparent approach in its proposed enabling legislation: the European Union (Withdrawal) Bill?

During the Cameron administration's attempts to renegotiate the terms of the UK's membership in advance of the referendum, resulting in European Council Decision 2016/C 69 I/01 of 18-19 February 2016, the UK Government made it clear that relations with the EU are a 'reserved' matter and as such under its exclusive jurisdiction. However, there is substantial overlap between areas that have a high level of EU competence and those that come under the remit of devolved policy. Therefore, one critical question is: where this overlap exists, to which authority should EU powers be repatriated after Brexit? A similar, but separate, question is; to where will the more clearly defined competences in the EU Treaties be repatriated? Should it be to the UK central government to 'hand-out' as it see fit, or directly to the devolved governments and administrations, where many of those competences currently reside under the devolution settlements?

These challenges are compounded by the current political climate. In Northern Ireland, the failure to form a power-sharing Executive, the fact that no nationalist MPs have taken up their seats in the new Parliament at Westminster, and the

Conservative Party/Democratic Unionist Party agreement, could lead to increased instability and the erosion of cross-community support.

In Scotland, although the immediate prospect of another independence referendum has receded, relations between the Scottish and UK Governments are highly strained. Against this backdrop, the Welsh Government, which is seeking recognition of Wales' particular needs within a whole-UK Brexit deal, fears the interests of Wales will be overlooked.

The establishment in 1998–99 of the devolved institutions and governments in Scotland, Wales and Northern Ireland transformed the UK's political and constitutional landscape. Constitutionally the UK has changed beyond recognition since it joined the European Economic Community in 1973. Furthermore, the very devolution settlements themselves were built upon the assumption of continued UK membership of the EU. Brexit will remove this and along with it one of the key foundations of the devolution settlements, with potentially destabilising consequences. This is reflected none more so in the tensions between the UK Government's position on repatriation of competences, the referendum result and subsequent stances of the devolved parliaments and assemblies in relation to repatriation. All of these threads are compounded by the fact that the devolution settlements were complex. Each settlement was designed differently and each has evolved differently in the subsequent twenty years.

Added to this political and constitutional complexity was the divisive nature of the Brexit referendum itself. In the referendum of 23 June 2016 the United Kingdom voted 'to leave the European Union'. However, two of the four nations of the United Kingdom voted to remain in the European Union and two voted to leave the European Union. Scotland voted to remain by 62% to 38% on a turnout of 67%; Northern Ireland voted to remain by 56% to 44%, on a turnout of 63%. Whereas, England voted to leave by 53% to 47%, on a turnout of 73% and Wales voted to leave by 52.5% to 47.5%, on a turnout of 72%. With the prospect of a 'hard-Brexit' being driven by the central UK Government the complexities of the role of the devolved governments, administrations and legislatures are in a state of flux, furthering tensions over the perception of the UK as a unitary or devolved state. The

process of withdrawing will also place demands on the UK constitution which will need resolving.

Upon her appointment as Prime Minister in July 2016, Rt Hon Theresa May MP set out “the Government’s commitment to fully engaging with the [devolved governments] in the forthcoming negotiations about the UK’s exit from the European Union”.¹ This commitment was restated in the Prime Minister’s January 2017 Lancaster House speech, when she committed to “working with the administrations in Scotland, Wales and Northern Ireland to deliver a Brexit that works for the whole of the United Kingdom”². She went on to say that ‘I should equally be clear that no decisions currently taken by the devolved administrations will be removed from them’ and ‘the principle of Parliamentary Sovereignty is the basis of our unwritten constitutional settlement. We have only a recent history of devolved governance – though it has rapidly embedded itself. Yet, the detailed content of the European Union (Withdrawal) Bill suggests a ‘top down’ approach in which the UK Government perceives the UK as a unitary state, rather than one in which competences have been permanently devolved and entrenched within each Nation and overlooks assurances by the UK Government that it would not legislate in defined areas without the consent of the devolved parliaments and assemblies.

III. A ruling on the scope of legislative consent

The opportunity to resolve some of these tension fell to the UK Supreme Court in *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5³. But the Court shrunk from that task. In *Miller*, the UK Supreme Court unanimously ruled that UK Ministers are not legally compelled to consult the devolved legislatures before triggering Article 50.

Counsel to the devolved Nations submitted that the Sewel Conventions required the consent of the devolved legislature as a pre-condition of Westminster legislating on EU matters (which would include repatriation of competences now devolved)

¹ Government press release, Prime Minister to visit Scotland and underline commitment to “preserving this special union”, 15 July 2016: <https://www.gov.uk/government/news/prime-minister-to-visit-scotland-and-underline-commitment-to-preserving-this-special-union> [accessed].

² Full text available at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

³ Full judgment available here <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>.

including triggering the Article 50 TEU Brexit notice. The Court rejected that submission. Instead it ruled that the Convention was not justiciable, even though it is now included in primary constitutional legislation. Section 2 of the Scotland Act 2016, amends the Scotland Act 1998, and "recognises" that "the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".⁴

However, the Court left open whether the enactment of the European Union (Withdrawal) Bill would require consent of the devolved parliaments.⁵ Leaving open the question of whether enactment of some of the final terms of European Union (Withdrawal) Bill might be another exception to the non-justiciability of primary legislations⁶.

Another aspect of the judgment was that whilst the judgment stressed respect of the democratic-will expressed in the referendum result to bring back sovereignty to Westminster. However, with a neat piece of judicial parking, it overlooked the democratic-will in two of the devolved Nations and whether competences currently residing in the EU should be repatriated to the central UK Government at Westminster, even when the competences have become devolved matter held exclusively in the devolved Nations and not by the UK Government.

IV. Background: An evolving UK: To whom and when

The UK's membership (of the then EEC) from 1 January 1973 resulted in significant legal and constitutional changes for the UK. At that time the UK had three distinct legal systems, the system in Scotland, the system in Northern Ireland and the system in England and Wales but it was constitutionally still a unitary state, with only one parliament, the UK Parliament at Westminster. Power to create legislation resided with the UK Parliament at Westminster (situated in the Palace of Westminster). That parliament legislated across all three legal jurisdictions and had sovereignty within each of those legal systems.

⁴ Scotland Act 2016 s. 2; Scotland Act 1998 s. 28(8)

⁵ *Miller [2017] UKSC 5* at [140] the Court observed "...devolved legislatures have passed legislative consent motions not only when the UK Parliament has legislated on matters which fall within the legislative competence of a devolved legislature, but also when the UK Parliament has enacted provisions that directly alter the legislative competence of a devolved legislature or amend the executive competence of devolved administrations."

⁶ It remains to be seen whether a declaration of incompatibility with the ECHR will be sought.

The constitutional arrangements within the UK changed significantly in 1998. No longer could it be described simply as a unitary state. New legislatures (a parliament and assemblies) were created in Scotland, Northern Ireland and Wales. The UK Parliament devolved law making powers to these new legislatures whilst retaining supremacy over certain matters, for example international affairs and regulation of space. The matters retained to the UK Parliament are known as reserved matters, those devolved as devolved matters.

This change and transfer of power back to the Nations reflected the history of the UK. The UK had emerged from Unions between Nations. The creation of new legislatures with absolute competency in devolved matters represented a transfer of power back to the Nations. It also reflected the political climate in the UK at that time (where the labour party dominated politics in three of the four Nations).

The devolution of law making powers to these new legislatures was underpinned and supported by the UK's membership of the EU. Membership of the EU means that the UK accepted EU-wide standard-setting and laws. These covered many areas, for example banking regulation, agriculture, the environment, consumer protection, equality and employment rights. Many UK citizens' rights also stem directly from EU laws. The new legislatures (at Holyrood, Cardiff and Stormont) can only create laws in relation to matters over which they have exclusive competence (devolved matters) that are consistent and compliant with EU law. If they are not consistent, they are automatically void and unenforceable and a court can strike them down. Their position therefore differs from that of the UK Parliament where a law that is not consistent with EU law can be challenged but is not automatically void and unenforceable.

Until 1998 the UK had one legislature (the UK Parliament) which responded to EU rules and laws. Since that date legislatures in the Nations (Holyrood, Cardiff, Stormont and the UK Parliament) have been created. In each case a different framework was used, thus each legislature has slightly differing settlements of devolved and reserved matters. As a result of these different frameworks, each of the legislatures may, depending on the area under discussion, be involved in implementing EU law. The picture in relation to implementation of EU law within the UK is now much more complex than it was pre-1998.

With the UK's withdrawal from the EU, powers which had been ceded to the EU in 1973 will be repatriated to the UK. Two issues arise. Firstly, in reality, how much flexibility will the UK will have to set its own laws after withdrawal? Much will depend on the final terms negotiated, the EU (Withdrawal) Bill and terms of UK's existing and future international agreements. Secondly, to whom will control return? To the UK Parliament or to all the legislatures within the UK that have law making powers in relation to matters covered by EU law? To the UK Parliament at Westminster solely? Or where EU law touches upon devolved matters to Holyrood, Cardiff, Stormont and the UK Parliament?

During the EU referendum campaign, much was made of the UK "taking back control" of law-making powers from Brussels, and the issue certainly resonated with many Brexit voters. However, the question of the 1998 devolution settlements were not much raised or discussed, particularly in England. Brexit will remove one of the foundation stones of the 1998 devolution settlements, that laws in relation to devolved matters must be compliant with EU law to be valid. If powers return solely to the UK Parliament, and the powers devolved under the 1998 settlements are ignored by all sides in the negotiations, there could be potentially destabilising consequences within the UK and more widely.

The position is therefore complex and opaque. To whom law making powers will and should return to is not being openly discussed and receives little coverage when the negotiating discussions are reported. The UK Government position appears to be that power should return to the UK Government. This does not include the democratically elected governments now established in Scotland, Wales or Northern Ireland⁷.

Added to this complexity is the referendum result itself. The referendum was an advisory one and the question on the ballot paper was unclear in that many citizens had no clear definition of what they were voting to leave. Many English voters thought they were voting for ending an EU institutional social (democratic) legitimacy deficit. Some voted leave but did not think this included the common market or EURATOM. Some voters in the Nations with devolved legislative powers feared it meant diluting the devolution settlements. Others thought it would result in

⁷ The Northern Ireland Executive collapsed on 16 January 2017 and negotiations are ongoing.

more powers being acquired by the devolved legislatures and an ability to reflect the needs of each Nation more directly. Added to these complexities is the division between the Nations who voted to leave the EU and those who did not.

V. A United Kingdom

Images associated with the UK tend to be focused on traditions and culture. Many non-UK residents associate particular images with the UK, for example red busses, red telephone boxes, the Houses of Parliament at Westminster, Big Ben (actually the Queen Elizabeth tower), Buckingham Palace, Windsor Castle, Westminster Cathedral, the changing of the guard, Tower of London and St. Paul's Cathedral. All of these are in fact based in or around London. England can be mistaken for being synonymous with the UK. The UK has a much wider and very diverse history.

The United Kingdom (UK) to, stems from a number of Unions between England and the other Nations, Wales, Scotland and Northern Ireland. Hence the term 'United' Kingdom. The unification was not always by choice. Each of the Nations was a nation in its own right (and recognised as such), some were invaded and colonised whilst others joined as a result of economic catastrophe. Each Nation has a rich political and cultural history involving both international trade and diplomacy. Despite political union and attempts to eradicate aspects of their culture the Nations, throughout the centuries, have retained separate identities. All four Nations have been governed by a government based in Westminster and one legislature (also based in Westminster)⁸.

On the international stage the separate identities of the Nations has always been recognised, for example, the Nations compete in a number of international competitions in their own right, including the rugby and football world cups, the commonwealth games and each is recognised as a separate county by bodies such as the International Organization for Standardisation (the ISO Council reports to the General Assembly). The national language of one nation is the oldest living language in Europe.

⁸ Union with Wales mid-1540s , Union with Scotland 1707, Union with Ireland in 1805 and the separation and creation of Northern Ireland by the Government of Ireland Act 1920.

Whilst events within the UK itself led to one Nation being predominant, the balance changed in 1998 with the devolution of powers back to newly created legislatures and administrations in Scotland, Northern Ireland and Wales. This process of devolution was followed by a further process within the UK Parliament by which only English MPs would vote on purely English matters⁹. Some see this as the creation of a parliament within a parliament.

VI. The UK Nations and devolution settlements

The remainder of this paper considers the positions of England, Scotland and Wales. Northern Ireland holds a unique position. It is the only Nation in the UK to have a land border with another EU country and the history of its process of devolution and settlement reflect and recognise its unique history.

Devolution was designed differently in each Nation. As a result, the devolution of legislative powers is often seen as being an ‘asymmetric devolution’. To further complicate matters devolution was regarded as a process and not a one off event, further powers have been devolved and changes in law making powers have also taken place. The glue throughout the process of devolution and the common thread holding the various settlements together has been the EU principles of subsidiarity, acquired because all Nations are part of the EU. The Brexit process impacts directly upon this yet not all Nations voted in favour of Brexit.

VII. The devolution settlements

Within the UK’s, largely unwritten, constitution the Westminster Parliament is sovereign. However, under the devolution settlements, certain powers are exercised exclusively by the devolved administrations and their respective legislatures.

The way in which these powers have been devolved has evolved over time. The primary model today is the ‘reserved powers’ model. Under section 29 of the Scotland Act 1998, the Scottish Parliament may not legislate on the ‘reserved matters’ which are defined in Schedule 5. The presumption, therefore, is that the Scottish Parliament may legislate on any matter that is not explicitly reserved to Westminster.

⁹ The House of Commons approved Standing Order changes that gave effect to the Government’s plans to introduce ‘English votes for English laws’ (EVEL) took place on 22 October 2015.

In contrast, the Government of Wales Act 1998 devolved specific (and more limited) powers to the National Assembly for Wales: the presumption was that all powers not explicitly devolved remained with the UK Parliament. Only after the Silk Commission's¹⁰ second report in 2014, implemented by means of the Wales Act 2017, did Wales follow Scotland in moving to a 'reserved powers' model.

VIII. The Scottish settlement: Holyrood

Scotland is one of 'the most powerful devolved parliaments in the world'¹¹. The powers of the Scottish Parliament in relation to law-making have been extended on a number of occasions. The last being a direct result of commitments given by the UK Government in the independence referendum as they campaigned 'Let's stay together'¹².

The Scotland Act 1998 (passed by the UK Parliament and regarded as a constitutional statute and therefore part of the UK's constitutional framework) created a Scottish Parliament with powers to make laws on a range of issues. Schedule 5 of the Scotland Act 1998 outlines matters that are reserved to the UK Parliament. If a matter is not reserved in Schedule 5 it is devolved to the Scottish Parliament and the Scottish Parliament has competence.

The Scotland Act 2012 transferred further powers to the Scottish Parliament and to Scottish Government Ministers. This Act formally changed the name of the 'Scottish Executive' to the 'Scottish Government' and transferred some significant financial powers. It also gave Scottish Government Ministers powers relating to the misuse of drugs, the drink-drive limit, the national speed limit and the administration of elections to the Scottish Parliament.¹³

Following the referendum on Scottish independence on 18 September 2014 further powers devolved to the Scottish Parliament in areas such as taxation, welfare

¹⁰ The Commission on Devolution in Wales, established in 2011 to review the financial and constitutional arrangements in Wales, and chaired by Sir Paul Silk. See Commission on Devolution in Wales (2017): <http://webarchive.nationalarchives.gov.uk/20140605075122/http://commissionondevolutioninwales.independent.gov.uk/> and <https://www.telegraph.co.uk/news/uknews/scotland/11361518/Scotland-Bill-what-you-need-to-know.html>.

¹¹ This has become a common phrase see <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-36300885>.

¹² The result "No" to Scottish independence 2,001,926 votes. "Yes" to independence 1,617,989 votes.

¹³ You can vote in a Scottish election at 16. In a UK parliament election at 18.

and elections. These followed the commitments made by the UK Government when supporting the campaign to ‘say no’ to Scottish independence. The Scotland Act 2016 contains these powers.

As a result matters now reserved to the UK Parliament include Broadcasting, the Constitution, Immigration, Defence & Security, Social security, Employment, Economic and monetary policy, including the currency and interest rates, Energy (excluding the promotion of renewable energy generation and energy efficiency), Telecommunications, aspects of trade and industry and Foreign policy.¹⁴

Under part 2A the Scottish Parliament and Government are now a permanent feature of the UK’s constitution.¹⁵ Section 63A states:

(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.

(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.

(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum

When creating law the Parliament can only do so on matters within its legislative competence set out in section 29 of the 1998 Scotland Act¹⁶. The concept of ‘legislative competence’ is an important factor in the law making process of the Scottish Parliament. The Scottish Parliament can only make laws that are within its legislative competence. Any law that is made without legislative competence is void (and therefore has no legal effect). In effect legislative competence means that the Scottish Parliament cannot legislate in relation to the ‘reserved matters’, it can only legislate for Scotland, it must follow certain procedures and any legislation must be compatible with the European Convention on Human Rights (ECHR) and with EU law. The concept of legislative competence is important as the legislative competence of any Bill must be assessed before it is introduced, and also provides an opportunity for it to be challenged after a Bill is passed but before it can become law.

¹⁴ For a full list see Schedule 5 at <http://www.legislation.gov.uk/ukpga/1998/46/schedule/5>.

¹⁵ <http://www.legislation.gov.uk/ukpga/1998/46/part/2A>.

¹⁶ <http://www.legislation.gov.uk/ukpga/1998/46/section/29>.

In relation to Scottish Government Ministers Section 57(1)¹⁷ of the 1998 Scotland Act notes: Despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under EU law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.

IX. The Welsh settlement: Cardiff

The devolution settlement in relation to Wales is complex. Devolution in Wales has been regarded as a process and not an event. The Government of Wales Act 1998 established the National Assembly of Wales¹⁸ as a corporate body with the executive (the government) and legislature (the Assembly itself) operating as one. The Act transferred powers to make secondary legislation (but only when authorised by the UK Parliament). This initial devolution settlement was a very different settlement from that in Scotland. The powers devolved were limited and broadly equivalent to those which has previously been held by the Secretary of State for Wales¹⁹.

The single corporate body proved to be complex and problematic in its operation. In 2002 the Welsh Assembly agreed a resolution to separate the executive and legislative as much as possible within the framework of the 1998 Act.

A number of subsequent reviews of the operation of the legislative and executive functions led to the Government of Wales Act 2006 (The Act). The Act gave the Welsh Assembly powers to make laws for Wales in defined areas. This was done through Legislative Competence Orders approved by the Welsh Assembly and both houses of the UK Parliament, or through framework powers conferred directly on the Welsh Assembly through sections included in Acts of the UK Parliament. This presented a much more complex system of law making than that followed by the Scottish Parliament. However, the Act also made provision for the National Assembly to gain all of the powers in the devolved areas, without the need for the UK Parliament's approval, through a 'Yes' vote in a referendum. That referendum

¹⁷ <http://www.legislation.gov.uk/ukpga/1998/46/section/57>.

¹⁸ *Cynulliad Cenedlaethol Cymru* and commonly referred to as the Welsh Assembly.

¹⁹ A UK Government position.

took place on 3 March 2011²⁰. In effect the Act therefore established a newly constituted National Welsh Assembly as the legislature and a separate executive (government).

Following further reviews the Government of Wales Act 2014 was passed. This delegated further powers, including powers to raise certain taxes, placing the Welsh Assembly on a more equal footing with the Scottish Parliament. Schedule 7 of the Wales Act 2006²¹ sets out the matters over which the Welsh Assembly has competence to make law. The areas include: agriculture, fisheries, forestry and rural development, ancient monuments and historic buildings, Culture, economic development, education and training, environment, fire and rescue services and promotion of fire safety, food, health and health services, highways and transport, housing, local government, public administration, social welfare, sport and recreation, tourism, town and country planning, water and flood defence, the Welsh language and the National Assembly.

Under Part A1 of the Government of Wales Act 2006 the Welsh Assembly has become a fixed part of the UK's constitution²². Section A1 states:

(1) The Assembly established by Part 1 and the Welsh Government established by Part 2 are a permanent part of the United Kingdom's constitutional arrangements.

(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Assembly and the Welsh Government.

(3) In view of that commitment it is declared that the Assembly and the Welsh Government are not to be abolished except on the basis of a decision of the people of Wales voting in a referendum²³.

However the Welsh Assembly can only make law in relation to matters specifically listed in Schedule 7. Section 94 of the Government of Wales Act 2006 sets out the legislative competence of the Assembly²⁴. Any Assembly measure which

²⁰ When the Welsh electorate voted in favour of further powers to the National Assembly by a margin of two to one.

²¹ <http://www.legislation.gov.uk/ukpga/2006/32/schedule/7>.

²² <http://www.legislation.gov.uk/ukpga/2006/32/part/A1>.

²³ <http://www.legislation.gov.uk/ukpga/2006/32/part/A1>.

²⁴ <http://www.legislation.gov.uk/ukpga/2006/32/section/94>.

does not comply with EU law is outside its competence and void. Section 50(1)²⁵ notes that: The power to designate a Minister of the Crown or government department under section 2(2) of the European Communities Act 1972 (c. 68) may be exercised to designate the Welsh Ministers.

X. The view from Westminster

Before considering the effect of the EU (Withdrawal) Bill on devolved competences, it is necessary to first consider the position post ante. As noted above the division of competences between the UK Parliament and the devolved legislatures is already set out in successive Acts of Parliament covering the devolution settlements. Thus a statutory framework exists, which could automatically apply at the date of Brexit, unless superseded by new legislation. If it did, in practise the result would be that any areas of exclusive EU competence that, in the respective devolution Acts, are not explicitly reserved to the Westminster Parliament as policy areas and competences will become devolved competences. Thus vesting in the governments of the devolved nations and not the UK Government the moment the UK ceases to be an EU Member State (23.00 on 29 March 2019, unless another date is set in the withdrawal agreement). Under such a model there is no need for an intermediate step: any EU competence that is a reserved Westminster policy area (such as certain security law) will revert to Westminster, while any EU competence that is a devolved policy area (such as agriculture, education and environment) will revert directly to the devolved legislatures. Controversially, the EU (Withdrawal) Bill, which is the UK Government's cornerstone to the required legislative enactments to effect withdrawal from the EU, seeks to amend the existing devolution settlements by 're-reserving', initially at least, all powers to Westminster. That is not to say the Bill circumvents devolution issues engendered by Brexit. Whilst clauses 10, 11 and 12 of the EU (Withdrawal) Bill purport to resolve post-Brexit devolution questions, both the Welsh and Scottish Governments have described these as a naked grab for power by central government and indicate outright opposition. Some of these tensions are driving the more than 400 amendments sought and have caused the second reading debate of the Bill (due for early October) to be delayed indefinitely.

²⁵ <http://www.legislation.gov.uk/ukpga/2006/32/section/59>.

The overall aim of the EU Withdrawal Bill is to avoid a regulatory black hole after Brexit. Through use of Henry VIII mechanisms, the Bill creates wide-ranging powers for UK ministers to amend this huge body of ‘retained EU law’ to ensure it will be ‘operable’ outside the EU and to reflect the terms of the Withdrawal Agreement. Whether that goes so far as to include bestowing powers on UK ministers to amend as well all legislation with EU content, such as the devolution Acts, remains to be seen. As drafted it appears to.

Throughout this Bill reflects the UK Government’s approach to Brexit and an unstated assumption: the Westminster Parliament is sovereign and the UK remains a unitary state in which it holds all inherent powers and prerogative. This is particularly manifest in the terms of the European Union (Withdrawal) Bill.

In the EU (Withdrawal) Bill the UK Government²⁶ repatriates all EU powers and competences to itself at the exclusion of the devolved administrations. This is at odds with previous assurances made by the UK Government to the devolved Nations. What is more, those terms have exacerbated the already serious tensions between the UK and the devolved Governments over Brexit and creates an urgent need to reset intergovernmental relations.

In essence, the Bill will take the UK out of the European Union (EU) while providing that all European law be imported into domestic law to avoid a regulatory black hole after Brexit. The UK Government’s belief that the UK remains primarily and politically a unitary rather than devolved state is found clause 11 and schedule 3 of the Bill.

Clause 11 of the Bill sets as a default position that all EU powers and competences return to directly Westminster and not to the devolved administration even where those devolved administrations have acquired related competences. In terms of constitutional continuance of the devolution of powers, clause 11 is the central point of contention. Clause 11 relates to compliance of the laws created by the legislatures in Holyrood and Cardiff. It states as follows:

²⁶ which can be found in full at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf>.

11 Retaining EU restrictions in devolution legislation etc.

(1) In section 29 of the Scotland Act 1998 (legislative competence of the Scottish Parliament)—

(a) in subsection (2)(d) (no competence for Scottish Parliament to legislate incompatibly with EU law) for “with EU law” substitute “in breach of 20 the restriction in subsection (4A)”, and

(b) after subsection (4) insert—

“(4A) Subject to subsections (4B) and (4C), an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law.

(4B) Subsection (4A) does not apply so far as the modification would, immediately before exit day, have been within the legislative competence of the Scottish Parliament.

(4C) Subsection (4A) also does not apply so far as Her Majesty may by Order in Council provide.””

Clause 11(2) has a similar effect in Wales. The result is that all powers currently exercised at EU level will initially flow back to Westminster and not to the devolved administrations. By doing so, The Bill muddies the boundary between devolved and reserved (non-devolved) powers and competences.

This alone has triggered a raft of proposed amendments Clause 11²⁷. For example, Proposed amendments 10, 11, 14, 17 and 18 remove the restrictions placed on the Scottish and Welsh Ministers’ ability to amend directly applicable EU law incorporated into UK law, again bringing the powers into line with those being given to UK Ministers (which raise their own constitutional issues in relation to wide executive powers).

In Edinburgh and Cardiff, there are serious concerns about the impact of the Bill on devolution and on the balance of power within the UK. The Scottish and Welsh Governments have announced that they oppose granting the bill devolved consent,

²⁷ For example see the joint response by the Scottish and Welsh Governments to amendments at [https://beta.gov.scot/publications/eu-withdrawal-bill-joint-letter-to-prime-minister/Proposed%20amendments%20to%20EU%20\(Withdrawal\)%20Bill.pdf?inline=true](https://beta.gov.scot/publications/eu-withdrawal-bill-joint-letter-to-prime-minister/Proposed%20amendments%20to%20EU%20(Withdrawal)%20Bill.pdf?inline=true) and letter at <https://beta.gov.scot/publications/eu-withdrawal-bill-joint-letter-to-prime-minister/>.

which Whitehall recognises should be sought under the Sewel Convention.²⁸ The UK Government has now set up the Joint Ministerial Committee (EU Negotiations) - also known as JMC (EN) - which is a forum that brings together ministers from the UK and devolved governments to discuss the UK Brexit strategy²⁹.

The Whitehall view is that new frameworks will be required to coordinate policy currently held constant across the UK by EU law in areas such as environmental regulation, agricultural policy, state aid and aspects of justice and transport. These frameworks might be needed to prevent new barriers to economic activity within the UK, to ensure the UK can strike comprehensive trade deals, to comply with international obligations or to manage common resources such as fisheries.

A long list of policy domains where EU and devolved powers intersect has been published. For Scotland there are 111 areas mentioned.³⁰ But the extent to which new frameworks will be needed is unclear.

Nevertheless, unless there are changes if the Bill is passed as it stands, it will result in a significant change to the constitutional position of the devolved governments and their administrations and will require amendments to the devolution settlements. Whereas, under the current devolved legislative settlements the devolved parliaments cannot pass legislation that is incompatible with EU law, clause 11 replaces this constraint with a new provision preventing them modifying the new category of ‘retained EU law’³¹.

If the EU (Withdrawal) Bill is passed without amendment the consequence is that all powers and competences currently exercised at EU level will initially flow back to Westminster, even though many of those competences have not been retained under the devolved settlements. There is further provision for some of these powers to be ‘released’ to the devolved level, but at the discretion of UK ministers.³²

²⁸ see <https://news.gov.scot/speeches-and-briefings/the-european-withdrawal-bill> and <http://gov.wales/newsroom/firstminister/2017/170713-first-minister-responds-to-eu-withdrawal-bill/?lang=en>.

²⁹ For more information on the response of the Welsh Government and Scottish Government see <http://gov.wales/about/cabinet/cabinetstatements/2017/eunegotiations/?lang=en> and <https://beta.gov.scot/news/eu-withdrawal-bill/>.

³⁰ <https://beta.gov.scot/publications/eu-withdrawal-bill-letter-to-finance-and-constitution-committee/>

³¹ Set out in clauses 3,4 and 5 of the European Union (Withdrawal) Bill.

³² para 36 of the Explanatory Notes relate to the European Union (Withdrawal) Bill as introduced in the House of Commons on 13 July 2017 (Bill 5) states - ‘The Bill further provides a power to release areas from the limit on modifying retained EU law where it is agreed that a common approach established by EU law does not need to be maintained and can be changed. This power is exercisable by Order in

The explanatory notes to the Bill state: This is intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed.³³

One of the uncertainty quandaries is that as of the date of writing the terms of exiting the EU remain unknown. If the UK remains within some EU frameworks, the devolution question will be (largely) moot. The proposed transitional period, uncertain as to its scope, raises another level of complexity in relation to repatriation of competences. During the transition period do exclusive EU competences remain where they currently lie? That is with the EU institutions. The EU's position is clear: they do.

XI. How does this all work?

The first complicating factor is that the three devolution settlements are framed in the context of the UK's pre-existing EU membership, and reflect the supremacy of EU law: they reflect not a one-to-one relationship between the UK and devolved institutions, but a three-sided relationship, in which many key powers are exercised neither in Westminster, nor in Edinburgh, Cardiff and Belfast, but by the EU and its institution. A common feature of all the devolved settlements is that the devolved legislatures are prohibited by statute from legislating contrary to EU law, such as section 29(2) (d) Scotland Act 1998. Thus the EU has, in effect, been the glue holding together the United Kingdom's single market. It follows that the reservation or devolution of powers in areas such as agriculture, transport and environment which may have had less significance up until 23 June 2016, will become highly significant after Brexit³⁴.

Council and the Order must be approved by both Houses of Parliament and the relevant devolved legislature (i.e. the Scottish Parliament, the National Assembly for Wales, or the Northern Ireland Assembly). The UK Government hopes to rapidly identify, working closely with devolved administrations, areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power. This process will be led by the First Secretary of State and supported by the relevant territorial Secretary of State and will begin immediately following the Bill's introduction.

³³ para 34 of Explanatory Notes relate to the European Union (Withdrawal) Bill as introduced in the House of Commons on 13 July 2017 (Bill 5).

³⁴ The devolved governments differ in their approach and policies but, for example, Scotland does not allow fracking whilst the UK Government pursues this. In Wales there is an opt out organ donation scheme, one is currently being consulted on in Scotland and one which the UK Government may now also adopt for England.

Against this backdrop, under EU law, the ‘principle of conferral’ means that the EU possesses only the competences conferred upon it by the treaties. Some of these competences are exclusive (such as the customs union, or the negotiation and conclusion of international trade agreements), so only the EU has the power to legislate, while others are shared between the EU and the Member States. In areas of shared competence (such as the environment, the regulation of the internal market, or agriculture) the EU may legislate, subject to the principles of subsidiarity and proportionality.

The most substantial EU competences that are currently devolved within the UK are; agriculture, fisheries and the environment. The Scottish Parliament exercises full competence, whilst the National Assembly for Wales (and the Northern Ireland Assembly) exercises similar though less extensive competence in these areas.

Four other important areas of EU competence that already devolved are; justice, education, health and regional policy. In relation to justice both Scotland and Northern Ireland have their own legal systems, which long predate the devolution settlements of 1998. Justice and home affairs is an area of EU competence that was currently devolved, particularly in the Scottish context. Wales is currently consulting on a separate legal jurisdiction³⁵.

A second area of devolved competence is education³⁶. The EU’s competence in education is limited, and primary responsibility rests with the Member States. The EU does, though, sponsor programmes such as Erasmus+, which seeks to improve the employability of young people. The EU is also a major funder of research with UK higher education centres who have benefited substantially from the Horizon 2020 programme, worth a total of €80 billion over seven years.

A third area is health. Health³⁷ is in part a shared competence at EU level, and the EU has legislated to set EU-wide standards for certain medical products (such as medicines) and services. This is supported by an EU regulatory and enforcement regime (notably the European Medicines Agency, which is currently located in

³⁵ The Commission is chaired by the current Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, and is reviewing the justice system and policing in Wales. It builds on a previous consultation in 2012. See <http://gov.wales/newsroom/firstminister/2017/170918-first-minister-establishes-commission-on-justice-in-wales/?lang=en>.

³⁶ Where there are already differences in areas such as student fees and grants.

³⁷ There is now a separate National Health Service system in each of the four Nations.

London and is to be relocated to Amsterdam). There are also reciprocal health rights, such as those exercised by citizens moving freely in both directions across the Irish land border, and these are reflected in the European Health Insurance Card (EHIC), which entitles EU citizens to access state-provided healthcare in other EU Member States.

The final area is regional policy. Whilst the Chancellor of the Exchequer has undertaken to match any EU funding agreed prior to the point at which the UK leaves the EU, up until 2020, from central UK funds,³⁸ whether that eventuates remains to be seen.

XII. What next?

A quick reading of the devolved settlements reveals that many of the powers that will be returned from the EU to the UK encompass matters covered under Schedule 6 (as amended in 2016) of the Scotland Act (1998), Schedule 7 (as amended in 2017) of the Government of Wales Act (2006). However, how they will be returned is controversial.

The UK Government's stance on repatriation of powers and competences is evident in the EU (Withdrawal) Bill, which is in contradistinction to the detail and clarity regarding internal arrangements within the UK on "shared powers". For example, schedule 5 of the Scotland Act 1998 reserves to Westminster the power to set fiscal, economic and monetary policy, including taxation rates, but this is qualified by Part 4A of the Act, as amended, which confers upon the Scottish Parliament the power to set specific 'devolved taxes'. A key feature of such 'shared competences' in the UK system is that they are set out in minute detail in legislation enacted by the Westminster Parliament: while powers may overlap in complex ways, there is a statutory basis for determining whether any particular exercise of devolved competences is lawful.

As already noted the Sewel Convention has been placed on a statutory footing in Scotland and Wales.³⁹ Whilst in *Miller* the Supreme Court did not rule on the scope

³⁸ HM Treasury and Department for Exiting the European Union, 'Further certainty on EU funding for hundreds of British projects' (3 October 2016): <https://www.gov.uk/government/news/further-certainty-on-eu-funding-for-hundreds-of-british-projects> [accessed].

³⁹ Section 28(8) Scotland Act 1998 as amended and Wales Act 2017.

of the convention, or on whether it was engaged by UK legislation drawn to triggering of Article 50, it did rule that it had not become legally enforceable though its statutory conclusion.⁴⁰ However, it is politically enforceable. Though, failure to respect it by the UK Government will not lead to sanction from the Courts, structures in place to deal with repatriations of competence do not amount to joint legislative decision-making and the bringing together of different legislatures and governments. The JMC is not a decision-making body and, given the continuing concerns expressed by the devolved governments, the question arises as to whether it has in fact been an effective tool for intergovernmental discussion enabling the devolved nations to effectively feed their policy concerns on competences.

The EU (Withdrawal) Bill does not appear to echo the UK Government's expectation in its White Paper: *Legislating for the United Kingdom's withdrawal from the European Union*.⁴¹ Here the UK Government's stated expectation was that "... The outcome of this process [Brexit] will be a significant increase in the decision-making power of each devolved administration."⁴² Quite to the contrary, the EU (Withdrawal) Bill reflects the UK Government's unitary state strategy. It repatriates all powers and competences to the UK Government and not to the devolved governments, even where those powers currently fall in policy areas which have been devolved. Further, in its policy statement, the UK Government has maintained a consistent position on repatriation of powers. In summary, that policy is that it is for the UK Government to determine at which level new laws and policies on these competences, without any deference to the devolved administrations.⁴³

The view of the devolved administrations is quite the reverse and has merit. They hold that it can be said that powers should not be returned to the UK government, as they already lie at the devolved level, even though there are constraints on their exercise. This view was echoed by the Supreme Court in the *Miller* judgment '(t)he removal of EU constraints on withdrawal from the EU treaties will alter the competence of the devolved institutions unless new legislative constraints are

⁴⁰ *Miller* para 148 & 149.

⁴¹ Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446, March 2017).

⁴² *Ibid*, para 4.5.

⁴³ HM Government, *the United Kingdom's exit from, and new partnership with the European Union* (Cm 9417, February 2017) para 3.5.

introduced. In the absence of such new restraints, withdrawal from the EU will enhance devolved competence.⁴⁴

The EU (Withdrawal) Bill undoubtedly provides comprehensive restraints. It remains to be seen whether the Bill once enacted will be subject to judicial challenge. In terms of the devolution aspirations, the process of withdrawing from the EU appears to have crystallised constitutional principles to the extent that the accommodation of different perspectives on the degree of legal and political autonomy held by the devolved nations has been effectively lost. It is clear from its stance on the penetration of competences, that the UK Government is pursuing a unitary state strategy in which it has thwarted the expectation is of the devolved administrations. It is suggested that the root cause of the problem lies in the devolution settlements themselves. For each of these settlements contains a statutory acknowledgement of the Westminster Parliament's continuing legislative power to override devolved parliaments and assemblies.⁴⁵ The U.K.'s government's position on repatriation of competences illustrates that the Westminster Parliament is not yet ready to dilute itself permanently of such power. However, not all players on the devolution pitch agree that such a permanent limitation of devolved powers should be brought about by bricks at legislation.

The Scottish First Minister, Nicola Sturgeon, described the prospect of re-centralise in competences as a 'power grab' on the part of the UK Government.⁴⁶ The Welsh Assembly has floated the possibility of introducing Continuation Bills as a pre-emptive strike against the future effect of the EU (Withdrawal) Bill's enactment on devolved competences. The proposal being that a Welsh Continuation Act would convert all existing EU law within devolved competences into the body of Welsh law.⁴⁷ Of course, constitutionally, this could be over born by subsequent UK legislation as a consequence of Westminster sovereignty.

⁴⁴ Paragraph 130 in the judgments of Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge at <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>.

⁴⁵ Section 28(7) Scotland Act 1998; section 107 (5) Government of Wales Act 2006.

⁴⁶ M Dickie, 'Great Repeal Bill Leaves Unanswered Question on Devolution' *Financial Times* 30 March 2017.

⁴⁷ National Assembly for Wales, Plenary of 4 April 2017.

The repatriation of powers following Brexit will have far-reaching constitutional consequences for the United Kingdom. Proposed powers for UK Government Ministers in relation to devolved matters is a matter of concern. Brexit also presents a risk that the complex overlapping competences within the UK could become increasingly unstable and unworkable.

