

# **Regulatory Reform in a Multinational State: The Emergence of Multilevel Regulation in the United Kingdom**

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## **Abstract**

This paper focuses on regulation in the context of devolution to Scotland, Northern Ireland and Wales. It concentrates on regulatory matters falling within the remit of the devolved administrations and their interaction with UK government and regulatory agencies and with EU regulation. It provides:

- An overview of the distinctive regulatory arrangements in Scotland and Northern Ireland and Wales, including matters handled by UK bodies but which fall within the legislative and executive competence of the devolved parliaments or assemblies.
- A discussion of similarity and differences between arrangements for different parts of Britain.
- The interaction between regulatory agencies covering part of Britain and those with related remits covering the whole of the UK (e.g. Competition Commission)
- The relationship between devolved regulatory matters and the regulatory roles of the EU in these policy areas, and the extent to which this restricts or enhances the scope for distinctive national arrangements within the UK.

The overall finding is that the scope for disputes is minimised by the UK government attempting to co-opt the devolved administrations in formulating and presenting UK positions on EU and other international regulatory matters, but that there is some scope for distinctive policies by devolved administrations in the delivery arrangements and in consequential matters such as compensation for regulatory actions.

## **Introduction**

An understanding of how the United Kingdom operates on regulatory matters in an international context will require for many policy issues an understanding of the operation of the United Kingdom as a multinational state internally, following devolution to Scotland, Wales and Northern Ireland in 1999. With less than two years since the devolution arrangements were put in place, there is only a limited amount of practical experience to draw on (particularly given that the key discussions are officially confidential). However, the potential significance of the issues are reflected in the amount of work which has gone in to trying to define procedures for processing issues in a context which is both multinational internally and international externally.

## **Devolution**

### *The administrative inheritance*

An understanding of developments following devolution to elected parliaments and assemblies needs to be based on the administrative arrangements which preceded it. Devolution in 1999 did indeed involve establishing new elected bodies, but there were already administrative structures in place to support the Whitehall territorial departments responsible for Scotland, Wales and Northern Ireland (that is, the departments of the United Kingdom concerned with selected functions in those particular territories.) Indeed, until the suspension of the Northern Ireland Parliament in 1972, there were separate departments of a Northern Ireland government staffed by a separate civil service; this civil service continued to administer those functions under a UK appointed Secretary of State until the resumption of devolution in 1999 (and again during the suspension of the devolved bodies in 2000). Over an extended period, including under the Conservative government 1979-97 there had been an increasing allocation of functions to the Scottish and Welsh Offices, especially the former (see Hogwood, 1996, for a summary of the developments in the 1980s and early 1990s). With the exception of law and order matters in Northern Ireland, it was the existing administrative functions of the territorial departments which came under the new elected bodies. Thus, while some reorganisation and adjustment to a new set of elected actors was necessary, the administrative infrastructure was already in place, and was staffed by civil servants who were already experienced in

dealing with other Whitehall departments in arriving at a position on regulatory and other matters with an international dimension.

Thus, there were already four ministries dealing with agriculture in the UK, and for many domestic policy areas other Whitehall departments were largely dealing with the implementation of policy in England rather than the UK (or Great Britain) as a whole.

### *Variations in capacity*

Devolution has so far been only in the smaller parts of the UK: Scotland, Wales and Northern Ireland (the Greater London Authority is here regarded as a local government body rather than a comparable devolved one). Thus there is no devolution to England as such. However, as a consequence of devolution to the other countries, many Whitehall departments are engaged in the delivery of policy in England only for all or part of their functions, even though for international purposes they are likely to act as the 'lead' UK department.

The nature of devolution also varies between the different countries. For Scotland and Northern Ireland, the Parliament or Assembly have primary legislative powers. That is they can pass legislation similar in status to Acts of the United Kingdom Parliament, save only that the UK Parliament can in principle pass any law for any part of the United Kingdom, though would normally refrain from doing so on devolved matters for the relevant countries unless asked to do so. The Welsh Assembly has only secondary legislative powers, but since this is the mechanism by which many EU regulatory requirements are met.

Another difference is that in Scotland and Northern Ireland there is a separation between the legislature and the executive, with each having statutorily defined roles and relationships with each other. The civil servants in each case are responsible directly to the executive, and not to the legislatures. In Wales, there is no such separation; civil servants are officers of the Assembly and the Welsh Cabinet is technically a committee of the Assembly. Although this has not yet had direct bearing on regulatory policy, it could potentially do so, since the arrangements outlined below are very much on the basis of executive to executive deals, without allowance for intrusion by mere legislatures.

### *Variations in policy coverage*

There are variations in policy coverage among the devolved bodies, reflecting the prior pattern of administrative devolution. In general, Northern Ireland has the widest range of policy areas, including social security and aspects of utility regulation, with the notable exception of law and order policy (including the police, courts and prison system). Scotland covers the full range of law and order functions, and continues to have an entirely different legal system (i.e. not simply as separate set of institutions). Wales has the narrowest remit, with some functions continuing to be administered on an England and Wales basis.

### *Variations in policy significance*

The significance of policy areas obviously varies in different parts of the UK, and this is likely to affect the extent to which devolved administrations will wish to have an active role in pushing their interests as part of a UK position and/or maintaining maximum flexibility on offering their own policy design. For example, fisheries is relatively much more significant to Scotland than to England than population differences would imply. All three parts of the UK with devolved arrangements have a disproportionate interest in targeted regional policy and associated inward investment policy.

### *The importance of finance*

The devolution legislation confers on the devolved bodies varying degrees of legal authority to develop distinctive policies. However, actual ability to engage in an activity will depend on the resources available to finance it. Funding is largely provided through a block grant from the UK Treasury. The size of this block grant is calculated on the basis of the previous size of the grant plus a marginal change which reflects changes in relevant policy applying to *England*, distributed on the basis of population size (which is now regularly recalculated). Because Scotland's past block grant was larger than its population size and its population is declining relative to England, this implies that funding for devolved Scottish functions will grow more slowly in total than that for England. Clearly this provides an indirect constraint on the Scottish Executive seeking to expand regulatory activity. The Scottish Parliament (but not the Welsh Assembly) does have the formal power to vary the income tax by 3p in the £ in either direction but an increase was ruled out for the first Parliament by the Labour party. In this

fiscal context the scope for an expansionary regulatory policy is limited unless the costs can be transferred to the regulatees.

*Acting as agent of other level is mutual not just downward*

One interesting feature of the devolved arrangements compared to, say, Germany, is that we are not talking about an ‘implementation devolution’, with the UK level setting out the framework for the devolved administrations to deliver policies. There are indeed examples where bodies covered by devolution carry out functions on behalf of the UK level (through agency agreements), but as we will see from the case studies there are plenty of cases where regulatory functions which fall within the remit of the devolved bodies are actually carried out on their behalf by bodies covering Great Britain or the whole of the United Kingdom.

*Reserved functions, especially EU and International Relations*

The devolution arrangements in the Scotland and Wales Acts operate on the basis of certain powers being reserved to the United Kingdom Parliament and Government, with remaining policy functions being devolved. At first sight this seems a much simpler and more flexible arrangements than the original (non-implemented) Scotland and Wales Acts of the 1970s. However, crucial to the focus of this paper is that relations with the EU and other types of international relations are reserved matters. Since there are few areas of devolved functions concerned with regulation which are not actually or potentially the subject of EU and other international commitments, this means that on many policy issues there is not a simple separation of levels, but a degree of mutual dependence. Because EU and international relations are reserved matters, the devolved administrations are dependent on the UK government for access to the formal mechanisms for involvement in policy formulation and implementation arrangements. The UK in turn is to some extent dependent on the devolved administrations for information about special characteristics of those parts of the UK (which occupy a much larger land area than their population share of the UK).

This is fully recognised in the formal powers set out in the devolution legislation. The Secretaries of State (who are members of the UK government) may overrule certain activities of the devolved administrations if they are deemed to conflict with the UK’s EU or international obligations. The Judicial Committee of the Privy Council (in effect though not in name the Constitutional Court) could rule on any conflicting interpretation. The

UK Parliament retains the right to pass any legislation on any matter, and potentially could overrule legislation passed by the Scottish Parliament or the Northern Ireland Assembly. Processing differences of emphasis and interpretation through these purely formal would guarantee friction and overload these mechanisms, so as will be shown below, there are elaborate non-statutory mechanisms for linking the devolved administrations into the process of UK involvement in the development of policy on regulatory and other matters in the EU and other international forums.

### **The party political context**

Laws specify the formal relationships between governments. Politics shapes the content of the relationship. It is impossible to understand the establishment of the framework and operation of the arrangements for intergovernmental policy negotiation on regulatory matters without touching on the party political dimension and the possibly contingent nature of the early relationship following devolution. The model which Labour had in mind was that there would be a smooth handover from the UK Secretary of State in Scotland and in Wales to the new First Minister (Scotland) and First Secretary (Wales), who would just happen to be exactly the same people as the previous Secretaries of State, and would be generally supportive of the New Labour policy agenda. This was, of course, contingent on the assumption that Labour would be the dominant party in each country. In Scotland, this handover initially worked relatively smoothly, with Donald Dewar handing over responsibility to himself, though the proportional representation (Additional Member System) ensured that to obtain a majority he had to form a coalition with the much smaller Liberal Democrats. Following Dewar's death, Henry McLeish became First Minister, and indications are that he may view the role as less of a handing on the baton one, though no specific points on regulatory matters have emerged as ones in which he is interested. The politics is still one of a Labour-dominated coalition negotiating with a Labour UK government. The politics of the relationship could change if there were a Conservative UK government or if a Labour UK government had to negotiate with, say, a minority Scottish National Party government or a minority Labour-Liberal Democrat coalition.

In Wales the transition was less smooth, for sometimes farcical reasons. Prior to devolution, the Secretary of State for Wales had to resign from the UK government as a result of personal indiscretion - 'a moment of madness on Clapham Common'. The Labour Party then appointed Alun

Michael as Secretary of State for Wales, and the favoured leader in the new Welsh Assembly. The internal Labour system for choosing the First Secretary nominate duly delivered that result, though at the expense of considerable internal resentment within the Labour Party and a possible contribution to Labour not winning an outright majority in the Welsh Assembly elections. Labour formed a minority administration, which was defeated on a motion of confidence in 2000. Alun Michael resigned, and was replaced by Rhodri Morgan, the alternative candidate whom London-based Labour had wanted to keep out of office. Rhodri Morgan formed a coalition administration with the Liberal Democrats, securing an overall majority in the Assembly. This change has not resulted in any friction on regulatory matters, but the head of the administration in Wales does not owe his position to the leader of the British Labour Party, but has his own local power base.

Northern Ireland is completely different. None of the parties in the Northern Ireland Assembly operate on a UK basis. The Executive has only been in operation for two periods of a few months each (separated by suspension of the arrangements for part of 2000). The devolution legislation in Northern Ireland requires that even if a coalition could command a majority in the Assembly in may not form the Executive, which has to include all substantial parties, however opposed on the issue of very existence of Northern Ireland within the UK. The civil servants, regardless of whether they are reporting to a UK appointed Secretary of State or a Northern Ireland Executive minister of whatever party, have continued to engage in discussion with their Whitehall (and Edinburgh and Cardiff) counterparts. The party dimension would be most likely to make a difference in bargaining about regulatory matters if after a future election a Northern Ireland party or parties held the balance of power in the UK Parliament (as in the late 1970s).

Regulatory matters in an international context are not the stuff of party political debate in the context of devolution, other than when particular issues arise. However, the smooth operation of the arrangements set out below is dependent on a favourable party background to cooperation between the devolved administrations and the UK government.

### **The Concordats**

An earlier section outlined the formal allocation of functions and mechanisms for overruling or resolving disputes over regulatory matters with an EU or international context. However, the intention was always to

develop a set of more informal structures which would minimise the need to resort to the formal ones. This was achieved at a general level by a Memorandum of Understanding between the UK government and the Scottish Executive and Cabinet of the Welsh Assembly in October 1999, later also including the Northern Ireland Executive and issued in revised form in July 2000 as a White Paper (Cm 4806, 2000). Part of the Memorandum dealt with the operation of a Joint Ministerial Committee, and the remained with a series of 'Concordats' between the UK government and the devolved executives covering European Union policy issues, financial assistance to industry, international relations, and statistics.

It is important to stress the executive nature of the Concordats – the Parliaments and assemblies were not consulted during their drafting, nor were they required to be ratified by them. Their operation depends on the unstated assumption that the executives will take decisions and will carry their assemblies with them, if those assemblies choose to comment on such matters at all. The Concordats are not legally binding, but are 'in honour only'. They contain a mixture of agreements about who will carry out which tasks, and the procedures to be used in arriving at agreed positions and implementing decisions, including those involved in implementing EU and other international obligations.

The original intention was to have the Concordats in place when the elected Parliaments and assemblies started operation, but this was not achieved, and the main Concordats were issued in a series of 'waves' from 1999. In addition to the Concordats set out in the Memorandum of Understanding, there were Concordats ranging from those between the UK Cabinet Office and the devolved executives to highly detailed ones involving the UK Department of the Environment Transport and the Regions and the devolved executives, and the Ministry of Agriculture, Fisheries and Food (MAFF) and the devolved administrations. The latter is also accompanied by often highly detailed Specific Concordats, which are still in the process of being prepared and issued.

Although there is a separate Concordat on EU matters, the individual departmental Concordats, most obviously on agriculture matters, are permeated by references to EU-related issues. Thus the mechanisms for internal relations on policy issues within the UK and those relating to EU and other external matters are not separate mechanisms but part of the same set of processes.

The Concordats lay great stress on the confidentiality necessary in preparing a common position on EU and other international matters. This includes not discussing detailed positions with the elected assemblies. In

return for confidentiality, both civil servants and ministers from the devolved executives will be involved not only in preparatory discussions on taking a UK position but may be included in the UK delegations to EU meetings.

Although the Concordats stress that EU and international matters are reserved to the UK government, it is notable that they provide that the cost of any penalty resulting from an action taken by a devolved executive or assembly will be borne from the relevant devolved budget, not from the central UK budget.

### **The Joint Ministerial Committees and Dispute Resolution**

The Memorandum of Understanding provided for a Joint Ministerial Committee of ministers from the UK government and the devolved administrations to liaise and consider disputes. It meets in plenary session at least once a year. The only communique issued to date, after a meeting on 1 September 2000, was a largely self-congratulatory review of the first year of devolution. More substantial work takes place in the four ministerial subcommittees on Health, Poverty, the Knowledge Economy and the European Union, and 'a number of sub-committees of officials (see [www.cabinet-office.gov.uk/constitution/devolution/JMC/jmc.htm](http://www.cabinet-office.gov.uk/constitution/devolution/JMC/jmc.htm)). In addition, there are 'less formal meetings of ministers' to discuss issues of common interest and concern, for example on agriculture, housing and the environment ([www.cabinet-office.gov.uk/constitution/devolution/JMC/jmccomm.htm](http://www.cabinet-office.gov.uk/constitution/devolution/JMC/jmccomm.htm)).

The JMC has no constitutional status and can only reach agreements, not decisions, and it is accepted that there may be circumstances where a dispute could only be resolved through legal means, such as reference to the Judicial Committee of the Privy Council. The whole thrust of the arrangements, though, is to co-opt the devolved administrations into preparation for decisions to prevent matters becoming disputes, and to provide multiple informal level for dispute resolution (such as mediation by the territorial Secretaries of State, before the matter would have to come to a Joint Ministerial Committee or The Judicial Committee of the Privy Council, let alone involve bodies outside the UK, such as EU institutions.

## Case Studies

The operation of devolved administrations on regulatory matters can be illustrated by a series of case studies. These are not intended as fully generalisable, but rather are thumbnail illustrations of the significance of territorial devolution and the scope for choice available.

### *Regulation of utilities vs Competition Policy*

Regulation of utilities is clearly an area of interest to the EU and to bodies at various levels within the UK. There is a territorial dimension to these issues. For example, former public water authorities in England and Wales have been privatised and are subject to a regulatory regime covering those areas, whereas those functions remain under public bodies (soon to be merged) in Scotland, which have a separate oversight body. Electricity and gas regulation come under separate regulators for Great Britain and for Northern Ireland. Utility regulation clearly potentially overlaps with general competition policy, which still remains a UK-wide function. The definitive judgement on whether utility regulators or the general competition authority had the final word was based on a judgement in relation not to the much larger GB regulatory system but to the Northern Ireland electricity and gas regulator in a court case in October 1998 (*The Times*, 31 October 1998). This clarified the issue of whether a utility regulator had to accept the recommendations of the general competition authority (formerly the Monopolies and Mergers Commission, now the Competition Commission) when it had been asked to adjudicate in a dispute between the regulator and the regulatee (in this case Northern Ireland Electricity). Although this case preceded the (renewal) of legislative devolution it illustrates both a territorial dimension within the UK which overlaps a UK function and the role of the courts in making rulings between bodies with differing territorial jurisdictions.

### *Fisheries policy*

As noted earlier, fisheries policy is of disproportionate significance to Scotland, and its political sensitivity is reflected in the fact that it was the cause of the first defeat of the Scottish Executive in the Scottish Parliament on 8 March 2001. This followed the imposition of new severe fishing quotas following the EU Fisheries Council in December 2001 (see SPICe, 2000, for a background paper on the issues). The procedure for allocating fishing quotas within the UK (but not the substantive basis of allocation) is set out

in a Specific Concordat on Fisheries, which also covers a range of other matters, including procedures for consulting the fishing industry prior to EU Fisheries Council Meetings and the enforcement of quotas. The issue which led to the defeat in the Scottish Parliament concerned a compensation package for fishermen. This package was one developed separately by the Scottish Executive, not on a UK basis. Because the defeat was not on a legislative vote, it was not accepted by the Scottish Executive, though it adjusted the details and effectively the timing of compensation within the overall ceiling. There have been calls in England for similar compensation, but this is an example where any similarity would be arrived at by convergence by political emulation rather than by a requirement to adopt a standard UK compensation package.

There is also a distinctive Scottish system of enforcement and fisheries protection more generally. Off English and Welsh waters fisheries protection is enforced by the Royal Navy on behalf of MAFF. Scotland, however, has its own Fisheries Protection Agency to carry out enforcement activities.

Thus, while the devolved executives can only affect EU policy on matters such as quotas through negotiation with each other and MAFF and also have to deal with the internal allocation of the UK quotas on a multilateral basis, there is some scope for distinctive policies on compensation and the actual means used for enforcement.

### *Food Safety*

Food Safety is a particularly interesting case in the context of regulatory reform, since this is a policy area undergoing major reform coming into effect once the elected devolved bodies had been established. It would have been open to the devolved bodies to have established their own new institutional arrangements for food safety. Furthermore, this is a policy area where some territorial differences might be expected. Scotland had felt particularly unfairly hit by the beef export ban following BSE because of the way it applied to disease free beef herds. One of the major incidents getting the issue of food safety on the agenda was an outbreak of e-coli food poisoning in Scotland which led to several deaths. However, the Scottish devolved bodies chose not to pass their own separate legislation but instead invited the UK parliament to pass legislation establishing a Food Standards Agency throughout the UK from 1 April 2000 (see [www.foodstandards.gov.uk/](http://www.foodstandards.gov.uk/)). Within the Agency there are sections labelled Food Safety Agency Scotland, etc, with separate advisory committees for the three devolved areas.

The work of the agency includes EU regulation issues. Accordingly, even if any of the devolved administrations had wished to establish separate structures, mechanisms for relating these to UK positions on EU matters would have been required. However, in the early days of their operation they chose not to develop distinctive arrangements but to operate in a UK-wide context.

### *Animal Disease: Foot and Mouth*

The outbreak of Foot and Mouth disease in the UK in early 2001 provides an interesting illustration of how the devolved, UK and EU levels interact. As noted earlier, agricultural matters are devolved but EU matters are not, and there are few agricultural matters that EU regulation does not touch on. There is a separate Concordat between the Ministry for Agriculture, Fisheries and Food (the England/UK ministry) and the Scottish Executive on the State Veterinary Service (SV) and Animal Disease Compensation.

Although Agricultural matters are devolved, there is not a separate Scottish Veterinary Service, but a common one for Great Britain. The justification for this is put in the first paragraph of the concordat:

‘There is unimpeded movement of animals and products within and between England, Scotland and Wales. All areas are equally at risk from rapidly spreading epidemic diseases and must be regarded as a single disease control unit.’ This anticipated the spread of foot and mouth, which rapidly spread from England to Scotland and Wales (and thereafter to Northern Ireland and other EU countries).

The Concordat states that the implementation of animal health and welfare legislation throughout Great Britain will be carried out by the SVS. If the Scottish Executive were to bring forward non-EC based legislation or legislation which went beyond EC requirements on animal health or welfare, any additional cost would be borne by the Scottish Executive.

By early April 2001 the UK government had altered its position from that at the beginning of the outbreak. Originally it had been in favour of a slaughter only policy with no use of vaccination, citing EU regulations. However, it obtained clearance from the EU to use vaccination if it so chose, but had not actually decided to put vaccination into effect. However, on 3 April 2001 the Scottish Rural Affairs Minister, Ross Finnie (who happened to be a member of the minority coalition party, the Liberal Democrats, rather than of Labour), stated that the Scottish Executive was opposed to vaccination and wanted an undertaking that if a vaccination programme was adopted in England there would be a six-mile vaccination exclusion zone at the border between England and Scotland so that Scottish animals would not

be hit by an EU ban on exporting for a year following a vaccination programme (*The Times*, 4 April 2001). This illustrates both that there is potential scope for important differences in responding to a common EU framework of regulation, but that where a phenomenon to be regulated does not respect borders there may be practical difficulties in unilaterally developing different policy responses.

## **Conclusions**

With less than two years of operation, it is impossible to be definitive about the long-term implications of devolution for intra-UK variations in regulatory policy or for the formulation of a UK position. We are clearly in a transitional phase based on:

- The inertial effects of civil servants in the devolved administrations continuing to work with their ‘opposite’ (but not opposing) numbers in the Whitehall departments. The introduction of devolution in Scotland and Wales has meant reporting to new elected bodies, but via ministers who in the initial months were sometimes the same ministers to whom those civil servants reported prior to devolution.
- The political dimension, where the devolved executives in Scotland and Wales have as the dominant party in their coalitions the same party as holds power in Westminster.

The potential scope for variation in regulatory processes and outcomes and for the actions of the devolved administrations providing a challenge to EU regulatory arrangements other than one supported by the Westminster government has been limited by the voluntary co-optation of the devolved administrations through the Concordats. In return for promises of full information and possible participation in the ‘UK’ presentation to the EU, the devolved administrations have agreed to engage in confidential negotiations with the Whitehall ‘lead’ departments in preparation for submissions to EU institutions and for mutual exchange of information about planned implementation of agreed commitments and any challenges to them. As a consequence, there has as yet been no need to invoke judicial arrangements internal to the UK to resolve disputes about the impact of international regulatory obligations.

These agreements, which are between the executives rather than the elected assemblies, have no legal status, and are revocable by any new administration. Such a revocation, however, potentially leads to an exclusion of timely information to influence positions before international bodies. It is

therefore most likely to appeal to an administration which was more concerned to use disputes about regulatory matters for broader political purposes than one which was concerned with a specific dispute on a particular regulatory decision.

The devolved arrangements would appear to allow for greater scope for creative fulfilment of internationally regulatory arrangements than negative ones. In other words the devolved administrations have more scope for variations in enthusiasm than in dragging their feet.

Devolution has also provided some scope for potential differences in choosing how to react to the regulatory framework in which the departments responsible for different parts of the UK have to operate. The suggestion that Scotland might pursue a different policy on vaccination of animals for foot and mouth from the UK (with both policies being in conformity with EU requirements) is an interesting ‘straw in the wind’, even if no actual difference in applied policy eventually emerges.

Devolution has clearly increased the scope for variations in consequential policy in conforming to international regulatory decisions. The compensation package to fishermen in Scotland was independently formulated within Scotland and modified as a result of internal Scottish not UK pressures. Those who see themselves as potentially benefiting from a more favourable arrangement elsewhere in the UK will, of course use this as in argument for improving their own compensation, but this is a political rather than a regulatory pressure to conformity (in this case to the most favourable compensation), rather than a regulatory requirement.

The willingness of the devolved administrations to be co-opted, in present political circumstances at least, has inevitably limited the extent to which overt political conflict over regulatory matters with an international dimension has occurred. This does not preclude internalised thrashing out of issues – it merely makes them more difficult to study.

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Concordat between the Ministry of Agriculture, Fisheries and Food (MAFF) and the Scottish Executive (SE) in respect of the State Veterinary Service (SVS) and Animal Disease Compensation.