

# EUROPEAN UNION (WITHDRAWAL) BILL

## SUPPLEMENTARY MEMORANDUM CONCERNING THE DELEGATED POWERS IN THE BILL FOR THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

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## SHORT SUMMARY OF ADDITIONAL POWERS

*The following powers are contained the amendments tabled by the Government on Wednesday 25 April:*

POWER	JUSTIFICATION	SCRUTINY
Clause 11(1)-(3C)/ paragraphs 1-3, Schedule 3 - <i>Powers to limit devolved competence to modify retained EU law</i>	<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>This powers sunset two years after exit day if not repealed earlier.</p>	Affirmative procedure
Clause 11(4B) - <i>Power to repeal the powers to limit devolved competence to modify retained EU law</i>	<p>This power recognises that powers to apply restrictions on competence are temporary and the restrictions are to be replaced with other arrangements and so provides a mechanism to repeal those powers.</p>	Affirmative procedure

## SHORT SUMMARY OF AMENDMENTS TO POWERS IN THE BILL

*The following powers are affected by the amendments tabled by the Government on Wednesday 25 April:*

AMENDMENT	POWER(S)	JUSTIFICATION FOR THE AMENDMENT
Changes to the limit on modifying retained direct EU legislation	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	<p>This amendment would remove the restriction on devolved authorities using the powers in Schedule 2 to modify direct retained EU legislation, except in areas that are subject to a constraint on competence under the powers in clause 11(1) - (3C) or Schedule 3 Part 1.</p> <p>This ensures that in those areas where the devolved institutions will gain competence on exit day, they can make all of the appropriate changes to those laws in preparation for exit day using Schedule 2 powers.</p>
Changes to the limit on conferring functions that correspond to the making of EU tertiary legislation	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	<p>This amendment would remove the restriction on devolved authorities using the powers in Schedule 2 to confer functions that correspond to the making of EU tertiary legislation, except in areas that are subject to a constraint on competence under the powers in clause 11(1) - (3C) or Schedule 3 Part 1.</p> <p>This ensures that in those areas where the devolved institutions will gain competence on exit day, they can exercise the powers in Schedule 2 to transfer such functions in preparation for</p>

		exit day
Removal of the limit on sub-delegation	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	This amendment would remove the restriction on devolved authorities sub-delegating their Schedule 2 powers creating parity, in this respect, with the corresponding powers for UK ministers.
Explanatory statement in relation to sub-delegation by the Scottish Ministers	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p> <p><i>Schedule 4, Part 1 - Powers in connection with fees and charges</i></p>	<p>This amendment would require a statement to be made alongside all instruments made by the Scottish Ministers under powers in Schedule 2 and Schedule 4 Part 1 that delegate legislative power to be exercised other than by a minister. The Scottish Minister must explain why this is appropriate.</p> <p>The amendment also requires that the authority exercising the power must lay before the Scottish Parliament an annual report on the exercise of the sub-delegated power, if it has exercised it that year.</p>
Replacement of consent requirement with consultation requirements	<p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	This amendment would replace the requirement for a devolved authority to have the consent of a Minister of the Crown when using the Withdrawal Agreement power to make provision about a quota with a requirement to consult a Minister of the Crown.
Prohibit the imposition or increase of fees	<p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	This amendment will prevent the power in Schedule 2 Part 3 from being used to impose or increase fees.

<p>Severance of ultra vires provision</p>	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	<p>This amendment would clarify that where one provision in regulations made under Schedule 2 is <i>ultra vires</i> because it is not within devolved competence, this does not mean that the regulations as a whole are <i>ultra vires</i>.</p>
<p>Joint instruments</p>	<p><i>Schedule 2, Part 1 - Power to deal with deficiencies in retained EU law</i></p> <p><i>Schedule 2, Part 3 - Power to implement the withdrawal agreement</i></p>	<p>The amendment would clarify that instruments made by UK Ministers and devolved authorities acting jointly may make provision that would otherwise be outside the powers of the devolved authorities acting alone.</p>

# SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

## ADDITIONAL DELEGATED POWERS IN THE BILL

### **Clause 11(1) - (3C) / 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 (see, for example, clause 11(1) in relation to the Scotland Act 1998). 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 relation to those areas, after exit, as it stood immediately 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(11) 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 the areas in which the restrictions will apply 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 temporary (subject to a five year sunset) 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 send the draft regulations to the devolved administration (unless those regulations only revoke a competence restriction) for them to put to their devolved legislature.
10. UK Ministers may only proceed to lay the regulations once a consent decision has been taken by the devolved legislatures or if no decision is taken, the 40 day period has passed. 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) of section 30A).
11. If the devolved legislature has not provided consent, the UK Minister must make an explanatory statement setting out why the UK Government is proceeding without consent and the effect of the regulations. The UK Minister must also provide to the UK Parliament any statement provided by the devolved administration on why they consider consent by the legislature has not been granted.

## **Limits on the use of powers**

12. The powers will be subject to limits on their exercise to temper their effect in relation to devolved competence.
13. Before a Minister can lay a draft instrument under these powers before Parliament, they must first have sent a copy of the draft regulations to the devolved administration for a consent decision from the relevant devolved legislature. In doing so the Ministers must inform the Presiding Officer of the relevant legislature that a copy has been provided.
14. The draft instrument can then be laid before Parliament once either a decision has been made by the devolved legislature, or a 40 day period has elapsed. If consent is not given by the devolved legislature, the Minister can lay the instrument but must make a statement to explain why the draft has been laid without consent and any statement by the devolved administration giving their opinion of why the legislature has withheld consent.
15. The competence restrictions are a temporary arrangement. The powers, and regulations made under them, will therefore be subject to sunset provisions. The powers will cease to be available two years after exit day. The regulations will cease to have effect five years after they come into force.

## Transparency on use of powers

16. 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.
17. 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: Affirmative*

### Context and Purpose

18. 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. The restrictions sunset five years after the regulations have been made. The power to make regulations sunset two years after exit day.
19. This power provides a mechanism to repeal those powers (and to make amendments consequential on repeal) earlier than the two year sunset if further restrictions are not needed.

### Justification

20. 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.



21. There is already a two year sunset on the power itself and a five year sunset on the restrictions created by regulations made under the power. The Government believes it is appropriate to take a further power to remove the powers to create restrictions and make any consequential amendments required sooner than the two year sunset if this is possible.

## **Scrutiny**

22. The powers will be exercisable by regulations and will be subject to the affirmative procedure.
23. 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 or to revoke regulations made under those powers (earlier than the legislative sunsets). A Minister must consider that matter every three months until all the powers are repealed.

## **Transparency on use of the power**

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

## AMENDMENTS TO EXISTING POWERS IN THE BILL

### Amendments to the scope of devolved ministers' delegated powers<sup>1</sup>

#### *Changes to the limit on modifying retained direct EU legislation*

25. The amendments tabled to clause 11 and Schedule 3 Part 1 would remove the blanket restriction on devolved competence to modify retained EU law once we leave the EU. This means that, except in those areas specified in regulations under clause 11 and Schedule 3 Part 1, competence will transfer from the EU directly to the devolved institutions on exit day.
26. It is right that in those areas where the devolved institutions will have competence over retained EU law from exit day that they should also have responsibility for correcting the relevant retained EU law, including the retained direct EU legislation, in preparation for exit day. The amendments therefore remove the blanket restriction on the Schedule 2 powers modifying any direct retained EU legislation.
27. However, in those areas where the devolved institutions will not assume competence immediately on exit day because a common policy framework may be required, the arguments for making corrections to retained direct EU legislation at a UK level continue to apply. Where uniformity of approach is expected to continue after exit day, it would not make sense to adopt divergent approaches to correcting deficiencies while future frameworks are considered.
28. The amendments will therefore provide that the constraint on the devolved authorities using the powers to modify retained direct EU legislation will continue to apply in areas specified as being subject to the general constraint on competence in regulations made under clause 11/Schedule 3 Part 1, but only in those areas.
29. The Government has committed that it will not normally use its concurrent powers in the Bill to modify EU-derived domestic legislation in devolved areas without the agreement of the relevant devolved administration. That commitment will also extend to modifications to retained direct EU legislation where these could now be made by the devolved administrations using their Schedule 2 powers.
30. In areas where the devolved administrations are not able to modify direct retained EU legislation by virtue of the clause 11/Schedule 3 Part 1 constraint, but which would otherwise be devolved, the UK Government will consult the relevant devolved administrations before making modifications to those laws using its powers in the Bill.

#### *Changes to the limit on conferring functions that correspond to the making of EU tertiary legislation*

31. The current restrictions on conferral of functions that correspond to the making of EU tertiary legislation are related to the restrictions on modifying retained direct EU law and follow the same policy rationale. Tertiary legislation is a form of directly applicable EU law and is used to supplement other principal EU laws, serving a similar role to subordinate legislation in UK law.

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<sup>1</sup> These amendments relate only to the powers in Part 1 and Part 3 of Schedule 2 and not to the power in Part 2 because the Government has separately tabled amendments that would remove that power from the Bill.

32. In those areas where the clause 11/Schedule 3 Part 1 powers have been exercised to temporarily maintain an existing common approach because a framework may be needed, it would not make sense for the devolved institutions to confer these functions, and in doing so risk introducing divergence from that common approach.
33. However, in the areas in which the devolved institutions will assume responsibility, it is right that they should be able to confer such functions as is appropriate in preparation for exit day.
34. The amendments therefore take the same approach as for the modification of retained direct EU legislation. The constraint on conferring such functions will continue to apply in areas specified as being subject to the general constraint on competence in regulations made under clause 11/Schedule 3 Part 1, but only in those areas.

#### *Removal of the limit on sub-delegation*

35. This amendment would remove the limits on the devolved authorities' Schedule 2 powers being used to confer powers to make subordinate legislation. This will allow the devolved authorities to sub-delegate these powers, where appropriate, in the same manner that UK ministers can.

#### *Explanatory statement in relation to sub-delegation by the Scottish Ministers*

36. The UK Government has consulted the devolved administrations on where additional scrutiny requirements applying to UK Ministers in the EU (Withdrawal) Bill should be extended to the corresponding powers for devolved authorities.
37. The Scottish Government, having sought the views of the Scottish Parliament, has requested that the additional requirements for UK Ministers to make explanatory statements when exercising powers under the Bill should also apply to the exercise of powers by the Scottish Ministers.
38. The amendments to Schedule 2 will permit sub-delegation of the powers by devolved ministers. This further amendment will therefore require that the Scottish Ministers make the same statement that UK ministers are required to make when exercising the powers in this way.
39. The Scottish Ministers will therefore be required to make a statement when exercising their powers in Schedule 2 and Part 1 of Schedule 4 to delegate a power to make legislation on an authority other than a minister to explain why this action is appropriate. The authority to which the power is delegated must then lay before the Scottish Parliament an annual report on the exercise of the sub-delegated power, if exercised that year.

#### *Replacement of consent requirements with consultations requirements*

40. The power for devolved authorities to implement the Withdrawal Agreement in Schedule 2 Part 3 is currently subject to the restriction that they require the consent of a Minister of the Crown in order to make provision relating to quota arrangements.
41. In line with commitments given by Ministers in both the Commons and the Lords, we have continued to review and discuss with the devolved administrations whether this provides an appropriate and proportionate safeguard. Given reassurances provided by the devolved administrations and the fact that this is also covered by the requirements in the Concordat on International Relations within the Memorandum of Understanding on Devolution we think that it is not necessary to maintain a consent requirement.

42. We do, however, think that it will still be important for the UK Government to be aware of any circumstances in which a devolved authority is considering making provision about quota arrangements, to ensure this works fairly for the whole UK. For this reason the amendment replaces the consent requirement with a requirement to consult a Minister of the Crown.
43. This reflects the similar changes made at Commons Report Stage to the corresponding requirements in Part 1 of Schedule 2. These were also changed from requirements for the consent of a Minister of the Crown to requirements to consult a Minister of the Crown.

#### *Prohibit the imposition or increase of fees*

44. This amendment restricts the ability for devolved ministers to impose or increase fees using the Withdrawal Agreement power in Schedule 2 Part 3. This is the same restriction that was applied to the corresponding power for UK ministers in clause 9 in an amendment tabled on Wednesday 18 April.
45. The Government's clear intention has been to make bespoke provision in relation to all financial matters in the Bill. The Bill was introduced with a specific power to make provision in relation to fees and charges in Schedule 4, which can be exercised both by UK ministers and by devolved ministers.

#### **Further technical amendments**

##### *Severance of ultra vires provision*

46. The Bill currently requires that regulations can only be made under the Schedule 2 powers where every part of them is within the competence of the devolved authority making the instrument. This is to ensure these powers cannot be used by devolved authorities to legislate in relation to matters that are not a devolved responsibility.
47. Some concerns have been raised as to whether the wording of this restriction would affect the ability of the courts to sever those parts of an instrument that are *ultra vires* because they are not within devolved competence, and thereby allow those parts that are within competence to remain law. This is not the Government's intention and we have therefore put forward these amendments to clarify the position.
48. To achieve this the amendments change the wording to require that provisions within an instrument must be within competence. This means that only a specific provision that is outwith competence could be deemed *ultra vires* rather than the whole of the regulations in which it is contained.

##### *Joint instruments*

49. At present the Bill allows for some combination of instruments made by UK ministers or by devolved ministers under the exercise of different powers. This existing provision allows for greater efficiency where it may be appropriate to make related provision under different powers to be made in a single instrument. That provision, in paragraph 25 of Schedule 7 to the Bill, deals with combinations of procedures, but only for instruments laid before a single legislature or where the procedure would be the same before different legislatures.
50. This principle also applies where it may be appropriate for UK ministers and devolved authorities acting jointly to make related provisions in a single instrument that fall both within and outwith the devolved authorities jurisdiction or competence. The amendment would clarify that instruments made by UK Ministers and devolved authorities acting jointly may make provision that would otherwise be outside the powers of the devolved authorities acting alone.

