

EUROPEAN UNION (WITHDRAWAL) BILL

Supplementary memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee

CONTENTS

- 1. SHORT SUMMARY OF ADDITIONAL POWERS**
- 2. SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**
 - a. CONTEXT AND PURPOSE**
 - b. JUSTIFICATION**
 - c. SCRUTINY**
 - d. TRANSPARENCY ON USE OF POWERS**

The following powers are contained in the amendments tabled by the Government on Monday 12 March:

POWER	JUSTIFICATION	SCRUTINY
<p>Clause 11(1)-(3C)/ paragraphs 1-3, Schedule 3 <i>- Powers to limit devolved competence to modify retained EU law</i></p>	<p>These powers allow for targeted restrictions to be applied on devolved legislative and executive competence so that they cannot generally modify retained EU law in specific areas, whilst new common arrangements are designed and implemented.</p>	<p>Affirmative procedure</p>
<p>Clause 11(4B) - <i>Power to repeal the powers to limit devolved competence to modify retained EU law</i></p>	<p>This power recognises that powers to apply restrictions on competence are intended to be temporary and the restrictions are to be replaced with other arrangements and so provides a mechanism to repeal those powers.</p>	<p>None*</p> <p>*A further amendment will be tabled at Lords Report to establish the scrutiny arrangements for this power.</p>

Clause 11(1) - (3)/ Schedule 3, paragraphs 1 - 3: Powers to place restrictions on devolved competence to modify retained EU law

Power conferred on: Minister of the Crown

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

1. Subsections (1) to (3C) of clause 11 contain powers to apply restrictions on the legislative competence of the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales in relation to retained EU law. Part 1 of Schedule 3 contains equivalent powers in respect of the executive competence of the Scottish Ministers, Welsh Ministers, and Northern Ireland Ministers and departments.
2. The Bill will lift the requirement for devolved institutions to legislate compatibly with EU law on or after exit day. These powers will allow for common UK frameworks created by EU law to be maintained in specific areas where a framework may still be needed after we leave the EU so that new arrangements can be developed and implemented. This will maintain the scope of devolved decision making in those areas immediately after exit as it stood before exit. This will be a temporary arrangement to provide certainty after exit and allow intensive discussion and consultation with devolved administrations in those areas where our analysis indicates that frameworks may be needed.
3. Clause 11 inserts these powers into the devolution statutes and they will therefore attract (where relevant) the general supporting provision in s112 to s113 and s115 of the Scotland Act 1998 and s157 of the Government of Wales Act 2006 (e.g. to make supplementary, incidental, consequential or saving provision). The amendments to the Northern Ireland Act 1998 (NIA 98) in clause 11(3C) and paragraph 3 of Schedule 3 to the Bill include their own supporting provision (see, for example, new s6A(5) NIA 98).

Justification

4. The purpose of these powers is to provide a mechanism to maintain the existing parameters of devolved competence in respect of retained EU law in areas where a framework may be needed, while allowing decision making powers in all other areas to pass to our devolved institutions on exit day.
5. It is appropriate to apply these limits through subordinate legislation as this is a matter of ongoing discussion between the UK Government and the devolved administrations and we must be able to reflect changes that result from those discussions. This provides greater flexibility than if these restrictions were set out in primary legislation.

6. Similarly, as the restrictions on devolved competence are intended to be temporary, using subordinate legislation will also allow restrictions to be lifted more quickly, following appropriate Parliamentary scrutiny, so new decision making powers can transfer to the devolved administrations.
7. The effect of these powers would be to preserve the current boundaries of devolved competence in order to maintain consistency of law in a policy area which prior to exit would have been provided by EU law. The scope of the power is therefore closely linked to the scope of the existing EU law constraints on devolved competence.

Scrutiny

8. The powers will be exercisable by regulations and will be subject to the affirmative procedure.
9. In addition, Ministers will be required, before laying regulations under these powers, to consult the relevant devolved administration (unless those regulations only revoke a competence restriction) and will also be required to make an explanatory statement to Parliament regarding the regulations. An example of this requirement in relation to the power to limit Scottish legislative competence can be found in subsection (2) of clause 11 (new subsection (3)(b) of section 30A).
10. The explanatory statement must set out the effect of the regulations and any responses devolved administrations have made to the required consultation. If a minister fails to make an explanatory statement when laying the regulations, they must make a separate statement to explain why they have failed to do so.

Transparency on use of powers

11. The Bill places requirements relating to the powers to increase transparency regarding their exercise and how this relates to the wider discussions on common frameworks going forward.
12. Starting three months after Royal Assent, the Government would be required to report every three months on a number of areas, including on the following matters related to the exercise of these powers:
 - steps taken to implement frameworks where in areas subject to a restriction made under the powers;
 - regulations made under the powers that add or remove restrictions on devolved competence; and
 - progress required in order to remove the restrictions where the restrictions are still in place.

Clause 11(4B): Power to repeal the powers to place restrictions on devolved competence to modify retained EU law

Power conferred on: Minister of the Crown

Power exercised by: Regulations

Parliamentary Procedure: None (but see paragraph 18 below)

Context and Purpose

13. The powers in subsections (1) to (3C) of clause 11 and paragraphs 1 to 3 of Schedule 3 allow for restrictions to be placed on devolved competence in relation to retained EU law. These restrictions are only intended to be temporary while discussions on the need for and form of future frameworks are considered.
14. This power provides a mechanism to repeal those powers (and to make amendments consequential on repeal) once the restrictions are no longer needed, or have been replaced by lasting arrangements.
15. If one or more of the powers were to be repealed, the regulations made under that power would lapse, unless explicit saving provision was made.

Justification

16. If consistency with retained EU law is no longer required either because no common arrangement is needed or lasting common framework arrangements have been implemented in all relevant areas, it would not be appropriate to retain the powers to implement restrictions for longer than necessary. The Government therefore believes it is appropriate to take a power to remove those powers and make any consequential amendments required.

Scrutiny

17. No procedure currently applies to this power in the Bill as drafted.
18. The Government intends to table an amendment to Schedule 7 of the Bill to apply scrutiny arrangements to this power during Lords Report Stage. This will subject the power to the affirmative procedure.
19. Under clause 11(4D), Ministers will be required to have regard to the intended temporary nature of the restrictions and to the progress made in implementing successor arrangements when considering whether to exercise the repeal power. Clause 11(4C) also provides that Ministers will also be under an ongoing legal obligation to consider whether it is appropriate to repeal the powers. A Minister must consider that matter every three months until all the powers are repealed.

Transparency on use of the power

20. As with the powers in clause 11(1) - (3), the reporting duty placed on UK ministers includes a requirement to report on the following matters related to the exercise of the clause 11(4A) powers:

- regulations made under the power that remove the powers in clause 11(1) - (3); or
- progress required in order to repeal those powers where this power has not yet been exercised.

Department for Exiting the European Union

14 March 2018