

The impact of the EU Withdrawal Bill on the devolved legislatures and their respective powers

Briefing to the All Party Parliamentary Group on Reform, Decentralisation and Devolution on 26th February 2018 at the House of Lords, in partnership with Cardiff University's Wales Governance Centre

Contents

Page 2: IWA House of Lords Brexit event note

Page 7: Professor Alan Page (Professor of Public Law at the University of Dundee) - Brexit and the territorial constitution

Page 11: Dr Jo Hunt (Reader in Law at Cardiff University) - Devolution: The Withdrawal Bill and the concept of the UK Common Market

Page 13: Professor Colin Harvey (Professor of Human Rights Law at Queen's University Belfast)

IWA Event Note on the Impact of the EU Withdrawal Bill on the devolved legislatures and their respective powers

Brexit negotiations, both parliamentary and international, have felt so long and protracted, and their presence in the media so ever present and dominating, that it begins to seem like, under its great centripetal force, the issue will engulf all others. So we can no longer have discussions merely about agricultural policy, rather about our post-Brexit agriculture; and the regime of austerity – the focus of bitter political discussion and one of the most seismic shifts in the UK in recent times – although not yet disappeared has now become absorbed into a discussion on how to mitigate the effects of Brexit on the economy.

It was the refreshing *reversal* of this hierarchy that made Lord Foulkes’s opening statement welcoming all attendees to the most recent meeting of the APPG for Reform, Decentralisation and Devolution in the UK, organised in association with the Institute of Welsh Affairs and the Wales Governance Centre, notable: ‘We couldn’t have a better time to discuss devolution with relation to the Withdrawal Bill’. In this spirit, what was notable about the meeting’s speakers and their contributions was that very reversal: not what Brexit will do to devolution, but rather what devolution means Brexit *must look like*. Through robust discussion of the shortcomings of the EU Withdrawal Bill, the speakers proposed concrete ways forward to meet the UK’s coming constitutional challenges.

The meeting, held in the House of Lords on 26 February 2018, brought legal experts from Wales, Scotland and Northern Ireland in conversation with the parliamentary members of the APPG. Giving evidence were Dr Jo Hunt, Reader in Law at Cardiff University, Alan Page, Professor of Public Law at the University of Dundee, and Colin Harvey, Professor of Human Rights Law at Queen’s University Belfast, and the message they issued collectively was a stark one. Not only does the EU Withdrawal Bill in its present form present an unworkable, inconsistent model for devolution going forwards, but, as Colin Harvey stated, it has become clear that ‘the processes for intergovernmental cooperation in the UK are not fit for purpose’. Without descending into hyperbole, the three speakers made clear that the process of Brexit, as well as its eventual effects upon the distribution of power within the UK, must reflect the considerable shift in constitutional make-up that the UK has experienced in the past twenty years as a result of devolution, a shift that many in Westminster and more widely in England are not truly cognizant of.

Beginning the session, Colin Harvey focused on the fraught issue of the place of Northern Ireland in the negotiations. As Professor Harvey noted, many of the issues circling around Northern Ireland have actually been at the heart of discussions not just in Westminster but also in Brussels, affecting as they do a current and future EU member – the Republic of Ireland. However, Northern Ireland has had no assembly and no executive throughout these discussions. For Harvey, this is at the heart of the issue: the ‘carefully crafted powersharing arrangements’ set out twenty years ago in the Good Friday Agreement have been found wanting in a situation where the UK Government has unashamedly tied its own political future to the support of one of the parties of government in Northern Ireland, the DUP. This leads to a ‘rather stark constitutional imbalance around the discussions’, where Sinn Fein has turned its back on the Westminster system almost entirely as a result. It is ‘merely a factual statement’, he said, that one community has effectively been silenced by the DUP’s cooperation with the Conservative government: ‘the DUP does not speak for the majority in Northern Ireland that voted remain’.

In the face of this intractable situation, Harvey underlined the importance of the Good Friday Agreement. When the Northern Irish institutions of government are eventually reconstituted, they will still have to follow that agreement, and its principles are as pertinent now as they were in 1998. In a practical sense, Harvey called for respect for the Good Friday Agreement to find a place in the EU Withdrawal Bill. Clarifying what this might mean, Harvey argued that the Agreement needs legal expression and legislative recognition of the institutions it enshrines. The Northern Irish Brexit settlement will clearly be unique in certain ways: Harvey insisted that the promise of ‘no diminution’ of rights for Northern Irish citizens necessarily means, given the spirit of cooperation across communities enshrined in the Good Friday Agreement, that the EU Charter of Human Rights should be brought into domestic law.

However, Colin Harvey also stressed the wider significance from the Good Friday Agreement, and its possible utility across the UK. In pointing out the unsuitability of current systems of intergovernmental cooperation to the post-devolution, post-Brexit situation, Harvey highlighted a lack of trust and a failure to grapple constitutionally with the complexity of the UK since devolution that make structures such as the Joint Ministerial Council, which has taken on much greater significance during Brexit than it has previously, insufficiently flexible to deal with the levels of cooperation that the return of EU frameworks to domestic control will necessarily require. Business will not go back to how it was previously; all speakers made clear that more open and structured negotiation and discussion between the UK governments will be necessary from now on. Pushed on the issue by Baroness Janke, Harvey said that in practice this should

mean having the discussion about the common frameworks first and legislating when agreement is reached. Necessarily therefore, and in agreement with the other speakers, Harvey was calling here for the removal of Clause 11 from the EU Withdrawal Bill.

In a much anticipated speech happening at the same time as the meeting was held, David Lidington, the Cabinet Office minister, promised the repatriation of ‘the vast majority’ of powers to the devolved administrations (without specifying which), whilst also stressing the need for control over ‘common UK frameworks’ in order to protect the UK common market. Quick to pick up on this, Dr Jo Hunt began her statement by pointing out that these powers had indeed been exercised by the devolved administrations on behalf of the EU for many years; thus the Bill proposes to ‘effectively recentralise powers that had previously been devolved’. Lidington’s supposed concession, far from the forward step it appears, moves us in the opposite direction of travel to the last twenty years of decentralisation and devolution. What the bill makes ‘startlingly clear’, Hunt argued, was that Westminster parliamentary supremacy still exists above the ‘permanent’ devolved administrations.

Dr Hunt’s key focus was on the issue of divergence within frameworks – a key feature of current EU frameworks such as the Common Agricultural Policy, which sees an ‘un-common’ approach to regulation of the common market. Similarly, the forms of free movement currently in place in the single market allow for local measures that may indeed hinder trade. For example, minimum alcohol pricing may be an obstacle to free movement of goods, but the health benefits it brings can trump that concern. Clause 11 as it stands does not allow for such flexibility. As Hunt argued, ‘what do we know about a UK internal market, and will it come with the guarantees that such protections can be recognised?’ ‘The lack of transparency and any meaningful explanation of what the concept of the UK internal or common market is, beyond a ready appeal to it by politicians to justify harmonising UK wide measures is concerning’, Hunt stated.

The internal market, an increasingly important concept for the UK, must be seen as a political as well as economic construction, revealing what will be valued and what will be protected against the demands for frictionless trade. The EU’s model holds free movement rights against other objectives and principles, something there is no sign of in Government discourse surrounding the emergent UK internal market. Dr Hunt argued that ‘we need to think about ways that these interests can be anchored down so that values can underpin a UK internal market. The adoption of amendments to the Withdrawal Bill which would provide for continued respect for such critical values should be strongly considered’.

And what is at risk if the Bill is not significantly amended? Professor Alan Page answered succinctly in beginning his statement, saying that ‘Brexit has the potential to weaken if not subvert the UK territorial constitution’. This is in part because of the number of powers that shall be reserved without amendment to the Scotland, and Wales, Acts – far more than will be devolved according to research undertaken by Professor Page – but also because of the fundamental weakness of UK intergovernmental relations. Even where powers are reserved, functioning intergovernmental relations would ensure the voice of devolved nations were heard. The EU Withdrawal Bill, which according to Page ‘has been drafted with scant regard to the principles on which the devolution settlements are based’, will serve only to further impoverish these relations. In place of Clause 11, Page called for a standstill agreement while frameworks and the necessary revisions to repatriated EU law are worked out between the UK governments.

Professor Page’s most striking intervention, however, was over the law-making powers UK Government ministers will gain over areas of devolved competence. Under the provisions of the Withdrawal Bill, they will gain powers ‘in areas in which ministerial responsibility has been transferred’ to the devolved ministers. The current proposal that these powers are only checked by a ‘non-binding requirement of consultation’ and no devolved parliamentary scrutiny is ‘contrary to the principles on which the devolution settlement is based’. Instead, and as Page pointed out, as has been proposed by the Welsh and Scottish Governments, these powers, necessary to correct imported law, should only be exercised in areas of devolved competence with explicit consent of relevant devolved ministers.

Clearly convinced of the deficiencies of the current proposed legislation in dealing with the complexities of UK intergovernmental relations, Lord Purvis asked what can be done to improve this, and what structures could be put in place or added to the Bill. Jo Hunt responded that ‘we’ve heard time and again about the lack of trust so it’s about constructing institutions that people can have trust in’; there is a good case therefore, Alan Page argued, for putting such structures of intergovernmental relations on a statutory basis. Statutory requirements for meetings and discussions to take place between the UK governments at significant junctures – rather than the rather piecemeal pattern of the Joint Ministerial Committee – could form the basis for future adjudication of disputes in the UK common market. UK courts have been involved in the adjudication of EU trade issues.

Lord Foulkes suggested that perhaps the eventual structure this formalisation of intergovernmental relations implies is federalism, ensuring a devolved settlement that addresses

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England too. However, what was clear from the preceding discussion was that first there needs to evolve a mature form of arbitration between the competing needs of the various governments of the UK: as Colin Harvey summarised, ‘powersharing needs to find a place within the UK arrangement’. We will be looking, no matter what, at a ‘remodelled UK’.

Merlin Gable, IWA

Professor Alan Page (Professor of Public Law at the University of Dundee) - Brexit and the territorial constitution

I start from the observation that Brexit has the potential to seriously weaken if not to undermine the UK's territorial constitution. I say that for two reasons.

First because it will alter the balance of powers and responsibilities between the UK parliament on the one hand and the devolved legislatures on the other, regardless of the outcome of the current dispute over whether EU competences in the devolved areas should be allowed to lie where they fall under the devolution settlements. That was the conclusion I drew from the analysis I did for the Scottish Parliament's European and External Relations Committee after the referendum, which showed that the majority of EU competences are reserved and will therefore fall to London rather than Edinburgh, Cardiff or Belfast. The Committee's interest understandably was in the powers that would fall to Scottish Parliament in the absence of any amendment to the Scotland Act but for me what was more striking was the extent of powers that would fall to the UK Parliament. The powers that are the subject of dispute – in agriculture, fisheries and the environment for example – are only a small proportion of those that will be repatriated.

The second is because of the weakness of UK intergovernmental relations. One of the purposes of a properly functioning system of intergovernmental relations should be to ensure that the interests of the devolved nations are taken into account in the exercise of non-devolved or reserved responsibilities, but that is a role which the current 'not fit for purpose' system performs patchily at best.

Allied to which there is a sense of a European Union (Withdrawal) Bill (EUWB) which has been drafted with scant regard to the principles on which the devolution settlements are based.

There is a long list of issues we might discuss. Let me pick out three: Clause 11 and the destination of repatriated competences; the proposed power of UK ministers to legislate in the devolved areas; and the protection of the devolved nations' interests in relation to reserved matters.

Issue 1: Clause 11 and the destination of repatriated competences

The 'debate' over Clause 11, much of which has been conducted behind closed doors, is revealing of a deep-seated lack of trust between the UK Government and the devolved administrations over the repatriation of competences.

On the one side, fear on the part of the UK Government that the devolved administrations – and an SNP Government in particular – will seize the opportunity provided by the repatriation of

competences to make mischief if they possibly can. In an effort to forestall this it is therefore proposing that EU competences should first be repatriated to London before any decision is taken on where they should finally sit.

On the other side, suspicion on the part of the devolved administrations that Clause 11 is not so much about legal certainty as stripping the devolved administrations of the leverage they would otherwise possess when it comes to the negotiation of common frameworks – the need for which, it should not be forgotten, is accepted by both sides to the current dispute.

The devolved administrations also fear that Whitehall departments will find it convenient to hang on to repatriated competences rather than pass them on, quite apart from which the grafting of a conferred powers model onto a reserved powers model will reduce the intelligibility of the settlement,¹ as well as make more difficult for the devolved administrations to carry out the responsibilities which in the original scheme of the Scotland Act certainly were regarded as theirs.

In any consideration of this issue it is important not to exaggerate the threat to the integrity of the UK single market posed by the repatriation of EU competences in the devolved areas. In particular, sight should not be lost of the part played by the reserved matters listed in Schedule 5 to the Scotland Act, for example, in maintaining the UK single market – many of which have a single market rationale as I explained in my paper for the Scottish Parliament’s Europe and External Relations Committee in 2016. Once allowance is made for the part played by the reserved matters, it seems to me that the UK Government’s ‘guiding principle’ can be more felicitously secured by a combination of the existing reservations and a ‘standstill agreement’ whereby the UK Government and the devolved administrations agree not to introduce, in the Prime Minister’s words, ‘new barriers to living and doing business within our own Union’ while the business of common frameworks – and, no less importantly, the necessary revisions to retained EU law – are being worked out. As well as preserving the integrity of the UK single market, the combination of reserved matters and a standstill agreement would avoid the undeniably damaging consequences of Clause 11.

Issue 2: the proposed power of UK ministers to legislate in the devolved areas

Under the EUWB UK ministers will gain far-reaching powers to legislate in the devolved areas, powers which are said to be justified by the scale of the challenge represented by Brexit and the shortness of the time within which it may have to be completed. To fully appreciate how radical

¹ ‘One fears that only lawyers and Civil Servants, but by no means all of them, will be able to work out or give reliable advice on the full meaning of the affirmations as qualified by the negations. Beyond doubt, this complexity and difficulty of comprehension is a defect of the Act. It infringes the principle of intelligibility of law, a principle most to be prized in constitutional enactments’: Neil MacCormick quoted in Page, *Constitutional Law of Scotland* (W Green 2015) p 115, fn 14. MacCormick was writing about the Scotland Act 1978, but the comment would apply equally to the Scotland Act 1998, as it is proposed to be amended by the EU (Withdrawal) Bill.

a departure this represents from the principles on which the devolution settlement is based we need to recall that there is no subordinate law-making equivalent of the ‘sovereign’ power of the UK Parliament to make laws for Scotland (SA 1998, s 28(7)).

UK ministers accordingly have only limited subordinate law making powers in the devolved areas, the principal one being in respect of the implementation of EU obligations, which may be exercised by UK ministers concurrently with their devolved counterparts (SA 1998, 57(1)). Under the EUWB, however, they will gain powers to correct deficiencies in retained EU law, to ensure continued compliance with the UK’s international obligations, and to implement the withdrawal agreement in devolved as well as reserved areas, i.e. in areas in which ministerial responsibility has been transferred to the Scottish ministers as well as in areas in which it has been retained. It is contrary to the principles on which the devolution settlement is based therefore for these powers to be exercisable, as is currently proposed, subject only to a non-binding requirement of consultation with Scottish ministers – and with no provision for Scottish parliamentary scrutiny of their exercise (below). Instead, as the Scottish and Welsh governments have proposed, they should be exercisable only with the consent of the Scottish and Welsh ministers.

Issue 3: The protection of the devolved nations’ interests in relation to reserved matters

As I have indicated the policy responsibilities that will fall to London following Brexit will far exceed in importance those that will fall to Edinburgh, Cardiff and Belfast. As well as the four freedoms, they include responsibilities in respect of immigration, competition policy, financial assistance to industry, and the negotiation and conclusion of trade agreements with non-EU countries to name only a few. The UK’s intended withdrawal from the EU raises in a new and acute form the question of the protection of the devolved nations’ interests in relation to matters decided at Westminster, an issue which in Scotland’s case is as old as the (Anglo-Scottish) Union itself. The negotiation and conclusion of trade agreements with non-EU countries, in particular, is likely to be a matter keen interest to Scotland and the other devolved nations.

In the 2013 Memorandum of Understanding which governs relations between the UK government and the devolved administrations, the UK Government ‘recognises that the devolved administrations will have an interest in international and European policy making in relation to devolved matters, notably where implementing action by the devolved administrations may be required’, before undertaking to involve them ‘as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters (paras 18 and 20).

But whereas JMC machinery has been put in place for involving the devolved administrations in (UK) decision making on EU matters, no comparable machinery exists for involving the

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devolved administrations in UK decision-making on international matters. That may be because such machinery has not been thought necessary hitherto, notwithstanding the breach of the Concordat on International Relations revealed by the 2001 Labour Government's 'deal in the desert', but with the UK's intended withdrawal from the EU the lack of such machinery, and with it the overhaul of the 'not fit for purpose' system of intergovernmental relations, will need to be addressed as matters of urgency.

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Dr. Jo Hunt (Reader in Law at Cardiff University) - Devolution: The Withdrawal Bill and the concept of the UK Common Market

David Lidington's speech on 26 February 2017 makes the promise of a 'considerable offer' to the devolved administrations in the form of a 'very big change' to the approach taken so far by HM Government to the repatriation of competences under the Withdrawal Bill. Under the original version of the Bill, Clause 11, which makes the exercise of devolved competence subject to the constraints of needing to respect 'retained EU law' (whilst the Westminster Parliament remains unshackled by any such requirement) effectively recentralises powers which have previously been devolved. The existing body of EU-derived rules continue to apply and constrain the devolved administrations and legislatures across policy areas which have previously been devolved to them, until such a point as Westminster or Whitehall agree to a release. In constitutional terms, the Clause moves the UK, in the opposite direction of travel to that of the last 20 years of devolution, which had been seeing an ongoing process concretising and solidifying of redistribution and resettlement of power and authority within the UK's territorial constitution.

The Withdrawal Bill makes startlingly clear the vulnerabilities of this order against what may be a version of the UK constitution centred on a still all powerful notion of Westminster Parliamentary supremacy. The devolution settlements, set out in the Scotland Act, the Government of Wales Act and the Northern Ireland Act have all seen ongoing reform and expansion, confirmed through successive referenda, and have now reached the point where their institutions are acknowledged as permanent, with primary legislative powers to exercise across a range of devolved areas. But these settlements are contained in Acts of Parliament and under a reading of the UK constitution which continues to reify a parliamentary sovereignty located in Westminster alone there is little to defend them against being undone by another Act of Parliament, and potentially, and particularly controversially, by secondary powers under the Withdrawal Bill. Other approaches to understanding the locus of sovereignty and the status of the devolved nations are held, and the current period is one of that could see these crystallise and replace the Westminster norm, but to date the debate in Westminster and Whitehall has discounted them as yet unformed and at best imminent.

The Clause 11 restrictions have been justified by HM Government as being needed to provide stability and consistency as the scaffolding of EU law is knocked away. Until now, EU law and the discipline of the EU's internal market has meant that the scope for differentiation within the UK has been minimised. Frameworks have been set by EU measures across the fields of agricultural policy, and environmental policy for example, which have placed limitation on how divergent the policy and law making by the different powers in the UK may be in those areas. As these frameworks are moved away from, HM Gov maintains there is a need to ensure that the

devolved nations do not use their devolved powers in such a way as to create new barriers to trade within the UK – that they respect the ‘constitutional integrity’ of the UK’s internal or common market.

It is not yet clear what HM Government’s new form of Clause 11 looks like. It has said that the starting point now is that powers returning from Brussels are to devolved, rather than held at Westminster. An approach to the creation of common frameworks which would be considerably more sensitive to the approach taken to date would simply see the removal of the Clause 11 constraint on the devolveds to comply with retained EU law. As things currently stand, where frameworks are needed the Westminster Parliament could legislate, with devolved involvement drawn in through respect for the Sewel Convention. However, this does not go as far as the means of participation in matters of EU governance held by the devolved nations. They currently are able to engage directly and indirectly in the policy processes that set EU wide common frameworks within an EU governance system, which, crucially has a constitutional orientation towards subsidiarity, that decisions should be taken at the lowest effective level. There is a strong case to consider amendments to the Bill that write in formal mechanisms for devolved involvement in making of common frameworks, and that these extend to both intergovernmental and interparliamentary relations.

Observers of the EU will know just how powerful the legal concept of the EU’s internal market had been. To date, and through the adoption of harmonising legislation and through the reach of the enforcement of the free movement provisions, EU law has created a level playing field for trade across the Member States. But we need to acknowledge that this EU internal market does not necessarily demand uniformity, and gives space to local divergence and differentiation. That space for difference may be built into the legislation itself – whether in provisions of environmental legislation that allow for local variation, or in the rules of the CAP, which sees an increasingly ‘un-common’ approach to farming support and its related regulatory structures. Divergence may also be seen in the way the free movement provisions apply and the space for justification which may be afforded to protect local measures which hinder trade. So for example, Scotland may be recognised under EU internal market rules as being justified on public health grounds on introducing a minimum price per unit for alcohol – the public policy objectives outweighing the impact on trade, but what do we know about a U.K. internal market, and will it come with the guarantees that such protections can be recognised? The lack of transparency and any meaningful explanation of what the concept of the UK internal or common market is, beyond a ready appeal to it by politicians to justify harmonising UK wide measures is concerning.

It must be recognised that an internal market – any internal market, whether the UK’s or the EU’s – is not simply an economic construction, it is also profoundly political. It reflects a set of

choices, about what will be valued and what interests will be protected against the pressures of ensuring freedom of movement. When looking at the EU, we know the free movement rights within its internal market are not unconditional. The internal market is placed in a constitutional setting alongside other objectives and principles, including the mainstreaming of equality, promoting environmental sustainability, and subsidiarity. The UK notion of a common market is not, as far as we are aware from the way it has been presented to date, grounded in anything like this. So we need to think about ways that these interests can be anchored down, that values can underpin a UK internal market. The adoption of amendments to the Withdrawal Bill which would provide for continued respect for such critical values should be strongly considered.

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Dr. Colin Harvey (Professor of Human Rights Law at Queen’s University Belfast) - Brexit, the EU (Withdrawal) Bill and Northern Ireland

Brexit has brought the position of Northern Ireland to the centre of an intense EU-wide debate that at present is circling around the nature of the border on the island of Ireland. The EU (Withdrawal) Bill, currently making its way through Westminster, is only one part of a bigger picture. It is the piece of Brexit legislation that aims to bring clarity and certainty but which seems to have succeeded in creating widespread confusion and disharmony. The focus here is on Northern Ireland, and I will concentrate on three themes: context; the Bill; and ways forward.

First, let us reflect on context. There is currently no government in Northern Ireland, in the sense that there is no functioning Executive or Assembly. Northern Ireland does have a Secretary of State, of course, and the Westminster Parliament is currently stepping in when required (for example, on the budget). Since the resignation of the late Martin McGuinness in January 2017 as deputy First Minister there have been ongoing attempts to re-establish the institutions. The latest effort failed, so at the time of writing there is much consideration of what next for power-sharing government.

Brexit has re-opened the British–Irish national identity fault line at the heart of Northern Irish politics in problematic ways. The majority voted to remain but the two main communities were notably divided. The Democratic Unionist Party (DUP) supported the Leave campaign and Sinn Féin argued for a Remain vote. The outcome means that Northern Ireland did not consent to leave, and given the contentious politics and history of that concept that fact still matters (in ways that transcend debates over the Sewel convention). There is a wider constitutional imbalance that also requires careful thought; the DUP has reached a ‘confidence and supply’ arrangement with the Conservative Party. In this deal the DUP has agreed to support the Government’s Brexit legislation. In this the DUP is departing from the majority view in Northern Ireland. At a time of heightened anxiety about the future of the peace process, the agreement with the Conservative Party has done little to reassure those who are worried that the Westminster Government can act impartially with respect to Northern Ireland. When you add to this general scene the fact that nationalism/republicanism in Northern Ireland opted for candidates who stood clearly on an abstentionist platform and that unionism lost its overall majority in the Assembly elections of March 2017 then the complexities multiply. This all now combines to create a real risk of upsetting the fragile cross-community balances that exist in Northern Ireland. Although many will be reflecting on the Good Friday Agreement this year (2018 is its twentieth anniversary) it increasingly seems as if the fundamentals of the peace process are steadily being abandoned.

Second, many of the questions raised by the EU (Withdrawal) Bill are now well known. These include clarity around the status of retained EU law, the power of Ministers (both devolved and Westminster), the claim of a ‘power grab’ by the centre, the decision to exclude the Charter of

Fundamental Rights of the EU and a concern that insufficient recognition has been given domestically to the Good Friday Agreement (and subsequent agreements). There is some protection in the Bill for the Northern Ireland Act 1998, and it has been amended, but many of the concerns remain. It must be recalled that this will not be the only piece of legislation dealing with Brexit, and it seems increasingly clear that Northern-Ireland-specific legislation may be needed to address a range of issues emerging from Brexit and the collapse of the recent political negotiations. The elements noted above do need to be considered in this Bill but thought must also turn now to the sort of measures that may be required to secure the special arrangements for Northern Ireland that may flow from the EU–UK negotiations. There is additionally the matter of trust. The UK’s flexible constitution comes under strain when trust breaks down to the extent that it now has, particularly between the constituent parts of the territorial constitution. The current efforts to secure a negotiated way forward, on common frameworks and Clause 11, are revealing the flaws in the UK’s system of intergovernmentalism. This requires urgent attention.

Finally, what about ways forwards? An obvious point is that the Bill should be amended to reflect devolved concerns. The work around this will send an important signal about the sort of UK that might evolve on the other side of Brexit. Given the continuing discussions regarding the position of Ireland/Northern Ireland it would make sense to prepare the ground for the sort of special arrangements that logically follow the agreements reached thus far between the EU and the UK. In general, and with much reflection on the state of the Northern Ireland peace process, it may well be wise to return to the spirit of the Good Friday Agreement. That document has a determined focus on relationships across these islands and the sorts of values that would provide helpful guidance (including on human rights and equality). Recall the scale of the current constitutional imbalance within this ongoing process. There is a need to ensure voices are heard at Westminster across all communities, however this is achieved. On this issue, among others, the DUP (with its impressive electoral mandate) simply does not speak for Northern Ireland. A question for the Westminster Parliament is how it can mitigate the problems identified and show genuine respect for the power-sharing principles that are central to the peace process. There is also the urgent need for enhanced British-Irish intergovernmental cooperation, and on this the Good Friday Agreement provides an answer: the British-Irish Intergovernmental Conference. It is time for a meeting of this body to be arranged.

These are challenging times for Northern Ireland but concerns have plainly been heard in Dublin and Brussels. If it is to demonstrate respect for the peace process the Westminster Government will have to take care that it acts with ‘rigorous impartiality’ and that the fundamental principles flowing from the Good Friday Agreement are central to whatever happens next.

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