

Constitution Adviser Briefing Paper

European Union (Withdrawal) Bill

Supplementary Legislative Consent Memorandum

This briefing paper is intended to assist members in their consideration of the Supplementary Legislative Consent Memorandum on the European Union (Withdrawal) Bill (“EUWB”) that was lodged by the Scottish Government on 26 April 2018.

The paper focuses on amendments and proposed amendments to the EUWB which have an impact on the devolution settlement. It deals in turn with:

- Amendments to the EUWB already passed by the Lords at Report and supported by the Scottish Government;
- The proposed amendments to the EUWB relating to devolution that have been tabled by the UK Government but which are not supported by the Scottish Government;
- Political commitments reflected in the UK Government’s agreement with the Welsh Government but to which it is not proposed to give legislative effect; and
- The alternative options put forward by the Scottish Government.

1. AMENDMENTS ALREADY MADE

1.1 A number of amendments have already been made to the Bill since the publication on 9 January 2018 of the Committee’s Interim Report on the EUWB Legislative Consent Memorandum.

1.2 So far as concerning devolution, those amendments, and the Scottish Government’s view of them, are summarised in Annex D to the Supplementary LCM. The amendments include:

- Amendment of clause 7 of the Bill – which confers power on UK Government to make regulations to deal with deficiencies arising from withdrawal – to provide that UK Government may not use this power to amend or repeal the Scotland Act 1998 or the Government of Wales Act 2006. As introduced, the Bill protected only the Northern Ireland Act 1998 from amendment or repeal by regulations made under clause 7. The Scottish Government considers that these amendments address their concerns about the status of the Scotland Act 1998.
- Amendment of Schedule 2 of the Bill to provide that where Scottish Ministers make regulations to deal with deficiencies in retained EU law, and those regulations are to come into force before exit day, the Scottish Ministers must consult UK Government but do not require the consent of the UK Government to the regulations. The Scottish Government supports this amendment.
- The removal in its entirety of clause 8 of the Bill which would have conferred powers on UK Government Ministers (and parallel, if more limited, powers on Scottish Ministers) to make

regulations to prevent or remedy any breach of the UK’s international obligations that might result from the UK’s withdrawal from the EU. The Scottish Government supports this amendment.

- Amendments to the remaining regulation-making powers of ministers (of the UK Government and devolved governments) to restrict the scope of those powers by, for example, preventing them being used to create new public authorities, to introduce fees and to amend the EUWB itself. The Scottish Government supports these amendments.
- Amendments made in the Commons to require UK Government ministers to make explanatory statements when UK Government made regulations using the main powers in the EUWB. The UK Government has tabled amendments that would extend this requirement to Scottish Ministers when exercising the equivalent regulation making powers. The Scottish Government supports that amendment.

2. UK GOVERNMENT’S PROPOSED AMENDMENTS

2.1 The UK Government’s proposed amendments to clause 11 and Schedules 2 and 3 to the EUWB are set out in Annex B to the Supplementary LCM. The table below summarises (but is not an exhaustive account of) the effect of the proposed amendments:

<p>Clause 11 – as introduced</p>	<p>As introduced, Clause 11 would have imposed a new restriction on the legislative competence of the Scottish Parliament. An Act of the Scottish Parliament would have been ‘not law’ to the extent that it modified or conferred power to modify retained EU law (except where the modification would have been within legislative competence prior to exit day).</p> <p>That restriction could be relaxed in future through the mechanism of Orders in Council.</p>
<p>Clause 11 – proposed amendments</p>	<p>The proposed amendments would remove this restriction on the legislative competence of the Scottish Parliament and replace it with a different restriction.</p> <p>Restriction on legislative competence: An Act of the Scottish Parliament would be ‘not law’ if it modified or conferred power to modify retained EU law where the modification is of a kind specified in regulations made by UK Government.</p> <p>The restriction on the Scottish Parliament’s legislative competence would therefore not be of the ‘blanket’ nature originally envisaged by Clause 11 and the onus would be on the UK Government to make regulations specifying the limits on the Scottish Parliament’s powers to change retained EU law.</p> <p>The regulation making power: The power of the UK Government to make regulations would be subject to a sunset clause: regulations could not be made more than 2 years after exit day.</p> <p>Any regulations made by UK Government would, in effect, ‘expire’ 5 years after they have been made.</p> <p>Consent of the Scottish Parliament: The amendments incorporate a</p>

	<p>mechanism by which the consent of the Scottish Parliament is to be sought to any regulations proposed to be made by the UK Government under this provision.</p> <p>However the Scottish Parliament would not have a veto: regulations can be made by UK Government once the Scottish Parliament has made a ‘consent decision’, even if that is a decision refusing consent.</p> <p>Repeal of the new restriction: The proposed amendments would empower the UK Government to use regulations to amend the Scotland Act 1998 by repealing this new restriction on legislative competence.</p> <p>Until it has been repealed (and until equivalent restrictions on the competence of the Welsh Assembly and Northern Ireland Assembly have been repealed) the UK Government is to consider, every three months, whether those restrictions should be repealed and whether any regulations made by UK Government should be revoked.</p>
Clause 19 – as introduced	<p>Clause 19 contains the Bill’s commencement provisions.</p> <p>As introduced, the Bill provided that Clause 11 and Schedule 3 were to come into force on a day appointed by the UK Government.</p>
Clause 19 – proposed amendments	<p>It is proposed that, for the purpose of making regulations limiting the legislative competence of the Scottish Parliament, clause 11 is to come into force when the EUWB is passed.</p>
Sch 2 – as introduced	<p>Schedule 2 deals with the equivalent powers for the devolved authorities as is given to UK Government by Clause 7 of the Bill to deal with deficiencies in retained EU law and by Clause 9 of the Bill to deal with implementing the Withdrawal Agreement.</p> <p>Deficiencies in retained EU law (‘the fixing power’): As introduced, the Bill limited the circumstances in which the Scottish Ministers could use the power to remedy deficiencies. In particular, the Scottish Ministers could not use it in a way that would have modified elements of EU law that had ‘automatic’ effect within the UK, even if the modifications would otherwise have been within devolved competence.</p> <p>Implementing the Withdrawal Agreement: As introduced, the Bill contained similar limitations on the use of the power to implement the Withdrawal Agreement as were imposed in relation to the power to remedy deficiencies. In particular the power was not to be used to modify “retained direct EU legislation” or general principles of EU law.</p> <p>The Bill also provided that where the regulation making powers were used and any part of the regulations were found to be outside devolved competence, the regulations in their entirety would be regarded as invalid.</p>
Sch 2 – proposed amendments	<p>The proposed amendments would remove the absolute prohibition on the Scottish Ministers using the regulation making powers to modify retained direct EU legislation. The power to make such regulations would however be subject to any</p>

	<p>limits on legislative competence imposed by regulations made under clause 11.</p> <p>In addition, where a provision of regulations made by the Scottish Ministers was found to be outside devolved competence, the provision and not the regulations as a whole would be subject to challenge.</p>
Sch 3 – as introduced	As introduced, the EUWB would have amended s57 of the Scotland Act 1998 to impose equivalent restrictions on the devolved powers of the Scottish Ministers as were to be imposed on the legislative competence of the Scottish Parliament by Clause 11 (i.e. a constraint not to use executive powers to modify retained EU law).
Sch 3 – proposed amendments	<p>The UK Government’s proposed amendments would mirror those proposed in relation to Clause 11. The Scottish Ministers would be prohibited from acting in a manner was in breach of regulations made by UK Government limiting devolved competence. Such regulations would be the subject of the same consent mechanism proposed for Clause 11.</p> <p>It is also proposed to introduce a new obligation on UK Government to report to the UK Parliament every 3 months on steps taken towards “implementing any arrangements which are to replace any relevant powers or retained EU law restrictions”.</p>

3. POLITICAL COMMITMENTS

3.1 Annex A to the Supplementary LCM contains the text of (a) a proposed Intergovernmental Agreement on the European Union Withdrawal Bill and the Establishment of Common Frameworks; and (b) a Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks.

3.2 These documents contain political commitments on the part of the UK Government. Commitments included in the Agreement and in the Memorandum but which are not given legislative effect include:

- Where the devolved legislatures are prevented, by regulations made by UK Government, from legislating in the 24 areas that have been identified as potentially requiring legislation to create common frameworks in the UK, the UK Government will not legislate for England in those areas.
- The UK Parliament will not normally be asked to approve Clause 11 regulations where those regulations do not have the consent of the relevant devolved legislature.
- The UK Government “commits to make regulations through a collaborative process” (and in return it is expected that the devolved governments will not “unreasonably withhold recommendations of consent”).
- Clause 11 regulations will not affect the operation of the Sewel convention.

- The UK Government will be entitled to use its powers under Clause 7 and 9 of the EUWB to amend the law in devolved areas but will not normally do so without the consent of the devolved administrations.

4. SCOTTISH GOVERNMENT ALTERNATIVES

4.1 The Scottish Government in the Supplementary LCM explains that (a) it does not agree with the UK Government's proposed amendments; (b) it maintains that the UK Government should advance the amendments proposed by the Scottish Government; (c) it considers that if the UK Government is not prepared to accept the Scottish Government's proposed amendments that the Parliament could refuse consent to the EUWB as a whole or provide partial consent.

4.2 **Scottish Government Amendments:** The Scottish Government proposes two alternative sets of amendments to the EUWB. Its position is that if either set of amendments was adopted, it would recommend consent to the EUWB. The two alternatives are, broadly, as follows:

- **SG Amendments – Option 1:** Amendments to remove the restriction on the Scottish Parliament's legislative competence contained in the EUWB as introduced (i.e. the prohibition on legislating so as to modify retained EU law) and to remove the further restriction on legislating so as to modify retained direct EU legislation (where the modification would otherwise be within devolved competence).
- **SG Amendments – Option 2:** Amendments that would accept powers to restrict the legislative competence of the Scottish Parliament (and executive competence of the Scottish Ministers) but where the powers are exercisable by Order in Council (and which would require the consent of the Scottish Parliament) rather than by regulations made by the UK Government and where it is clear on the face of the EUWB that those powers do not affect the Sewel Convention as articulated in s28(8) of the Scotland Act.

4.3 If neither set of amendments is adopted, the Scottish Government will not recommend that the Scottish Parliament gives its consent to the EUWB.

4.4 **Approaches to consent:** In the event that its proposed amendments are rejected by UK Government, the Scottish Government considers that the Scottish Parliament has a number of options:

- Refusal of consent to the Bill as a whole;
- Consent to some provisions of the Bill; or
- Consent to the Bill as a whole but under exception of specific provisions.

4.5 The Scottish Government considers that if consent is refused or given only in part, the UK Government should bring forward amendments to the Withdrawal Bill at Third Reading in the House of Lords to reflect the extent of the Scottish Parliament's consent.

4.6 In the event that the Scottish Parliament refused consent to the EUWB as a whole, the Scottish Government's position is that the Continuity Bill would provide the necessary powers to ensure the continuity of retained EU law in devolved areas.

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