



Findings from the Economic and Research Council's
Research Programme on *Devolution and Constitutional Change*



Devolution Briefings

Scotland and the European Union

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Key points

- The overlap of devolved and EU competences is substantial, and produced a strong commitment on the part of the UK government to include the devolved administrations in UK EU decision-making.
- Most of the operational procedures for considering Scottish concerns in UK EU policy were adapted from pre-devolution practice for involving the Scottish Office in UK government decision-making
- New, ministerial-level coordination mechanisms have been established in the Joint Ministerial Committee (Europe) which provide direct and frequent access for Scottish ministers to counterpart ministers at UK level
- As a result Scotland's 'voice' in EU policy has become louder since devolution – though some of this depends on there being the lines of communication and friendly relations which parallel Labour-led governments in Edinburgh and Westminster guarantee; a change of government may well disrupt the coordination system
- The Scottish Parliament has developed a vigorous scrutiny system on EU matters, in part responding to pre-devolution deficits, in part reflecting the commitment to establish the Parliament as a crucible for ideas and policy choices
- It has 'mainstreamed' EU scrutiny across the subject committees of the Parliament and developed a strong emphasis on transparency in EU policy matters
- But its resources are limited, and it needs to prioritise early engagement with policy initiatives, and a selective focus to make the best of limited resources

Introduction

Devolution brought with it a political commitment by the UK Government that the devolved administrations would be consulted over policy issues relating to the European Union in so far as these issues touched upon devolved competences. By the end of the 1990s EU competence had extended to cover a wide range of policy areas which, under the devolution settlement, had been devolved to Scotland (e.g. justice, fisheries, environment, agriculture, economic development).

In effect, therefore, EU competence to enact legislation in these policy areas effectively restricted the scope for the Scottish Parliament to legislate in these areas, because under EU law domestic law must not conflict with EU law. And because EU policy was solely a matter for member states (sub-state legislatures are not formally recognised in the EU's legislative processes), this meant that when an EU legislative proposal touched on a devolved (Scottish) competence, then authority over the devolved competence effectively reverted to the UK Government.

In addition, devolution mattered in EU terms because, under the devolution settlement, responsibility for implementing EU law in Scotland would fall to the Scottish Executive and Scottish Parliament, which would be required to enact law in Scotland to give effect to EU law.

The devolution White Papers recognised these issues, and stressed that it was the Government's intention post-devolution to include the devolved administrations in the UK's EU policy process where EU legislative proposals touched on devolved matters. However, no proposed modalities were offered in those Papers, and indeed the devolution Bills were entirely silent on this matter.

Two central research questions were raised by this 'European Union' dimension to devolution:

- First, how would the pre-devolution arrangements of UK Government for formulating its position with respect to an EU legislative proposal be adapted to permit the devolved administrations inputting to that process? The obvious problem was that the devolved administrations self-evidently were not part of UK Government as had been the territorial Secretaries of State, and under what terms should these administrations be given access to the machinery of UK government?
- Second, how would the devolved legislature in Holyrood deal with EU policy – in particular how would it arrange to scrutinise EU legislative proposals and thereafter influence the UK policy process?

UK-Scottish Coordination on EU Matters

Successful cooperation between the Scottish Executive and UK Government on EU matters was central in delivering the political commitment set out in the White Papers. In practice, of course, ever since UK entry to the EU in 1973 the then Scottish Office had represented the Scottish dimension to the UK's EU policy through bilateral discussions with officials in the lead Whitehall department and of course at Ministerial level within the Cabinet. The SO simply plugged into the evolving UK EU-policy process as another Department, albeit one that seldom if ever constituted the 'lead' department.

Devolution required a review and adaptation of these procedures simply because officials working in the now Scottish Executive were no longer in a UK Government Department. On the one hand the devolved administrations had to have access to the UK EU-policy process, but on the other hand as these administrations lay outwith UK Government such access had to be based on clear rules.

These rules were formulated late in 1999 in a series of concordats that were signed between the devolved administrations and UK Government. Each concordat provided for policy discussion and coordination between UK Government and the devolved administrations over both devolved and reserved matters – the ultimate aim being to ensure that all administrations were informed about the intentions of the other, and had opportunity to represent their own interests in the activities of the others.

The late Donald Dewar memorably described the concordats as simply ‘road maps for bureaucrats’, while others have described them as arrangements which honour the convention of ‘no surprises’ between administrations in policy terms – i.e. that if coordination and communication is working as intended then no administration should be surprised by the policy proposals of the other.

At the heart of the concordats, and indeed as has been the overwhelming practice since devolution, is the notion that the UK approach to developing a single negotiating line to take to Brussels works well. The ultimate objective was to ensure a united UK position was presented in Brussels for fear that any public disagreement between UK Government and the devolved administration(s) would weaken the UK hand in negotiations in the Council.

If these arrangements were to continue to operate successfully, and given that devolution could lead to domestic policy differences over matters in which the EU had competence to legislate, an inter-governmental mechanism was needed to broker consensus on the line to be taken by the UK at the EU level. So while most issues could continue to be resolved by counterpart officials or Ministers in the relevant administrations, the concordat established a Joint Ministerial Committee (Europe) – JMC(E) – which, among other tasks, would be used to broker inter-administration agreement at political level.

Coordination among officials

Little has changed from the pre-devolution system at least in institutional terms. On a Departmental level the Scottish Executive remains closely involved with all EU policy areas that impact on Scotland much in the manner the Scottish Office had been prior to devolution. For instance, agricultural policy officials from the Scottish Executive Environment and Rural Affairs Department (SEERAD) continue to have a very close involvement with counterpart officials in Department for Environment Food and Rural Affairs (DEFRA – this being the ‘lead’ department on EU agricultural policy) in ensuring that a Scottish ‘voice’ is heard within UK Government when the UK line with respect to CAP reform is being developed. This is replicated elsewhere in the Executive over the wide range of devolved policy issues that have an EU dimension.

And while agricultural and – say – fisheries policies are issues of high politics within Scotland, there is no evidence that devolution has altered in any meaningful way the ability of Scotland’s officials and Ministers to speak, and to be heard within UK Government, on the subject of EU policy that impacts upon devolved competences. Indeed, arguably devolution has given Scotland a (louder) ‘voice’ in some EU policy areas that it did not have prior to 1999.

Adaptation to devolution was a two-sided affair. If it was to be successfully managed, then officials and Ministers in Whitehall had to play their part. At the level of officials, it was important that they kept the devolved administrations in the information 'loop' regarding EU policy developments. Modalities had to be created that permitted representation to be made by the devolved administrations at the various levels in the overall UK EU policy process (including UKRep).

In the event, and notwithstanding some initial teething difficulties, the evidence indicates that Whitehall adapted fairly quickly to the new constitutional settlement. A number of Departments initially established dedicated 'devolution units' to ensure that the arrangements set out in the concordats (and subsequent Devolution Guidance Notes) were being followed. However, as the post-devolution arrangements bedded down, and the devolved administrations were effectively mainstreamed into Departmental activities at all levels, these units became obsolete.

In addition, it was made clear from the outset that officials from the devolved administrations would continue to be welcome to meetings within Whitehall departments where EU issues touching upon devolved competences were being discussed. This invitation extended to the weekly Friday meetings at which UKRep discussed EU developments with the Cabinet Office and other Whitehall Departments.

Coordination among ministers

At political level (i.e. 'above' the official level), matters inevitably were initially more sensitive. After all, responsibility for formulating and representing the UK position on EU legislative proposals lies with UK Government, and often the crucial decisions are taken at Cabinet level. There would be obvious political risks by involving politicians from the devolved administrations in Cabinet discussions that could be disputatious.

At the same time, could the devolved administrations really be said to be in the UK's EU policy loop if their Ministers were entirely left out of crucial Cabinet deliberations? And if the devolved administrations were not involved in the political debate, then could the resulting UK line properly be described as reflecting the views of the entire UK? After all, devolution was, in part at least, introduced as an exercise in re-establishing the legitimacy of government in Scotland.

EU issues that are raised to the political level are dealt at Cabinet level by the Ministerial Committee on European Policy (EP). It would be politically impractical for non-UK Government Minister to attend EP meetings. However, it was agreed that a UK Minister on EP could copy in the counterpart Minister (in the devolved administration) to relevant papers to go before EP on the condition that this would not "...entail unnecessary risk, for example by exposing significant disagreements between UK Ministers".

By this mechanism, devolved administrations would be privy to the terms of UK Government discussions on EU matters that affected devolved competences and could represent their own position with the relevant Minister. Moreover, the JMC(E) machinery was in place should an inter-administration consensus fail to emerge from

this process. Inter-administration EU discussions were also held under the aegis of a Ministerial Committee for the co-ordination of European Union issues (MINECOR), chaired by the FCO Minister with responsibility for Europe and involving Ministers from the devolved administrations with responsibility for EU affairs. MINECOR provided a forum for discussion of the UK position on EU matters of high politics – forthcoming Council Presidencies, UK position regarding EMU, the Future of Europe Convention, etc.

By 2003, therefore, the devolved administrations engaged UK Government on EU issues through at least four distinct fora – inter-departmental official level contacts, inter-departmental Ministerial level, the Joint Ministerial Committee (Europe), and through MINECOR. In one sense these arrangements reflected the potential for devolution to produce conflict between UK Government and the devolved administrations over EU policy. Indeed, the creation of the JMC(E) was predicated on the possibility that such disputes as arose would require the intervention of the Prime Minister and the First Ministers from the devolved administrations. In so far as we are aware, however, the JMC(E) has never convened in dispute resolution mode.

In recent months these arrangements have been considerably overhauled. The most significant change has been the substantially increased use made of the JMC(E) as a forum for involving the devolved administrations in the development of the UK's EU policy on issues that impact upon their competences. Indeed, the JMC(E) in practice has virtually replaced the EP Cabinet Committee as the main forum for discussing UK policy with respect to *these* items of EU-related business. The UK Government membership of the JMC(E) is virtually identical to that of the EP Cabinet Committee. Moreover, MINECOR has been abolished and its tasks have been included in the JMC(E) business. The result is that the JMC(E) now meets much more frequently than before – at least monthly – and provides an opportunity for direct and frequent access on the part of Ministers from the devolved administrations to their counterpart Ministers in UK Government.

These changes in the arrangements for involving the devolved administrations in UK Government deliberations over relevant EU policy issues is, of course, a matter of discretion. None of these arrangements described here have (or have ever had) constitutional authority, and UK Government is fully entitled to overhaul these in the future should it deem this to be necessary. In all likelihood the revised JMC(E) is the result of two related factors:

- First, the management of EU policy issues that touch on devolved competences has proceeded better than might have been expected – indeed than some did expect. The JMC(E) has never met in dispute resolution mode, and both UK Government and the devolved administrations have accommodated the impact of devolution on EU policy issues relatively smoothly.
- Second, and in part related to this, is the fact that Labour is the dominant political party in both the Scottish and Welsh administrations (and devolution to Northern Ireland is suspended). Political disputes have been kept to a minimum, and this may have facilitated the relatively painless transition which appears to have been achieved. Of course, this simply begs the obvious question – whether or not the current friendly relations and policy

arrangements will survive when different political parties are in power in one or other of the UK or devolved administrations and so where there will be no presumption of sharing information to achieve common political objectives. Only time will tell.

The Scottish Parliament and Scottish EU Policy

Arguably, the main change brought about by the devolution settlement in the area of UK-European affairs was the opportunity it created for the development of parliamentary debate and scrutiny on EU matters at the 'sub-state' (Scottish) level. The new Scottish Parliament – and its European Committee (now the European and External Relations Committee - EERC) – was expected to be 'pioneering' in this regard, its role critical to the development of innovative working methods to enable a more democratic and legitimately-informed Scottish-UK-European policy to be developed in those areas of particular importance to Scotland – e.g. justice, fisheries, economic development.

The demand for a 'Scottish scrutiny system' of EU affairs can be linked to a perceived failure of the system pre-devolution, when Scottish interests had been represented within Westminster parliamentary procedures established to handle UK-EU affairs. Concerns had been raised over the extent to which the Westminster system was able (given its own constraints) to conduct territorially-sensitive parliamentary scrutiny, particularly when voting patterns in Scotland were not reflected in the 'political make-up' of the UK Parliament.

The concern that the new Scottish scrutiny system should 'innovate' and 'pioneer' was also linked to a positive aspiration for devolution, namely that the Parliament and its Committees should become the crucibles for an improved Scottish-UK-EU policy discourse, leading to the generation of new ideas and the development of different sets of policy choices for policy-makers in Scotland.

The European and External Relations Committee and the 'Scottish Approach' to Scrutiny

The Scottish Parliament - and the EERC – were thus given a wide-ranging set of powers in this area. The remit of the EERC is extensive and includes powers to scrutinise EU documents; to scrutinise the implementation of EU legislation; and to develop a pro-active role in the development of key areas of EU policy.

Chief amongst these functions was the intended conduct by the EERC of *ex ante* scrutiny of EU legislation. In performing this function, it was anticipated that the EERC would *both* be able to influence Scottish-UK-EU decision-making *and* ensure proper scrutiny and accountability of the Executive's activities within domestic UK inter-governmental processes, and when in contact with the UK government. In addition, powers of scrutiny were also granted to the subject committees within their own subject area – and the integrated powers of committees provided the legal base for a 'pro-active' role of policy development to be operationalised.

Since 1999, two main distinctive features of a 'Scottish' approach to scrutiny and engagement in UK-European affairs have emerged, marking out differences from the Westminster approach:

- First, and as a result of decisions taken during the course of a Parliamentary inquiry into the 'Governance of the European Union', the EERC has developed a scrutiny system which is characterised by its focus on 'transparency'. This focus has enabled the EERC to better identify the type of information to be requested from the Executive for the purposes of scrutiny and includes *inter alia*:
 - procedures to receive information from the Executive pre- and post-Council of Ministers meetings
 - procedures to receive annotated agenda of Council meetings accompanied by the Executive's view
 - an elaborate 'sift' system which enables the EERC to identify areas of interest for the subject committees
 - the conduct of inquiries and the instigation of debates on matters of significance to Scotland
 - moreover, as a means of giving 'transparency' effect, all information received from the Executive is placed in the public domain.
- The second main element to the 'Scottish' approach, and one that also follows from the focus on 'transparency' (and is distinctive compared to Westminster), has been the desire to 'open up' processes within the Parliament, and to move to 'mainstream' the scrutiny of Scottish-UK-EU affairs across the subject committees of the Parliament. Increasingly, subject committees are recognising the EU elements of their own work (e.g. in environment and rural development and in justice) – aided in part by the 'sift' system.

Problem Areas

A number of areas remain problematic:

- First, a high level of membership turnover in the EERC has been a problem – and one which is echoed elsewhere in other committees. A high level of 'membership turnover.... prevents committees from developing a collective memory or expertise' and can pose a problem for the development of long-term strategies.
- Second, conducting effective scrutiny is a resource-intensive task, and resources are thin. Again, this is a problem which is echoed in other 'sub-state' assemblies, e.g. for the National Assembly of Wales.

One way around such difficulties is for the Scottish Parliament to engage at the very early stages of the EU policy cycle when there is more time to consider aspects of policy design and to be highly selective in deciding which areas of policy to prioritise in terms of engagement – 'get in early and be selective' is the message.

Conclusion

After almost 6 years of devolution it is clear – perhaps surprisingly so – that the adaptation of domestic UK policy-processes with regard to EU matters has been successfully achieved. For its part, the UK Government has honoured the pledges given in the devolution White Papers to ensure that the devolved administrations were consulted and played a full role in the development of the UK position on EU legislative proposals which impinged on devolved competences.

At both official and ministerial levels within UK Government, machinery has been created and procedures implemented to make inter-governmental consensus-building work reasonably smoothly. This is confirmed in the emergence of the JMC(E) not as dispute-resolution body, but as the primary vehicle for developing UK Governments' position on EU legislative proposals which impinge on devolved matters. However, as we noted earlier, this arrangement may become considerably more problematic should the voters in the UK return different political parties to power in one of the administrations.

The devolved administrations too have adapted well to the new constitutional settlement. Although over a range of policy issues the business of managing EU matters continued as before – albeit under a new set of arrangements embodied in concordats – new capacities had to be created within the Scottish Executive to take account of the new responsibilities both it and the Scottish Parliament had in relation to EU matters, particularly of course in relation to the transposition of EU Directives into Scots law. Beyond that, the Executive did charge specific officials with responsibility for coordinating European and External relations business within the Executive, and the Parliament has made substantial progress in 'mainstreaming' EU issues in other subject committees.

What remains to be determined, however, is the degree to which devolution is generating domestic UK outcomes with respect to EU policy that otherwise would not have occurred and/or which deliver improved outcomes in the context of the different needs and aspirations of the different peoples of the UK.

There are grounds for being optimistic in this regard:

- First, it is indisputably true that where prospective EU legislation touches on devolved matters then the Scottish 'card' has considerably more clout than it did prior to devolution. This is true for many reasons, but the central point is that the Scottish 'card' now carries with it the legitimacy of a Scottish democratic process. Should the views of the devolved administrations simply be ignored in this area, then this could presage a political (and conceivably a constitutional) crisis with the capacity to undermine the UK negotiating position within the EU-level decisional processes.
- Second, the fact that a Scottish scrutiny of EU legislative proposal is undertaken should lessen the risk that Scotland's interests will not be fully represented.

However, it would be wrong not to point to potential weaknesses under the current arrangements. Negotiations between the devolved administrations and UK

Government are undertaken in an essentially non-transparent manner. While this may be justified in certain instances, it does lend succour to claims that Scottish Ministers are failing fully to advance Scotland's interests in the face of Whitehall opposition. Such claims gain at least superficial support from the absence of transparency in the activities of the JMC(E).

That inter-governmental disputes over EU issues have not arisen – at least in public – may well reflect the efficiency with which the post-devolution arrangements are working. At the same time, this absence of disagreement may also indicate a reluctance on the part of the devolved administrations publicly to depart from the national, UK, position lest this lend support to those seeking greater powers for the Scottish Parliament. The full potential of devolution to deliver different policies in different jurisdictions may not really be demonstrated until the current political constellation where Labour is the dominant party in each jurisdiction (except Northern Ireland) is changed.

This Devolution Briefing was written by Caitriona Carter, Drew Scott, Simon Bulmer, Martin Burch, Ricardo Gomez and Patricia Hogwood and draws on the results of our research project 'Asymmetric Devolution and European Policy in the UK' in the ESRC Devolution and Constitutional Change Programme (award no. L219 25 2003).

The Devolution and Constitutional Change Programme was set up by ESRC in 2000 to explore the series of devolution reforms which have established new political institutions in Scotland, Wales, Northern Ireland, London and the other English regions since 1997. It has commissioned 35 projects around the UK to carry out top-class academic research and to contribute to the policy debates surrounding devolution.

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