



Law Society  
of Scotland

# European Union (Withdrawal) Bill Clause 11 – Retaining EU Restrictions in Devolved Legislation

Briefing by the Law Society of Scotland

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## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee has the following comments to make on clause 11 of the EU (Withdrawal) bill.

## General Comments on Clause 11

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Clause 11 amends the legislative competence provisions in section 29 of the Scotland Act 1998 by deleting the provision of section 29(2) (d) which provides that the Scottish Parliament has no competence to legislate incompatibly with EU law by deleting "with EU law" and substituting "a breach of the restriction in subsection (4A)". Subsection (4A) is provided for in clause 11(1) (b) which inserts the following into section 29 of the Scotland Act 1998:

*(4A) Subject to subsections 4(B) and 4(C) an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law.*

*(4B) Subsection (4A) does not apply so far as the modification would, immediately before exit day, have been within the legislative competence of the Scottish Parliament.*

*(4C) Subsection (4A) also does not apply so far as Her Majesty may by Order in Council provide.*

Similar provisions are made for the National Assembly for Wales (clause 11(2)) and the Northern Assembly (clause 11(3)).

Clause 11 also imports parts 1 and 2 of schedule 3 making corresponding provisions in respect of executive competence and other amendments to devolution legislation. The explanatory notes state that "The amendments will replace the former requirement with the provision which means that it is outside the competence of the Scottish Parliament to modify retained law in a way which would not have been compatible with EU law immediately before exit. This legislative competence test is subject to any exceptions which may be prescribed by an order in Council (paragraph 130)".

These ‘exceptions’ will introduce conferred powers into the structure of devolution in Scotland. This risks adding additional complexity in ascertaining what exactly the law in Scotland is.

At present, section 29(2)(b) of the Scotland Act 1998 provides that a provision in an Act of Scottish Parliament (ASP) is “not law” if it is incompatible with EU law. Clause 11 does not simply replace the reference to EU law with a reference to retained EU law so that the Scottish Parliament would be required to legislate in conformity with retained EU law. What it does is to remove the current constraint on the Parliament’s competence to legislate in conformity with EU law and to prohibit the Scottish Parliament from modifying or conferring power by delegated legislation to modify retained EU law.

In our view, both repealing the requirement to legislate compatibly with EU law and legislating to prevent the Scottish Parliament from modifying that law are significant changes to the competence of the Parliament. Such changes in our view engage the legislative consent (or Sewel) convention.

Also it is not clear what the ASPs are to which this new provision will apply. It appears that it is not intended to be retrospective and that it will only apply to post exit ASPs but what is a post exit ASP? Arguably it is an ASP which is enacted on and after exit day which, subject to Parliamentary approval, will be 29 March 2019. But this would mean that the bill for such an ASP would require to comply with this restriction. This would apply even if it had been introduced months before exit day, and before the EU (Withdrawal) bill has been enacted, and even if it may have been passed by the Scottish Parliament before exit day. There is an argument that such legislation might be regarded as having retrospective effect. It should be made clear in the bill which ASPs are affected by clause 11.

Schedule 8 paragraph 29 provides that the amendments made by section 11 and by Part 1 of Schedule 3 (which apply the same legislation to Scottish Ministers) do not affect the validity of:

- (a) any provision of an Act of the Scottish Parliament made and in force before exit day or;
- (b) any subordinate legislation made, confirmed or approved and in force before exit day.

But paragraph 3 of Schedule 1 would not appear to allow any challenge to be made on and after exit day, or allow any court or tribunal or other public authority to quash any ASP, on the grounds that it does not comply with the general principles of EU law. Schedule 8 paragraph 29(2) which provides that the validity of anything falling within paragraph 1(a) or (b) is to be decided by reference to the law before exit day. The effect of the proposed section 29(4A) is to remove from the Scottish Parliament’s legislative competence any matter in retained EU law even although that matter, as such, would not have fallen within a reserved matter under schedule 5 of the Scotland Act 1998 e.g. agriculture, fisheries, environmental protection and the other areas contained in the list of 111 policy areas where EU law “intersects” with devolution referred to later in this paper.

There are a number of alternative options in addition to the one in the bill for dealing with the complexities of retained EU law and the competence of the devolved jurisdictions. This is an area of political debate and we offer these options for consideration without endorsing any particular one:

- (a) Adopt the provisions in the bill on a transitional basis only and subject to a specific cut-off date. At the expiry of the transitional period, powers in devolved areas would revert to the devolved legislatures, unless specific alternatives had been put in place. This would allow the UK Government the opportunity to work out what has to be done in light of the UK's future relationship with the EU, but acknowledge that the devolved legislatures will obtain the additional powers within a defined timescale.
- (b) Repeal the EU law constraint leaving EU competences to fall as determined by schedule 5, and any new common frameworks to be established by agreement between the UK Government and the devolved administrations.
- (c) Replace the cross-cutting EU constraint with new cross-cutting constraints, for example to protect the UK single market and/or to comply with international obligations. These might be more or less extensive than the EU law constraint in practice, but would have the benefit of (a) an underpinning principle and (b) catering for unforeseen cases.
- (d) Repeal the EU law constraint and amend schedule 5 to re-reserve specific competences to the UK level to enable UK Government to establish common frameworks.

### The Sewel Convention

The Sewel convention was named after Lord Sewel, then a Scottish Office Minister of State in response to a proposed amendment to the Scotland bill 1998 moved by Lord Mackay of Drumadoon - a former Lord Advocate.

Lord Sewel in responding to debate said

*“we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament”* (Lords Hansard 21 July 1998, vol 592 col 791).

Devolution Guidance Note 10 (DGN10) notes that the House of Commons Procedure Committee has indicated its support for the convention.

DGN10 provides that where a bill

“any submission to the legislative Programme Committee for the inclusion of a Bill in a future programme should state clearly that the proposed Bill:

“contains provisions applying to Scotland and which are for devolved purposes, or which after the legislative competence of the Parliament or the executive competence of the Scottish Ministers”.

that bill is affected by the convention and thereafter requires the consent of the Scottish Parliament”. Although a bill may be directed at reserved matters it could contain some provisions in this category.

The convention has been placed on a statutory footing in the Scotland Act 1998 section 28(8). Under section 2 of the Scotland Act 2016 however only the exact phraseology used by Lord Sewel has been stated in the bill rather than the interpretation as provided by DGN10.

Furthermore as we know from *Miller and Dos Santos v Secretary of State for Exiting the European Union* [2017] UKSC 5, the convention is not considered to be justiciable but is instead a political matter.

We consider that the Bill provisions will alter the competence of the Scottish Parliament and would therefore trigger the Sewel convention. We also note that, although the Scottish Government considers that the Bill would normally require the consent of the Scottish Parliament, they do not intend to lodge a legislative consent motion.

Whilst there may be other views, in our view the Bill provisions will also increase the complexity and uncertainty as to what is within the competence of the Scottish Parliament because it will be necessary to determine, in each case, what is meant by EU retained law and what matters would have been within that competence before the exit day. As we have explained above it is uncertain what the bills and the ASPs are to which new provisions will apply and whether the provisions might be regarded as retrospective; and it is uncertain whether, or to what extent, any ASP which infringes the provisions in the Bill be invalid.

The method chosen in the Bill has been the focus for political contentions between the UK and Scottish Governments. We have indicated before that withdrawal from the EU should be completed on a Whole of Governance basis with the UK Government and the devolved administrations acting in concert to ensure that the legislative structure post withdrawal is effective and functional.

Under the Sewel Convention, the UK Parliament will not normally pass bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a legislative consent motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee, in the case of the European Union (Withdrawal) bill by the Finance and Constitution Committee on the basis of a memorandum. The motion must normally be decided on before the bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced. On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

The absence of the consent of the Scottish Parliament does not prevent the UK Parliament from passing the Bill. The consequences of not obtaining consent would be political in nature rather than legal.

### **Clause 11 and Powers of the Scottish Parliament**

A question arises as to whether EU law which is repatriated at the point of the UK's leaving the EU falls into the reserved, devolved, protected or shared competence and what mechanisms if any should be applied to properly transition EU law in devolved areas to the respective legislatures and executive arrangements throughout the UK.

The Scottish Government's White Paper *Scotland's Place in Europe* identified the following areas currently under EU competence which are not specifically reserved under the Scotland Act 1998.

- (a) Agriculture, food and drink, in areas covered by the EU Common Agricultural Policy and EU law on food and drink, animal health and welfare, plant health, seeds, potatoes, pesticides and genetically modified organisms.
- (b) Fisheries, aquaculture and the marine environment, which are subject to the EU Common Fisheries Policy and marine environment and planning laws
- (c) Environmental protection, including laws on pollution, waste and recycling.
- (d) Civil law.
- (e) Criminal law and law enforcement.
- (f) Health, where for example protections afforded under the European Health Insurance Card scheme are at risk.
- (g) Higher education and research, where Scotland has benefited from EU mechanisms for collaboration and funding.

In a letter dated 17 September 2017 from Michael Russell MSP, the Scottish Government Minister for UK negotiations on Scotland's place in Europe to Bruce Crawford MSP, Convener provided a list of 111 powers returning from the EU that intersect with the devolution settlement in Scotland.

Some of these powers (where there is for example some aspect of reciprocity) may be dealt with in the context of the withdrawal agreement between the UK and the EU such as civil law and criminal law enforcement, but others will be effectively repatriated at the point of leaving the EU. The Prime Minister has stressed that "no decisions currently taken by the devolved administrations will be removed from them", but that devolution of repatriated powers would need to be managed in such a way as to ensure no new barriers within the UK are created.

The UK Government's Brexit White Paper indicates that "As the powers to make these rules are repatriated to the UK from the EU we have the opportunity to determine the level best placed to make new laws and policies on these issues..."

What powers are devolved as a result of leaving the EU is a matter of political negotiation between the UK Government and the devolved administrations taking into account legal and stakeholder views.

We note the JMC(EN) communique <https://beta.gov.scot/publications/joint-ministerial-committee-communique-october-2017/> which indicated that the UK and Scottish Governments had reached agreement regarding the creation of frameworks for the discussion of a number of areas at the intersection of EU and devolved powers. This type of political agreement enhanced by the inclusion of knowledgeable

stakeholders could lead to an approach to the withdrawal which achieves certainty in the law and an effective legal structure for all the jurisdictions in the UK.

There are a number of past and current arrangements which could advise the UK Government and the devolved administrations on how to achieve the distribution of powers in the most efficient and effective way. For example:

- (a) The Standing Advisory Committee on Industrial Property which brought together industry, technical advisers and interested parties to advise Government on industrial property issues.
- (b) The Farm Animal Genetic Resources Committee which gives advice to the government on the conservation and sustainable use of farm animal genetic resources.

In coming to a decision concerning the distribution of powers the frameworks should reflect the principles of devolution and of subsidiarity, proportionality, legality, transparency and clarity. It will be necessary for the agreement between the Governments to take place within a reasonable timescale (amendments which the Society promoted suggested a two year period) and for there to be good cooperation between the UK Government and the Devolved Administrations and broad consultation with stakeholders. We suggest the agreement be formalised in a Memorandum of Understanding between the UK Government and the Devolved Administrations.

This is essentially a political issue however the UK ought to take into account the views of all devolved administrations. For Scotland, there are particular issues about our legal system, constitutional arrangements such as legislative competency and how EU laws are dealt with once they are repatriated.

The publication of the JMC(EN) communique indicates that progress in practical issues to ensure that the law and legal system and areas affected by EU law continue to work effectively in the post-withdrawal period. The discussions need to be carried out in the best interests of the people who live in the UK irrespective of which jurisdiction they are in and should be subject to proper parliamentary accountability in each legislature.



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