

Brexit & Devolution

Helen Bowdren, partner at Dentons; and **Pamela Coulthard**, associate at Maclay Murray and Spens, look at the issue of Brexit from the point of view of the devolved nations, and discuss how to ensure the opportunities it presents don't go to waste

The wheels of Brexit have started to turn. Over the summer, the Government published the European Union (Withdrawal) Bill (the Bill), which is currently working its way through the Westminster Parliament. The Bill has 19 clauses and an immense objective – to transpose nearly 45 years of European Union legislation into domestic law, and to determine how EU law will apply in the UK after Brexit.

But what does this mean for the devolved administrations, and for businesses in highly regulated sectors, such as waste, working across the UK? Devolution certainly seems to pose an additional complication. Will Brexit slow the pace of change in Scotland, Wales and Northern Ireland?

What Does The Bill Do?

IN SHORT, the Bill repeals the European Communities Act 1972 and puts into effect the exit from the European Union. In order to deliver "maximum clarity", the Government intends to incorporate into domestic law all EU legislation as at the date the UK leaves the EU. The position for day-to-day legal compliance the day before and the day after exit day should be the same.

The Bill contains "delegated powers" for Ministers, which have already proved controversial. Ministers could use these delegated powers to correct technical deficiencies in legislation, such as legal provisions which no longer make sense after Brexit. Examples include references to European Directives, "other member states", or to EU institutions.

It may be necessary to create new public bodies, or to transfer functions that are currently carried out by European agencies to an existing public body or regulator. For example, regulation of chemicals under REACH could transfer from the European Chemicals Agency (ECHA) to the Health



and Safety Executive. The power to determine the national emissions cap for allowances under EU ETS permits could be transferred from the Commission to the Environment Agency.

Making law through delegated powers involves much less rigorous parliamentary scrutiny and, for this reason, these powers are controversial. We expect that the Bill will be heavily debated and amended.

Devolution and Brexit

DEVOLUTION HAS taken place entirely within the cocoon of EU law. Where Westminster has devolved particular areas of law, this has always been subject to the limits set by EU law. As things stand now, the devolved administrations (the Scottish Parliament, the Northern Irish Assembly and the Welsh Assembly) cannot legislate in such a way as is incompatible with EU law.

The Bill, as currently drafted, maintains that framework. It amends the devolution legislation so that after Brexit, the devolved administrations will not be allowed to legislate in a way that is incompatible with EU law

as retained by the Bill. The Bill also prevents the devolved administrations from amending EU law which has been retained as domestic law, even if that legislation relates to an area over which the devolved administration has competence.

There is a fundamental difference of opinion between the devolved administrations and Westminster as to how to approach this issue. The devolved administrations believe that if power is returning to Westminster from the EU, it should flow through to the devolved administrations. Westminster believes that the original limits on the devolved administrations should remain as they are, pending future discussions about the future legal landscape.

The Welsh Government has set out six main issues which it regards as vitally important for Wales, one of which is social and environmental protections and values. Rosanna Cunningham, Scottish Environment Secretary; and Lesley Griffiths, Welsh Environment and Rural Affairs Secretary, have planned to meet to discuss their opposition to the Bill and coordinate a response. Ms Cunningham has said

that the protection of devolution is vital to continue Scotland's ambitious environmental targets.

The Sewel Convention

IT IS convention that when Parliament is passing legislation on a devolved issue, the devolved administrations pass a Legislative Consent Motion demonstrating they agree to that legislation. However, this is not legally binding on Parliament, and is only a convention, known as the "Sewel Convention".

In the Article 50 court case (which considered whether Parliament's consent was needed to trigger Article 50), the Supreme Court confirmed that even without the consent of a devolved administration, Parliament can still enact legislation which affects the devolved authorities. In its Explanatory Notes the Government has said that a legislative consent motion is required for most of the clauses of the Bill, demonstrating that it intends to request consent from the devolved administrations in the usual manner.

The Scottish and Welsh governments have raised concerns and may well decline to approve such motions. If so, this could raise serious political challenges for the Westminster government.

Race To The Top

ENVIRONMENTAL REGULATION is one area where the devolved administrations have moved away from Westminster policy. Scotland has, for example, often been accused of "gold plating" European environmental legislation and policy; and the Scottish Government has undertaken initiatives of its own in many areas including, in the waste sector, commissioning Zero Waste Scotland to carry out a detailed study into the logistics of running a deposit return scheme for bottles and cans.

In Wales, the Well-being of Future Generations (Wales) Act 2015 requires public bodies to consider long-term impacts and carry out their work in a sustainable way. A statutory Future Generations Commissioner for Wales has been created to act as "guardian" for future generations. This is the first such act of its kind, and the United Nations has commented: "We hope that what Wales is doing today, the world

will do tomorrow".

The devolved administrations have been quicker off the mark in adopting environmental provisions arising from the EU. For example, the plastic bag levy was first introduced by Wales in 2011, Northern Ireland in 2013, Scotland in 2014 and finally in England in 2015. This was in response to an EU strategy (and eventual directive) which required member states to reduce the amount of plastic used, and introduce a charge for plastic bags.

Scotland is also leading the way in terms of viewing waste as a resource. It has a circular economy strategy, "Making Things Last", with a strong emphasis on waste prevention. The Scottish Institute of Remanufacturing co-funds projects that address industry challenges and enables companies to increase reuse, repair and remanufacture in their operations, and is the only centre of its kind in the Europe. Equally, Wales has the highest recycling rate of the home nations, and aims to be a zero waste country by 2050 through the 2010 "Towards Zero Waste" plan. By contrast, England has only focused on compliance with EU targets, rather than the ambitious plans seen in other parts of the UK.

Given the differing approaches and standards in at least some areas of environmental regulation and policy, should England move away from the requirements set by the EU, there will be several areas of concern for the devolved administrations. If landfill tax changes, it may be cheaper, for example, to dispose of commercial waste in England rather than Scotland.

This in turn could lead to the waste sector being reluctant to operate in Scotland or Wales, if it has concerns regarding a potentially stricter regime. Businesses that operate across the UK may need to get to grips with numerous regulatory regimes which may cause confusion and frustration within any given sector, and perhaps make the UK as a whole a less attractive place to do business.

If Brexit is about the return of powers to the UK, it begs the question, the return to who? ■

Dentons and MacLay Murray & Spens are combining. The combined firm will have offices in Aberdeen, Edinburgh, Glasgow as well as Watford, Milton Keynes and London.

A couple from Northampton are counting the cost after paying an unlicensed man to take away their waste. They were ordered to pay a total of £1,976 after he illegally dumped the couple's waste in the South Northamptonshire countryside. Following renovations, Vatan Bakija and Justyna Wiecezorek were approached by a man to remove waste that was later fly-tipped on private farm land off a minor road leading to Great Houghton, from the junction of the B526. Environmental enforcement officers found numerous items in the waste addressed to the couple. Both pleaded guilty at Northampton Magistrates on Monday 4 September. Bakija was fined £400 and ordered to pay £250 council costs, £1,156 compensation to the farmer and a £40 victim surcharge. Wiecezorek was fined £100 and ordered to pay a £30 victim surcharge.

A North East man who burned waste at his illegal waste site to avoid disposal costs has been sentenced. George Charlton, 62, of Manor Way in Jarrow, appeared at Gateshead Magistrates' Court for sentence on Wednesday 23 August after previously pleading guilty to flouting environmental law. He was charged with operating a waste site without a permit at Reay Street, Bill Quay in Gateshead, and illegally burning waste at that site. He was sentenced to an 18-month Community Order, 250 hours of unpaid work, a 30-day Rehabilitation Activity Requirement, and ordered to pay costs of £750. Acting on behalf of the Environment Agency, solicitor Laura Taylor told the court that Charlton collected waste from friends and relatives and took it to the site without registering as a waste carrier. He also had no environmental permit to store and sort the waste at the yard.

A major joint agency operation, led by Lancashire Police, has been carried out, leading to the closure of a waste site under the Anti-social Behaviour, Crime and Policing Act 2014. The joint action by agencies including Lancashire Police, Lancashire Fire and Rescue Service, the Environment Agency and Hyndburn Borough Council was taken following numerous reports from members of the public concerned about activities associated with the site. A Closure Notice was served to TH Smith, Great Harwood, under the Anti-social Behaviour, Crime and Policing Act 2014. A significant number of resources attended the site including more than 100 police officers, police dogs and the police helicopter.