



Law Society
of Scotland

European Union (Withdrawal) Bill

House of Lords Committee

Clause 11 – Retaining EU Restrictions in Devolved Legislation

The Law Society of Scotland's Briefing

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Introduction

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. We comment firstly on clause 11 as it currently stands in the bill. Our comments on the Government's amendments begin on page 9 of this briefing.

General Comments on Clause 11

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. 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.

Clause 11 has been the subject of considerable criticism from Parliamentary Committees in the UK Parliament and the Scottish Parliament. We draw attention to:

1. The report of the Public Administration and Constitution Committee of the House of Commons, Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration.
2. The report of the Finance and Constitution Committee of the Scottish Parliament European Union (Withdrawal) bill LCM -interim report.
3. The reports of the House of Lords Constitution Committee on the European Union (Withdrawal) bill.

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 "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’s current 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’s current 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.

EU Law and its intersection with devolved matters

The UK's withdrawal from the EU raises the question as to whether EU law which is repatriated at Withdrawal 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 provisions of Clause 11 and the list of powers returning from the EU that intersect with devolution have also been the subject of discussion between the UK Government and the devolved administrations in the Joint Ministerial Committee (EU negotiations) (JMCEN). The provisions have also been examined by the Public Administration and Constitution Committee of the House of Commons, the Constitution Committee of the House of Lords and the Finance and Constitution Committee of the Scottish Parliament.

The JMCEN which met on 16 October 2017 issued a communiqué on *Common Frameworks: Definition and Principles* as follows:

1. Common frameworks will be established where they are necessary in order to:
 - enable the functioning of the UK internal market, while acknowledging policy divergence
 - ensure compliance with international obligations
 - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties; enable the management of common resources
 - administer and provide access to justice in cases with a cross-border element and safeguard the security of the UK
2. Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:
 - be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent
 - maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules
 - lead to a significant increase in decision-making powers for the devolved administrations
3. Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.

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 has promoted suggest a two year period) and for there to be good cooperation between the UK Government and the Devolved Administrations and broad consultation with stakeholders.

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.

Recent developments in the negotiations between the UK and Scottish Governments indicate that the specific areas of contention concerning the intersection of EU and devolved matters have narrowed but that the Governments are still at some distance from an agreement.

The Cabinet Office published a list of 111 points where EU Law intersects with devolved matters in late 2017. This has been supplemented by the publication of the UK Government's *Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* on 9 March 2018. The Government's analysis focuses on the EU legislation which applies in the devolved areas.

The UK Government have concluded that there are:

- (a) 49 policy areas where no further action is required;
- (b) 82 policy areas where non-legislative frameworks may be required;
- (c) 24 policy areas which are subject to more detailed discussions to explore whether legislative common frameworks might be needed in whole or in part and
- (d) 12 policy areas which the Government believe are reserved.

In order to add further information to the debate, we offer a survey of the powers in the list <https://www.lawscot.org.uk/media/359818/ministers-111-paper-final-12-mar.pdf>, which includes details of the implementing legislation for Scotland and, where appropriate, for the UK (occasionally on a GB basis) and for England and Wales. The survey seeks to order the intersection powers into sectoral points to match Scottish ministerial portfolios. It then analyses each point by setting out the EU law applicable to the policy and any UK law which applies. Finally, it describes the Scottish law which applies in the policy area and which implements the EU Law within the Scottish jurisdiction.

There are a number of observations to make arising from our survey:

- The areas highlighted are important, complex and frequently very technical. They comprise highly Regulated areas of policy implemented by EU Directives, Regulations and Decisions and transposed by UK Acts and subordinate legislation, Scottish Acts and Scottish subordinate legislation; as well as a number of administrative, non-statutory arrangements.
- Scottish Ministers acting under the European Communities Act 1972 have made subordinate legislation in most of the areas which has been approved by the Scottish Parliament.
- UK Ministers have also made subordinate legislation with the consent of Scottish Ministers in areas which have been subject to a Transfer of Powers Order. These have tended to be in areas of policy where there is a clear interest in a pan-UK legal structure, e.g. organic products or greenhouse gas emissions.
- As would be expected, when implementing EU law there are a number of occasions where parallel regulations have been passed by each legislature in exactly the same terms.
- There are also occasions where guidance or other administrative arrangements have been issued by the Scottish Government following consultation with the UK Department e.g. the Animal Health and Welfare Framework.
- There are a number of areas where there is no need for legislation but for greater cooperation, e.g. in criminal justice matters where the role of the Lord Advocate needs to be taken into account. One or two areas are presumptive, such as the material on the Data Protection Bill or where a Directive will be implemented in the near future.

Clause 11 Government Amendments

The proposed amendments 302A, 310A, 310B, 312A, 312B, 312C (to Clause 11), 319A, 320A, 322A, 323A, 326A, 326B, 326C, 330A, 330B, 332A (to Schedule 3), 355ZA, 355ZB, 355ZC, 357ZB (to Clause 19) 363A, 371A (to Schedule 8) intend that many EU powers that intersect with devolved competencies (corresponding to the Frameworks Analysis referred to above) will devolve to the devolved legislatures at the time of Withdrawal.

The amendments also provide that the UK Ministers may by regulation restrict the devolved legislatures from amending retained EU Law in areas of returning policy. The Frameworks Analysis paper indicates that there are 24 policy areas which are subject to more detailed discussions to explore whether legislative common frameworks might be needed in whole or in part. The UK Government's stated purpose for this Ministerial power is to protect the UK common market and ensure no new barriers are created for consumers and businesses.

The amendments in summary provide:

(a) New section 30A (inserted by amendment 302A) will reverse the original clause 11 provisions which restrict the Scottish Parliament being able to modify any retained EU law. New section 30A enables the Scottish Parliament to modify that law, which before exit day it could not have modified where that would have been incompatible with EU law, except to the extent that the modification is of a description specified in regulations made by a Minister of the Crown under section 30A. This regulation-making power does not apply to modifications that, immediately before exit day, would have been within the legislative competence of the Scottish Parliament. The regulation making power in the amendment is subject to affirmative resolution procedure (Type C regulations under the Scotland Act 1998, Schedule 7, paragraph 2 - i.e. a draft of the instrument requires to be laid before and approved by both Houses of the UK Parliament before it can be made).

(b) before making these regulations, the Minister of the Crown must consult Scottish Ministers and lay, before the UK Parliament, an explanatory statement describing the effect of the regulations and any representations made in response to the consultation. The Minister also has to have regard, among other things to the fact that any restrictions imposed by the regulations are intended to be temporary and, where appropriate, replaced by other provisions;

(c) there is nothing in the bill which expressly requires the regulations and the restrictions to take effect at the same time as the new section 30A comes into force or which prevents further restrictions from being imposed. The restrictions could therefore be applied after section 30A has come into effect and possibly after the Scottish Parliament has exercised its power to make modifications to EU retained law. This could lead to uncertainty and confusion;

(d) UK Ministers require to consult Scottish Ministers on such regulations (amendment 319A) and are under a duty to make an explanatory statement about the effect of the regulations and any representations made in response to the consultation (amendment 326C). There appears to be no requirement on UK Ministers to explain the need for the regulations.

(e) amendment 310B provides that in considering whether to make regulations under new sections 30A or 57 of the Scotland Act 1998 the Minister must have regard (among other things) to the fact that the regulation making power and any restrictions imposed by them are intended to be temporary and, where appropriate, replaced by other provisions.

We have the following comments on the amendments:

(i). although not expressly stated, the regulation making power would appear to be intended to be used only where the UK Government consider that it would be necessary for the purpose of protecting the UK common market. We suggest that it would be clearer if that was expressly stated in the Bill and that the explanatory statement should also explain why the regulations are required for this purpose. Does the Government envisage the power in new section 30(A) being used only once or more than once?

(ii). although it is stated that the regulation making power is intended to be temporary and that Ministers are required to have regard to that fact, there is nothing in the Bill which expressly provides for the regulation making power to be temporary. We suggest that there should be a provision which makes this clear.

- (iii). we suggest that the bill should be amended so that the regulations and the restrictions take effect at the same time as the new section 30A comes into force.
- (iv). although the regulations are subject to the affirmative consent of both Houses of Parliament, there is nothing in the amendments which requires the consent of the Scottish Parliament. This contrasts with the accepted way of making amendments to the legislative competence of the Scottish Parliament which is by an Order in Council under section 30 of the Scotland Act 1998. The Government should be asked to explain why it has not adopted this method to legislate on this matter.
- (v). we suggest the bill should be amended to require Ministers to explain the need for regulations under new section 30A.
- (vi). in addition to the lack of a definition of the “other things” which the Minister is to have in mind when making these regulations there is no sunset clause which we have advocated for the current clause 11. Instead, there are provisions (amendment 323A) which require a Minister to report to each House of Parliament the steps taken towards implementing any arrangements to replace any relevant powers or retained EU law restrictions and to report on a 3 monthly cycle until the EU restrictions no longer have effect and all the relevant powers have been repealed. A sunset clause would provide a statutory incentive to complete the processes under this new Part 1A of schedule 3.
- (vii) early implementation of Clause 11 for all purposes would be desirable. That would be in line with the Ministerial reporting periods (on retained EU law restrictions) envisaged under amendment 323A, where “The first reporting period is the period of three months beginning with the day on which this Act is passed.



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