

Written evidence from Professor Michael Keating¹ (BRE 02)

Public Administration and Constitutional Affairs Committee Brexit and Devolution inquiry

1. The devolution settlement

- 1.1 Devolution in the United Kingdom occurred entirely during UK membership of the European Union and is deeply affected by it.
- 1.2 EU law (as well as the European Convention on Human Rights) is incorporated into the devolution acts and directly applicable by the courts.
- 1.3 The EU framework permitted a more extensive devolution than might otherwise have been possible. It provides for equality of market conditions across the UK as well as Europe in matters such as agricultural support and state aid. It deals with externalities in matters like environmental regulation. This obviates the need for UK frameworks in these fields.
- 1.4 Europe provides a discursive framework for ideas of shared and divided sovereignty as an alternative to statist monist conceptions of sovereignty. This has encouraged the search for ‘third way’ solutions to nationalist claims, beyond the old binary oppositions.
- 1.5 The EU is not founded on a unitary conception of the people or *demos*, but recognizes multiple national identities. It does not have a fixed end goal or *telos* but is open-ended and evolving. In this it provides a good fit with the UK devolution settlements. Both have allowed foundational issues such as the ultimate locus of sovereignty, on which there is little chance of agreement, to remain in abeyance.
- 1.6 The EU both stabilizes international borders and opens them up, which has proved an important element in the Northern Ireland settlement.
- 1.7 Survey evidence shows that the largest section of opinion in both Scotland and Northern Ireland supports a multilevel and balanced constitutional arrangement rather than one that concentrates sovereignty and control at one level. Both Scotland and Northern Ireland registered majority support for the EU and (in surveys in Northern Ireland and in the 2014 referendum in Scotland) for the UK. Brexit makes it impossible to respect their wish to remain in both unions.

2. Post-Brexit Scenarios

- 2.1 There is no default option for the devolution settlement after Brexit. At a minimum, the clauses binding the devolved institutions to act within EU law will have to be repealed. There are three broad scenarios.

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- 2.2 *Recentralization*. The United Kingdom could reconstitute itself as a unitary state in which Westminster is supreme but in which powers could be ‘lent’ to the devolved nations. The Supreme Court judgment in the Miller case suggests such an interpretation in its dismissal of the Sewel Convention as a mere ‘political’ agreement intended to smooth legislation but with no binding force, legal or otherwise. This goes against an emerging ‘federal’ understanding of the UK as a union in which the devolved nations have power in their own right. Such an understanding was implied in the Vow issued by the unionist parties during the Scottish independence referendum campaign and in the provisions of the Scotland and Wales Acts entrenching the existence of those institutions and the Sewel Convention.
- 2.3 *Disintegration*. This entails the break up of the United Kingdom, with independence for Scotland and the unification of Ireland. This is a real possibility if there is no accommodation for the nations within Brexit. It does not currently command majority support in either Scotland or Northern Ireland and would be the second choice even of some voters who support it if the only other option is the unitary state. It would create a ‘hard’, EU border between Scotland and Northern Ireland and the rest of the United Kingdom similar to that created between the UK and Ireland by Brexit.
- 2.4 *Reconfiguration and differentiation*. This entails a reconsideration of the relationships between the nations of the UK and Ireland, including differentiated relations with the EU. The Scottish Government has presented proposals, which are complex but technically feasible, for Scotland to remain in the single market after Brexit. These are not being pursued by the UK Government (they do not feature in the Article 50 letter). There are renewed proposals from some parties and individuals to convert the United Kingdom into a federation. Whatever the merits of federation itself, it does not address the issue of differentiated relations with Europe.
- 2.5 There are proposals for a differentiated Brexit in Northern Ireland but without official support from the Northern Ireland Executive because, even before it collapsed, there was no agreement. The main concern there is to keep open the border with the Republic of Ireland. There are promises from the UK Government that there will be no return to ‘the borders of the past’ and that the border will be ‘frictionless’ as far as possible. Yet there is no detail. In both parts of Ireland, there seems to be a concern to avoid a physical border, which would provide a clear target for opposition. If the UK is outside the single market and the Republic of Ireland inside it, however, a border, albeit a virtual one, is inevitable unless a differentiated settlement, allowing Northern Ireland to remain in the single market, can be agreed. There is a lack of clarity about how much of the single market provisions the UK wishes to keep. The further the UK moves out of the single market, the worse the situation with respect to the Irish border will be.
- 2.6 Provisions to keep the free movement of Irish and UK citizens across the border are less problematic, as that could be done under a bilateral UK-Ireland agreement. While the Republic of Ireland, as an EU country, cannot negotiate trade deals, it can make agreements on the movement of persons.

3. Repatriation of Competences

- 3.1 The argument over the repatriation of competences pitches recentralization against reconfiguration and differentiation. Currently, most of agriculture, fisheries and environment policy and significant parts of justice and home affairs are both devolved and under European control. The UK input into EU policy making in these areas is negotiated in the Joint Ministerial Committee (Europe), with the UK Government having the last word on the line to be pursued.
- 3.2 These powers are not mentioned specifically in the devolution acts; rather, in Scotland and Northern Ireland (and in future Wales), everything not explicitly reserved to Westminster is devolved. This means that, after Brexit, *unless the respective devolution acts themselves are amended*, the powers will come back to the devolved bodies. They will not revert to Westminster, which could then decide what to devolve and what to keep.
- 3.3 The UK Government has said on several occasions that no ‘decisions’ currently taken at the devolved level will be recentralized in London. In its new White Paper it even suggests that the devolved bodies will gain new powers. Yet it also says that policy in these fields will be governed by UK frameworks. Does this represent more devolution, as the UK Government claims, or a taking back of powers, as the Scottish Government complains?
- 3.4 The UK Government position has not been set out in any detail but it appears to be based on the proposition that, at present, the devolved bodies do not make policy in these fields; they merely implement EU policies. The devolved governments argue that the powers belong to them and that they, like the UK itself, have given them to Europe as part of our EU membership. So, they say, the powers are devolved in UK domestic law, and Westminster has no right to take them back unilaterally. It is difficult to resolve this difference of interpretation. One could argue that, had the original devolution acts intended only to devolve the *administration* of these competences, that could have been specified in the devolution legislation.
- 3.5 A move to take the competences back to Westminster would thus breach the Sewel Convention which, in its broader meaning, does not allow unilateral changes in the settlement. Legally, this may be of no importance, as the Supreme Court, in its judgment in the Miller case, ruled that the Sewel Convention is not legally enforceable and is a mere ‘political’ agreement. Politically, however, such a unilateral move would be unprecedented in the history of devolution.
- 3.6 On the other hand, there are practical arguments for some UK-wide frameworks. Agriculture, fisheries and environment are mostly devolved, but agriculture and fisheries trade and international agreements in all three fields are reserved. It is not possible to make a clear distinction between the internal and external aspects. Any free trade agreement on agriculture would have to include provisions on agricultural support and subsidies, as would UK membership of the World Trade Organization. Free trade in agriculture within the UK would require agreement on subsidies to ensure a level playing field. UK state aids rules could be needed to ensure fair competition. The external effects of environmental rules imply both international and intra-UK cooperation. International agreements on the environment would have to bind devolved governments.

3.7 The question then arises as to how these frameworks or agreements would be managed.

- Westminster could amend the devolution acts to reserve the necessary powers. This would be politically provocative, raise questions about the Sewel Convention and give the devolved governments a clear grievance.
- There might be new, transversal laws, laying down general provisions about competition, support regimes or environmental standards. If these in practice took powers back to Westminster, they would also in effect alter the devolution acts and raise the question of the Sewel Convention.
- The UK Government could use the funding of the relevant policies to secure compliance.
- There could be negotiation among the four governments on the basis of consensus. This could be done through the expanding the existing Joint Ministerial Committee structures and Memoranda of Understanding.

The UK Government has given no guidance on which mechanism it will use.

3.8 Currently, matters that are both devolved and Europeanized are handled in the Joint Ministerial Committee (Europe), which decides on a common line between the UK and devolved governments in advance of European negotiations; but the UK Government has the deciding voice. If this is the model the UK Government wants to use in making the frameworks, that is not likely to be acceptable to the devolved nations. The Welsh Government accepts the need for common policies but insists that they should be negotiated among the four nations rather than imposed from London. The Scottish Government has emphasized the potential for autonomous policy making and for clear devolved ownership of the powers. The UK Government has so far given no detail on how the frameworks would operate.

3.9 Whichever mechanism is chosen, Brexit will, given the connections between devolved and reserved competences in the relevant fields, lead to more intergovernmental policy making. This calls for stronger institutions, in which the UK Government does not have the last word. There could be qualified majority voting in the joint ministerial committees, on the lines of the Council of the EU or the Spanish sectoral conferences.

3.10 Where former competences are retained by the devolved bodies, it might be appropriate to extend them to the conclusion of international agreements in those fields and to give the devolved administrations international legal personality.

4. Funding of Repatriated Competences

4.1 The UK is currently a net contributor to the UK budget, as is Scotland but not Northern Ireland or Wales. There will therefore be a repatriation of money, although the amount will depend on how much the UK has to continue contributing and for how long. Most of this is money previously used to fund agriculture, structural (regional) policy and research. There has been no decision on how these funds will be distributed among the nations of the UK. Currently the devolved territories benefit disproportionately from them.

	% UK CAP receipts	% Structural Funds 2014-20	% UK population
England	63	63.8	84
Scotland	18	8.2	8.2
Wales	9	22.2	4.7
N. Ireland	10	5.6	2.7

4.2 The options for dealing with cohesion and agricultural funds are:

- Distribution according to a UK-wide formula, which would imply a UK-wide policy framework;
- Distribution on a historic basis, which would favour the devolved governments, given their generally larger existing share;
- Distribution on a per capita basis, which would not take account of needs and which would favour England;
- Incorporating the money into the block grant and adjusting according to the Barnett Formula, which would imply transferring existing levels of funding and adjusting thereafter on a per capita basis.

The most likely option for research funding is to transfer it to UK Research and Innovation, which is reserved and which distribute funds competitively.

5. Brexit Negotiations

5.1 In regular EU policy making, where devolved competences are involved, the matter is taken to the Joint Ministerial Committee (Europe), where the four nations are invited to agree a joint line. In case of disagreement, the UK Government has the decisive say. Ministers of devolved governments may then be invited to participate in the UK delegation at the Council of the EU (Council of Ministers). Papers are circulated among the devolved governments. The Scottish Government has in the past complained that these mechanisms are inadequate.

5.2 For Brexit, there is a Joint Ministerial Committee (European Negotiations) with the devolved administrations. This is not a decision-making body but a forum for consultation. There are also meetings at official level. There has been open disagreement between the UK and the Scottish and Welsh governments about the substance and value of these arrangements. There are no proposals for devolved governments to participate in the negotiations themselves and it is not likely that there will be extensive circulation of papers, given the confidentiality on which the UK Government has insisted around the negotiations.

6. Legislative Consent

6.1 Under the Sewel Convention, Westminster legislation in devolved areas and legislation changing the competences of the devolved administrations should 'normally' only proceed with the assent of the devolved legislatures. The UK Government argued that this did not apply to the

legislation triggering Article 50 because that concerned foreign relations, a reserved matter.

- 6.2 It would be more difficult to make the same argument in relation to the Great Repeal Bill and other legislation on repatriating devolved competences; or to amending the devolution acts in order to take powers to Westminster where they would otherwise revert to the devolved level.
- 6.3 We can therefore expect much of the Brexit legislation to be subject to legislative consent –and to the English Votes for English Laws (EVEL) provision in the House of Commons.
- 6.4 If a devolved legislature were to withhold its consent for such a law, then the legal position is that Westminster could over-ride it. The Supreme Court reminded us of that and the legislative incorporation of the convention into the Scotland and Wales Acts of 2016 and 2017 does not change the legalities. It might be argued that the Convention is, *pace* the Supreme Court, part of the conventions that underpin much of the UK constitution and is more than a mere convenience. This would open a constitutional confrontation between the devolved administrations and the UK Government, with no legal or institutional mechanism for its resolution.

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