PoliticsPlus

Perspectives on the Impact of **BREXIT**

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Introduction

Although the range of potential outcomes of the Brexit process remains wide, it is possible to identify some key issues that require to be confronted by the Northern Ireland Assembly in any event. The purpose of this paper is to outline some of those issues.

Must Brexit happen at all?

The narrative of the United Kingdom Government has consistently followed the lines of "Brexit means Brexit"[1]. A series of Ministerial indications was firmed up in the Secretary of State's Statement to the House of Commons on 10 October 2016 in the following terms: "The Prime Minister will invoke Article 50[2] no later than the end of March next year".

Despite this clarity of intention on the part of the UK Government, there is still no legal obligation on the UK government to trigger Article 50. At this point it is difficult, but not impossible, to imagine circumstances in which the Brexit process might be allowed to lapse; and that remains a technical legal possibility until Article 50 is invoked.

In particular, there are proceedings currently before the courts attempting to establish legal obligations of the Government in relation to Brexit, whether arising from the referendum result or from general principles of Parliamentary supremacy and other features of constitutional law. It is conceivable that the outcome of those proceedings might result in the Government feeling legally constrained from beginning the Article 50 process. Similarly, it is conceivable that developments in Parliament might have the same effect.

Although conceivable that legal or Parliamentary proceedings might change the Government's determination to proceed with Brexit, it is extremely unlikely. Whether or not the final result of various legal proceedings is that the Government will be required to obtain the consent of Parliament – and possibly the devolved legislatures too – before taking specified action in relation to triggering Article 50(2), it will still be open to the Government to determine whether or not to proceed with the Article 50(2) process. Again subject to the final result of those legal proceedings, it is possible that Parliamentary approval may or may not be sought in practice either before Article 50(2) is triggered or before the withdrawal negotiations are concluded[3] – but unless required by the courts, if the Government decides voluntarily to invite Parliament to approve the taking or withholding of action under Article 50(2), that will not restrict the Government's freedom of action.

Parliament has legislated in the European Union (Amendment) Act 2008 and the European Union Act 2011 to require its approval to be sought by Ministers for certain kinds of action in relation to the EU Treaties (including action in connection with changes to the provisions about extension of a withdrawal time limit under Article 50(3))[4]: but that Act does not require Parliamentary approval of action or inaction under Article 50(2) – a fact which may be conclusive on the final determination of the question of whether Parliamentary approval is required for triggering Brexit.

1 See, in particular, the Secretary of State's Oral Statement to the House of Commons of 8 September 2016.
2 For discussion of the mechanism of Article 50 see below.
3 There have been differing suggestions from Government of the degree of approval that might be sought from Parliament at different stages of the withdrawal process. In his Statement to the House of Commons on 10 October the Secretary of State said nothing firmer than: "Naturally, I want this House to be properly engaged throughout, and we will observe the constitutional and legal precedents that apply to any new treaty on a new relationship with the European Union."
4 See European Union Act 2011, Sched.1.

The argument that triggering Article 50(2) would undermine section 2(1) of the European Communities Act 1972[5] arguably rests on a fundamental misunderstanding of what that section achieves: it embodies European Union law in the law of the United Kingdom, to the extent required by the international obligations of the UK as a Member State: should the UK cease to have any such obligations as a result of leaving the EU, section 2 would simply beat the air.

The vote in favour of Brexit in the referendum also has no constitutional or legal effect on the Government's freedom of action. There would obviously be considerable (although possibly temporary) political effects of a decision to disregard the referendum result and remain in the EU. But as a matter of constitutional law there would be nothing objectionable or challengeable in the decision.

So political realities may make the Government feel obliged to seek Parliamentary approval, and the courts may decide that it is required as a matter of law; and while political pressure may make it difficult or impossible for the Government not to trigger Article 50(2), as a matter of law there is no obligation to do so.

5 "(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; …"

What will Brexit mean?

In the matter of what form the Brexit process will take, again all the options remain open at present.

At one extreme, an Act could be passed repealing the European Communities Act 1972 in its entirety, allowing all implementing instruments made under section 2(2)[6] to lapse upon the repeal of their enabling power; and the United Kingdom could be liberated from all obligations arising out of European Union legislation and law.

At the other extreme, following Brexit the entirety of the implemented EU obligations could be preserved as part of the United Kingdom's body of law, either on a fixed-term transitional basis or in an open-ended form for long-term transitional purposes.

Between these two extremes lies the complete range of potential partial preservation of EU obligations as part of UK law. The Secretary of State has announced[7] the Government's intention, at some point in the next Parliamentary Session, to introduce "a Great Repeal Bill that will mean the European Communities Act ceasing to apply on the day we leave the EU".

That still leaves open the question of how much of EU law will be frozen in, or reintroduced into, UK law following the repeal of the 1972 Act. Which of the two extremes set out above, or which point between them, eventuates, will be dictated entirely by the political process of negotiation between the UK and the remaining Member States of the EU.

The prevailing expectation at present appears to be that the UK will wish to secure some kind of formal relationship with the EU amounting to something more than an arm's length third-party trade deal. Should that prove to be the case, it is equally the general perception that the price of any special relationship will be the continued application to the UK of a number of significant EU obligations, including many of the commercial and other regulations required as a consequence of the freedom of movement of persons, goods and services provided for by the EU Treaties.

Whatever the desired political outcome, relatively simple legislative mechanisms exist to achieve it. On the assumption that the most likely outcome is likely to be something between the two extremes of complete uncoupling of EU and UK law and complete preservation of the entirety of EU law, the most likely mechanism is some form of transitional modification of section 2(2) of the European Communities Act 1972. This is likely to preserve some or even all of the instruments made under section 2(2) until such time as they are revoked, with revocations following in tranches in accordance with political priorities[8]. And it might also involve the creation of a modified power along the lines of section 2(2), to make provision for the gradual and selective unravelling of EU-based obligations from primary and subordinate UK law.

6 Section 2(2) allows Ministers to make subordinate legislation to give effect to obligations arising out of our membership of the European Union.
7 In his Statement to the House of Commons on 10 October.
8 This is one possible interpretation of the Secretary of State's observation in his Statement to the House of Commons on 10 October 2016 that "There is over 40 years of European Union law in UK law to consider in all, and some of it simply won't work on exit. We must act to ensure there is no black hole in our statute book."

The transitional preservation of section 2(2) instruments and other implementing legislation could take two forms. In one possible scenario, it will be required to give effect to the continued EU obligations which form part of the trade deal or other political negotiations between the UK and the EU following withdrawal. In another scenario, the transitional preservation of EU-inspired implementing domestic legislation will simply be required in order to give time for the UK government to plan orderly disengagement from EU obligations. It is quite likely that both aspects of this transitional preservation will be required in different areas of EU law, since the eventual political result is reasonably likely to fall between the two extremes described above.

It follows from all this that the Northern Ireland Assembly will wish to be prepared to influence the prioritisation of legislative changes for partial or transitional withdrawal from EU.

Although there will be a relatively modest extent to which the high-level deal on the relationship between the EU and the UK can be influenced by particular Northern Ireland considerations, there is likely to be a broad hinterland of more flexible policy areas in which the UK Government will be able to advance the concerns of the devolved governments, provided that those concerns are expressed clearly and realistically.

Similarly, in the process of "un-packing" EU-inspired legislation to reflect those areas of EU law not included as a requirement of any trade or other deal, priorities will be set to some extent on a nationwide central basis, but there is likely to be room to reflect local concerns too, and the Northern Ireland Assembly will wish to be well-placed to take advantage of that opportunity[9].

9 The Secretary of State's Statement to the House of Commons on 10 October 2016 says: "And Mr Speaker, legislation resulting from the UK's exit must work for the whole of the United Kingdom. To that end, while no one part of the United Kingdom can have a veto over our exit, the Government will consult with the devolved administrations. I have already held initial conversations with the leaders of the devolved governments about our plans. And I will make sure that the devolved administrations have every opportunity to work closely with us."

Form of Brexit legislation

As to the form which the Brexit legislation is likely to date, there is an expectation – now enforced by the Secretary of State's announcement in his Statement to the House of Commons on 10 October 2016 – that section 2(2) of the European Communities Act 1972 will be repealed, whether or not the repeal is subject to transitional savings that might last for a number of years.

It remains technically possible, however, for section 2 to be allowed to remain on the statute book as it is now[10]. Since it is a proposition that gives effect to the EU obligations insofar as they bind the United Kingdom, the release of the United Kingdom from those obligations on Brexit could simply render section 2 nugatory. **The importance of that is that it could lead to the implementation of Brexit without any significant primary legislation being required, which has obvious political implications.**

The Northern Ireland Assembly and other devolved legislatures are likely to be invited to consider one or more motions relating to Brexit, potentially including approval of triggering Article 50 itself, or approving the content of any deal agreed with other Member States by way of implementation of Brexit. The UK government could choose to invite the Northern Ireland Assembly to consider those motions in the form of consent motions, along the lines of those used as a matter of convention (but not law) when the UK Parliament proposes to legislate for a devolved region on a devolved matter. But as a matter of constitutional law, not even a decision by the UK Parliament to defer to consent motions by the devolved legislatures assemblies would limit Parliament's power to pass legislation at the request of the UK Government to implement Brexit at a nationwide level, without the consent of the devolved legislatures or governments. The supremacy of Parliament in relation to devolved matters is preserved expressly by the devolution legislation[11], and the discretion of the UK Government to take action under and in respect of international treaties cannot be fettered by agreement to defer to other internal procedures or processes. **So any involvement by the Northern Ireland Assembly in the decisions around the triggering and implementation of Article 50 will be non-determinative as a matter of law.**

10 And despite the Secretary of State's announcement, the availability of this option should be remembered in case, in particular, the Parliamentary circumstances, perhaps in the House of Lords, make it difficult to process the "Great Repeal Bill".

11 Northern Ireland Act 1998 s.5(6) – "This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland."

Status of Northern Ireland

Section 1(1) of the Northern Ireland Act 1998[12] is not affected by Brexit. It is of course open to the Northern Ireland people to determine that Brexit on the part of the United Kingdom is a reason for triggering the expression of a wish to leave the United Kingdom in accordance with section 1(1). But that is a purely political judgment, as always. In a legal and constitutional sense, the proposition encapsulated by section 1(1) is unaffected by any decision of the United Kingdom in general to enter into or withdraw from relations with the EU or any other country or international organisation.

Much has been said at a political level about the possibility of any or all of Scotland, Wales and Northern Ireland acquiring their own status in relation to the European Union following Brexit. In purely technical constitutional and legal terms, all that can be said is that it is neither impossible nor unprecedented for the European Union to enter into arrangements that reflect the special nature of part of a country. While much has been said at a political level about the relations between Norway and the EU as a possible precedent, in some ways the precedent of Gibraltar may be worth considering in the context of possible special arrangements after Brexit. Gibraltar demonstrates that it is possible for a region within a state (albeit presently a Member State) to be accorded a status that is both equivocal in terms of EU membership, and different in some respects from the status of the country of which it forms part. While it may be difficult or impossible to imagine a particular part of the United Kingdom retaining full and normal membership status of the European Union following Brexit, and it is difficult to see how that could be achieved within the time available, it is less difficult to conceive as a matter of legal theory a number of kinds of special relationship, possibly including trade deals, that might be developed between the EU and one or more parts of a former Member State. Whether this is politically desirable or realistically achievable is beyond the scope of this note; but that it is technically possible simply requires to be understood, as a background to the discussions and negotiations that are likely to take place in parallel to the main Brexit negotiations.

The Northern Ireland Assembly may therefore wish both to participate in negotiations conducted by the UK Government and also, subject to the political will to do so, to consider developing capacity to conduct parallel negotiations relating to the status and treatment of Northern Ireland following Brexit.

The Good Friday and Stormont House agreements both (but particularly the first) include provisions recognising the importance of EU law to the present constitutional position of the UK as a whole in a number of respects. Negotiations will therefore have to include consideration of what is required to take the place of EU obligations for a range of legal purposes that are reflected in the constitutional arrangements embodied in those agreements. (For example, in relation to a number of social and commercial equalities that are presently achieved as a matter of EU law.) This is, however, a political and not a legal or constitutional question: there is nothing in either of those agreements that is dependant in a constitutional sense on the UK's continued membership of the EU.

12 "It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1."

Article 50

Although the general effect of Article 50 is now well known and has been covered extensively in the media, it may be worth drawing attention to a few technical points that have not commanded widespread attention.

Article 50(1) provides that "any member state may decide to withdraw from the Union in accordance with its own constitutional requirements". In the course of legal challenges proposed to giving effect to the results of the Brexit referendum, suggestions have been made that if it can be shown that the referendum was in some way constitutionally deficient, then as a matter of EU law the UK Government would not be able to trigger Article 50.

It is, however, difficult to believe that either the Supreme Court or the European Court of Justice will wish to use these words to impose constraints on the exercise by the United Kingdom of a prerogative treaty-making power. The purpose of the words "in accordance with its own constitutional requirements" is simply to make clear that the EU does not lay down any European law substantive or procedural requirements constraining the freedom of Member States to withdraw.

Article 50(2) requires the European Union to "negotiate and conclude an agreement" with a Member State that has indicated its desire to withdraw, "setting out the arrangements for its withdrawal". What is not universally appreciated is that there is, or at least may be, a difference between arrangements for withdrawal and arrangements for the conduct of relations between the Member States and the European Union after withdrawal. It would be open to Member States to confine the Article 50(2) negotiations to matters such as the transitional arrangements for winding down contributions to and receipts from the EU, and other matters that dictate the timing and method of achieving withdrawal. It would be, at least arguably, entirely within the spirit of Article 50(2) for Member States to insist upon at least some matters of the future relationship between the UK and the EU to be set aside to be dealt with in separate negotiations after the end of the two-year period. **The political difficulties involved in this interpretation are clear, but at this stage before Article 50 has even been triggered, it is important to remember that it is a possible stance that might be taken by some or all other Member States[13].**

Article 50(3) sets a two-year time limit from the moment when withdrawal is triggered. At the end of those two years, the United Kingdom would automatically and without any other action being taken cease to be a member of the European Union. There is provision in the Article for an extension of that period, based upon a unanimous decision of the European Council. Since any political negotiations for an extension are likely to be as difficult as those for withdrawal itself, it is difficult to say that this provision is likely to be of much practical utility. **The Northern Ireland Assembly would be wise to regard the two-year period as in practice inflexible.**

That of course makes the amount of time for negotiation extremely small considering the number of parties required to be involved and the various different periods during which governments and parliaments are unavailable for all practical purposes; which may add to the pressures discussed above to limit the negotiations to matters of withdrawal rather than including all matters of the post-Brexit future relationship between the United Kingdom and the European Union.

13 And this fits with some of the hard rhetoric from various European leaders in recent weeks, suggesting an "all or nothing" approach to the negotiations.

Legislative competence

The parameters of legislative competence for the Northern Ireland Assembly are presently set in part by reference to compatibility with European Union law[14]. The legal requirement for that limitation would disappear if, and to the extent that, the UK were no longer bound to comply with EU law.

So it is logical to expect that any legislation implementing Brexit and repealing or modifying section 2 of the European Communities Act 1972 will make a consequential amendment to the legislative competence parameters of the Northern Ireland Assembly and the other devolved legislatures. **The result would be that there would be significant areas of policy that are presently within the legislative competence of the Northern Ireland Assembly but as to which it is presently significantly constrained as to what it can achieve by the requirement for compatibility with EU law, in which the Assembly would become significantly freer to develop policy after Brexit.**

The statute that implemented Brexit would, however, be able to include provision designed to delay, obstruct or qualify the degree of liberation of policy and the consequent expansion of legislative competence of the Assembly. The justification for doing that, however, would be a matter of politics and not of law.

It is open to question whether the Brexit legislation could avoid extending the legislative competence of the Northern Ireland Assembly simply by omitting any consequential amendment of the Northern Ireland Act 1998. That would leave the present restriction by reference to compatibility with EU law on the statute book so far as the Assembly was concerned. It is, however, at least strongly arguable that the mere omission of consequential amendments of the legislative competence provisions would make no difference to the expansion of legislative competence brought about by Brexit. The requirement at present is one of compatibility with European Union obligations on the United Kingdom; upon leaving the European Union, EU law would no longer place obligations on the UK (except to such a limited extent as might be agreed in a post-Brexit treaty). In which case the requirements for compatibility with EU law would simply be nugatory, there being no relevant obligations applying to Northern Ireland (or the rest of the UK) as a matter of EU law.

14 See, in particular, Northern Ireland Act 1998 s.6(2)(d).

Policy development

To the extent that Brexit will result in an expanded legislative competence for the Northern Ireland Assembly in some, if not all, devolved areas, a practical challenge for the Assembly and for the Northern Ireland Executive will be to develop policy-making capacity in those areas. Ministers and the Assembly have necessarily since the inception of devolution been used to avoid a range of areas in considering new policy, simply because those areas were so circumscribed by EU law that there was no scope for the development of national, far less regional, policy.

One of the timing challenges, therefore, involved in the two-year period under Article 50(2) will be to identify areas which are unlikely to be construed by EU legal obligations as part of the post-Brexit deal with other Member States, and to acquire capacity to develop policy in those areas, to form and refine appropriate policy to replace the present EU-based requirements, and to replace the EU-based legislation with purely domestic legislation. Since it is unlikely that this can be achieved entirely within the two-year period, some kind of transitional preservation of the EU-based legislation is likely to be necessary, with graduated replacement over a period of months and years following Brexit, in accordance with agreed political priorities.

Although to some extent transitional arrangements of this kind will remove the urgency from developing replacement policy and enacting replacement legislation, particularly in relation to the large areas of law implemented through subordinate legislation, a degree of urgency may be created by the need to justify the continued effect of those provisions without being able to have recourse to the obligations of EU law. At present, a great deal of legislation passed in a number of devolved areas is in effect immune to challenge on general administrative law grounds, since it is required for purposes of EU compatibility. Once that requirement has gone, even in relation to legislation that has already been enacted before Brexit, the courts will require Ministers to justify the continued effect of that legislation by reference to general administrative law principles, and it will no longer be sufficient to point to an underlying EU Directive or other obligation. It would, of course, be open to Parliament to provide some kind of transitional cover to prevent such legislation being challenged. But there is likely to be a political tolerance for transitional arrangements beyond which UK ministers may find it difficult to justify going, if they are to be perceived as delivering Brexit in a sufficiently effective form to satisfy those who voted for it.

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