

# Brexit and Devolution

**Alan GREER**

In a recent report, the House of Lords European Union Committee comments that the impact on the devolution settlements of withdrawal from the EU ‘is one of the most technically complex and politically contentious elements of the Brexit debate’, adding that Brexit ‘presents fundamental constitutional challenges to the United Kingdom as a whole.’<sup>1</sup> The report is one of many produced by parliamentary committees since the referendum, sitting alongside enquiries on matters such as agriculture and UK-Irish relations. It covers issues relating to policy competences such as agriculture, finance, the approach to negotiations, and the broader impact on the devolution and political settlements, mainly organised in separate chapters covering Scotland, Wales and Northern Ireland.

## **Brexit Negotiations: institutions and preferences**

The devolved territories have created institutional machinery to work on Brexit, which also facilitates consultation with stakeholders such as those in the business communities. The Scottish and Welsh governments have nominated Brexit ministers (Mike Russell and Mark Drakeford) and issued comprehensive policy documents, drawn up with input from newly established independent expert advisory groups. In Northern Ireland, departmental Brexit teams at senior level have been created, within an overarching governance structure reporting to the First Minister/Deputy First Minister (FM/DFM) that can facilitate liaison with Whitehall, Irish and EU counterparts. There also has been much discussion of Brexit in committees of the devolved Assemblies.

The devolved administrations want to ensure that their preferences are clearly expressed and understood by the UK government. The main Brexit priorities of the Scottish and Welsh governments have been set out in detail but while the information service of the Northern Ireland Assembly has produced some impressive work, the publicly stated position of the Executive amounts to a two page letter to Theresa May in August 2016 in which First Minister Arlene Foster and Deputy First Minister Martin McGuinness set out their initial response (although Sinn Féin subsequently issued its own position paper).<sup>2</sup> At the political level, work on the challenges posed by Brexit has been hampered by political instability, especially the Assembly and Westminster elections in 2017, ongoing friction between the Democratic Unionist Party (DUP) and Sinn Féin, and the failure to re-establish the Executive.

The point of creating institutional machinery and issuing widely agreed policy statements is to allow the devolved administrations to protect their interests and influence the Brexit negotiations. While they have their own priorities there is much consensus, for example on maintenance of the single market and customs union, continued availability of labour, and the protection of the agri-food sector (for Northern Ireland there are the added complications of cross-border trade and the common travel area). As Nicola Sturgeon states, the overarching objective is ‘to maintain Scotland’s current position in the European Single Market’ and similarly for Carwyn Jones, ‘continued full and unfettered access to the Single Market is fundamental to our future.’<sup>3</sup> Even if practically possible this seems politically unlikely with Theresa May telling the Joint Ministerial Committee (JMC) on 30 January 2017 that maintenance of the single market will not be possible, although the waters have been muddied in the febrile political atmosphere after the general election.

A major conclusion of the Select Committee report is that despite their differences the devolved governments need to work together to achieve an outcome that protects the interests of the whole of the UK. However it also voiced a concern that compared with Northern Ireland and Scotland, the interests of Wales may not be properly considered because of its small size, the absence of fundamental constitutional and political cleavages, and the pro-Brexit majority in the referendum vote.

### **The Joint Ministerial Committee**

While there has been much rhetoric about the need for collaboration on the Brexit negotiations, there are serious concerns about the extent to which the 'UK' position takes account of the preferences of the devolved governments. The main UK-wide forum for inter-governmental discussions has been the European Negotiations (EN) formation of the JMC, the aims of which (according to the UK government's Brexit white paper) are: to ensure that the devolved administrations are fully engaged in preparations to leave the EU; to understand and consider each administration's priorities; to seek to agree a UK approach to, and objectives for, negotiations; and to consider proposals put forward by the devolved administrations.<sup>4</sup>

The Select Committee report notes that the creation of JMC (EN) has been positively received as a sign of the intention of the UK government to include the devolved governments in the development of its approach to Brexit. Nonetheless there has been criticism of its operation, notably by Scottish minister Mike Russell and his Welsh counterpart Mark Drakeford, who argue that the administrative support for meetings is poor (especially the failure to circulate agendas in advance), the membership is heavily weighted in favour of UK representatives, and it provides mainly a vehicle for dissemination of information from Whitehall. In the wake of the general election the Scottish and Welsh governments demanded more effective machinery for consultation and negotiation. Writing to Brexit Secretary David Davis on 15 June, Russell and Drakeford set out proposals for a 'radical reshaping of the UK Government's approach to building a broad-based consensus' on the Brexit negotiations, and in a letter to the Prime Minister, Nicola Sturgeon called for the UK negotiating team to include representatives from the devolved governments.<sup>5</sup> To broaden support for the UK negotiating position and to mitigate the imbalance created by the absence of representatives from Northern Ireland, Sturgeon called for a cross-party advisory group to be set up that included both sides of the political debate in Northern Ireland. This is intended to address the problem of how the interests of Northern Ireland can be 'meaningfully voiced' without a functioning executive, although as David Davis indicated to the Select Committee the government would try to find ways of speaking to the 'major components' of a reformed Executive.

In the Queen's Speech on 21 June the UK government reiterated its pledge that it would work with the devolved administrations to build the 'widest possible' consensus. Giving evidence to the Select Committee, Davis claimed that it had 'bent over backwards...to pay attention to the interests of the people of Scotland, the people of Wales and, of course, particularly the people of Northern Ireland.'<sup>6</sup> However it is clear that this view is not shared by the devolved administrations, or indeed by the Select Committee. While its report welcomed the creation of JMC (EN), the Committee noted the concerns about its administrative shortcomings, and urged the UK Government 'to raise its game' to make it more effective. In addition the Committee called on the UK government to respond 'as a matter of urgency' to proposals that the devolved governments should have a seat at the negotiating table when devolved issues such as agriculture and fisheries are being discussed.

## **Money and financial arrangements**

Funding is a major concern for the devolved territories, especially in areas such as agriculture and regional development where there is a large EU contribution. Because the devolved territories receive substantially more per capita from the EU than England they stand to lose most when this support is removed. On farm subsidies, for example, in comparison to England, payments from the Common Agricultural Policy (CAP) are over twice as high in Scotland and Wales, and almost three times higher in Northern Ireland. Unsurprisingly a core priority of the devolved administrations is to ensure that current levels of funding from the EU are maintained - the Northern Ireland Executive for example wants to retain the substantial EU funds for the economy and the Peace Programmes. After the referendum the Treasury gave an assurance that EU funding commitments will be met until the end of the multiannual financial framework in 2020. In the DUP-Conservative Party agreement underpinning the government the parties have agreed to provide the same cash total for farm support until the 'end of the Parliament'. As the Select Committee notes, this implies that whereas regional and structural funds are guaranteed until 2020, farm support could conceivably be continued until 2022, depending on the duration of the Parliament.

In the longer term it is unclear how much money will be available for devolved matters such as agriculture, and the arrangements for calculating and disbursing funding will be crucial. This is likely to be a source of tension, especially in relation to 'the Barnett formula', which calculates changes in public expenditure in the territories on a per capita rather than a needs basis. The devolved administrations point out that applying the Barnett formula to farm spending for example would substantially reduce funding - Scotland's population is about 8 per cent of the UK but Scottish farmers receive 18 per cent of the UK's CAP funding, and on some estimates using a Barnett type formula would reduce the farm budget in Wales by nearly 40 per cent. Accordingly, the Welsh government wants EU funding to be replaced by a revision of the Block Grant. The Select Committee agreed, pointing to 'compelling evidence' that allocating funding to the devolved jurisdictions on a population basis 'will not adequately recompense them in the long term for the loss of EU funding. Brexit means that it is now time finally to bite the bullet and replace the Barnett Formula with a needs-based funding arrangement.' This 'will be a complex task' but Brexit means that reform of the Barnett Formula 'can be delayed no longer.'<sup>7</sup>

## **Devolution or re-centralisation?**

Brexit has created new tensions between the UK government and the devolved administrations, especially around the balance between devolved flexibility and UK-wide frameworks. While the Select Committee argues that responsibility for devolved matters that have a strong EU component will 'fall automatically' to the territories upon Brexit, it suggests that this will lead to an increased risk of conflict, not least because the UK Government will remain responsible for negotiating international agreements in areas such as trade which often overlap with devolved competences. There will also be the potential for divergence in the approach to regulation, for example on the environment, which may create barriers to trade within the UK. As the Committee notes, while common standards will be needed for the smooth functioning of the UK internal market, these cannot be imposed in a top-down fashion.

The signals from the UK government have been mixed, indicating both that Brexit will be used to strengthen devolution, and that it will be necessary to limit flexibility to protect the integrity of the UK. As the Great Repeal Bill points out, repatriation of EU competences provide 'an opportunity to ensure that returning powers sit closer to the people of the United Kingdom than ever before.' However the best level for taking decisions will need to be considered and 'where the existence of common frameworks at EU level has also provided common UK frameworks, it will be important to ensure that this stability and

certainty are not compromised.’ Nonetheless it is ‘the expectation of the Government’ that the outcome of the Brexit process ‘will be a significant increase in the decision making power of each devolved administration.’<sup>8</sup>

However, as the Select Committee notes, the Brexit statements of the UK government might be taken to suggest that the Westminster Parliament should assume the coordinating role of the EU and set new “common frameworks” for what currently are devolved competences. It adds that ‘any attempt to amend the existing devolution settlements to “re-reserve” powers to Westminster would be highly controversial.’<sup>9</sup> The devolved administrations are adamant that Brexit must not be used to re-centralise powers. As Carwyn Jones told the Welsh Assembly, ‘we will resist any attempt — any attempt — by the UK Government to claw back powers to itself. People in Wales didn’t vote for that. We accept that some issues will be best dealt with on a UK-wide basis, that’s true, but this can only be done through intra-governmental agreement, through some pooling of sovereignty, not imposition.’<sup>10</sup> So when the ‘great repeal bill’ – formally the EU (Withdrawal) Bill - was published on 13 July 2017, it was immediately rejected by the Scottish and Welsh governments as ‘a naked power-grab’ that does not return EU powers to the devolved administrations. Accordingly they indicated that they would be unable to support a motion for its approval in their respective parliaments (as required by the Sewel Convention that Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislature).

The Select Committee added its concerns, noting that a ‘successful settlement’ cannot be imposed but must be developed in partnership. While it welcomed the Brexit Secretary’s ‘belated confirmation’ that the UK government would seek consent for the Great Repeal Bill in the devolved legislatures, it warned of serious political and constitutional consequences if such consent is withheld. Noting that Brexit is a ‘major constitutional change’ and a potential source of instability, the Committee warned that ‘any attempt to use Brexit to make a power grab, either to “re-reserve” powers previously devolved, or to claim more devolved powers, could compound such instability.’ It concluded that ‘this is not the time to embark on controversial amendments to the devolution settlements. We therefore believe that the existing statutory balance of competences between the UK Parliament and the devolved legislatures should as far as possible be unchanged.’<sup>11</sup>

### **The future of devolution after Brexit**

Nicola Sturgeon argues that the ‘stark divergence in the democratic will’ on Brexit between the different nations of the UK ‘demands a reappraisal of how political power in the UK is exercised.’<sup>12</sup> However as the Select Committee recognises, the UK government has not so far addressed the fundamental constitutional challenges facing the UK as a result of Brexit. The devolution settlements, constructed incrementally since the mid-1990s in response to different political forces, are ‘asymmetric’, with important differences in policy competences and institutional structures. The impact of Brexit will add to the pressures for greater differentiation, so there needs to be substantial rethinking of the devolution settlements, notwithstanding the pressure for Scottish independence and the need to sustain the political agreement in Northern Ireland. The Scottish and Welsh administrations agree that withdrawal from the EU is a massive constitutional shift that has far-reaching implications for devolution, which is likely to require a radical rethinking of constitutional arrangements and the creation of innovative intergovernmental machinery, including independent mechanisms for dispute resolution. For example in its Brexit paper, the Welsh Government proposed the creation of a ‘Convention’ to review constitutional arrangements within the UK and argues that the scale of change brought about by leaving the EU requires a remodelling of the UK around more federal structures.

To manage the different political priorities and pressures, greater differentiation will be necessary. Sinn Féin, for example, argues for ‘special status’ for Northern Ireland within the EU, which is rejected by the DUP and also by the Northern Ireland Secretary of State, James Brokenshire, who told the Select Committee that it is ‘the wrong approach.’ In its White Paper the Scottish government has put forward the most considered case for a ‘differentiated solution’ that would allow Scotland to remain in the single market even if the UK as a whole does not. This would require a fundamental revisiting of the powers of the Scottish Parliament and the allocation of competences, for example with Scotland allowed to make international agreements in areas of devolved responsibility. However this approach was ruled out by the UK government when Article 50 was triggered on 29 March 2017. Witnesses to the Select Committee enquiry were divided on the practicality and desirability of the proposal for continued Scottish membership of the single market (and indeed also of the Welsh government’s notion of ‘full and unfettered access’), the Committee noting that the weight of evidence suggests that it is ‘politically impracticable, legally highly complex and economically potentially disruptive to the functioning of the UK single market.’<sup>13</sup>

It seems clear that Brexit will produce increased asymmetry between the devolved structures in the UK. Although the need for some common frameworks is generally agreed, what these will include and how policy competences post-Brexit are distributed remain very much up in the air. As Lord Peter Hain – a former Secretary of State for both Wales and Northern Ireland - noted in his evidence to the Select Committee, a fundamental reality is the ‘different political imperatives, given that Scotland and Northern Ireland voted to remain and Wales voted to leave’. Acknowledging the existing asymmetric structure of devolution, he went on to say ‘I do not see why there could not be different solutions for each of Wales, Northern Ireland and Scotland appropriate to their interests and their needs...I think we should start from the presumption that there is not a uniform, one-size-fits-all approach to this. It has to be tailored to the particular needs of each of the nations.’<sup>14</sup>

---

<sup>1</sup>European Union Committee, *Brexit: Devolution, Fourth Report*, House of Lords HL 9, London HMSO 2017, p. 5.

<sup>2</sup> ‘Foster and McGuinness united in determination to achieve the best possible outcome for all our people’, Executive Office Press Release (10 August 2016); <https://www.executiveoffice-ni.gov.uk/news/foster-and-mcguinness-united-determination-achieve-best-possible-outcome-all-our-people> [accessed 4 August 2017]

<sup>3</sup>Scottish Government, *Scotland’s Place in Europe*, 2016, p. vi; Welsh Government & Plaid Cymru, *Securing Wales’ Future: Transition from the European Union to a new relationship with Europe*, 2017, p. 9.

<sup>4</sup> HM Government, *The United Kingdom’s exit from and new partnership with the European Union*, Cm 9417, 2017, p. 17.

<sup>5</sup>European Union Committee, p. 71; Scottish Government, ‘*First Minister writes to Prime Minister ahead of Brexit negotiations*’, (14 June 2017); <https://news.gov.scot/news/first-minister-writes-to-prime-minister-ahead-of-brexitnegotiations> [accessed 4 August 2017]

<sup>6</sup>European Union Committee, p. 22.

<sup>7</sup>*Ibid.*, pp. 3 & 58.

<sup>8</sup>Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm 9446, 2017, pp. 7 & 28.

<sup>9</sup>European Union Committee, p. 54.

<sup>10</sup>*Statement to the Welsh Assembly on EU transition*, 1 November 2016; <https://yoursenedd.wales/debates/2016-11-01-2-statement-eu-transition> [accessed 14 August 2017]

<sup>11</sup>European Union Committee, p. 4.

<sup>12</sup>*Scotland’s Place in Europe*, p. vii.

<sup>13</sup>European Union Committee, p. 48.

<sup>14</sup>*Ibid.*, p. 32.