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BRIEFING PAPER

Number 08275, 23 May 2018

Legislative Consent and the *European Union (Withdrawal) Bill (2017-19)*

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Summary

The UK Government introduced its *European Union (Withdrawal) Bill (2017-19)* (*EUW Bill*) on 13 July 2017. As introduced, the Bill would have made significant changes to the legislative and executive competencies of devolved institutions. The Government has since made significant amendments to the Bill's devolved provisions in the House of Lords.

Following those changes, the Welsh Government recommended that the National Assembly for Wales should grant legislative consent for the Bill. The Scottish Government, however, recommended that the Scottish Parliament should withhold consent for it.

Devolved objections to the Bill as introduced

The Scottish and Welsh Governments opposed the Bill as introduced. Each lodged a legislative consent memorandum with the Scottish Parliament and with the National Assembly for Wales (NAW) respectively. In these documents, the Governments raised four main concerns about the *EUW Bill*'s effect on the devolution settlements. They opposed:

- **original clause 11 (and Schedule 3)**, which would have imposed a broad obligation that devolved institutions cannot "modify retained EU law";
- aspects of **Schedule 2**, which would have constrained the powers of devolved ministers in ways that UK Ministers exercising equivalent powers in **original clauses 7-9** would not be constrained; and
- the absence of devolved consent requirements for **original clauses 7-9**. This meant UK Government ministers could use Henry VIII powers, unilaterally, in order to:
  - modify the devolution statutes; and/or
  - change the law in devolved policy areas.

The preliminary view of both devolved Governments was that neither the Scottish Parliament nor the NAW should grant legislative consent for the *EUW Bill*. The two Governments jointly published a series of amendments designed to address their concerns with the Bill. If those (or equivalent) amendments were accepted, they said, they would reconsider their opposition to the Bill as a whole.

The Continuity Bills

By March 2018, agreement had still not been reached on changes to the *EUW Bill* that could secure devolved consent. As a consequence, the Scottish and Welsh Governments introduced their own, pre-emptive, legislation, expected to take effect if agreement could not be reached for a UK-wide *EUW Bill*. The "Continuity Bills" completed their legislative stages on 21 March 2018.

The Bills could not receive Royal Assent, however, because the UK Government referred them to the Supreme Court under a devolution reference. This process exists to clarify whether a devolved Bill, agreed by the relevant legislature, is within its competence. The Supreme Court is

expected to consider arguments in relation to the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* on 25-26 July 2018. It will not hear arguments on the *Law Derived from the European Union (Wales) Bill* because the Attorney General's reference for it will be withdrawn as part of an agreement reached between the Welsh and UK Governments that it will be repealed before the *EUW Bill* receives Royal Assent.

Government amendments to the Bill made in the House of Lords

At Lords Report stage there were significant changes made to the *EUW Bill* in relation to devolution. These changes were made following discussions between the UK and devolved governments in the Joint Ministerial Committee on European Negotiations (JMC (EN)). The Welsh Government agreed to these changes as a compromise but the Scottish Government took the view that they did not go far enough to address their original objections.

As a result of the government amendments made at Lords Report stage, the presumption in the **original clause 11** (now **clause 15**) was effectively "reversed". Instead of all retained EU law being protected from modification by devolved institutions by default, UK Ministers would have to specify in regulations (approved by the Commons and Lords) which areas it wanted to protect. The power to make those regulations will now be time limited (to 2 years after exit day) and no set of regulations will be allowed to have effect for longer than 5 years. Devolved consent is not required for these regulations to be made but a UK Minister making regulations without consent must justify their reasons for doing so to Parliament under a statutory procedure.

The Intergovernmental Agreement

The UK Government published an Intergovernmental Agreement in late April. It includes a series of political commitments that supplement the legislative changes made at Lords Report stage. This agreement is bilateral: between the UK and Welsh Governments, and has not been agreed to by the Scottish Government.

The Scottish Government opposes this approach because it only binds the UK Government with political promises but the devolved institutions with legal constraints. It considers this to be an inequitable arrangement.

Legislative Consent Motions

On 15 May 2018, the Scottish Parliament withheld consent for the *EUW Bill* by 93 votes to 30. The National Assembly for Wales, by contrast, granted consent by 46 votes to 9.

The UK Government must now decide whether to legislate without the Scottish Parliament's consent or to find another way to secure its agreement. Depending on the outcome of the Supreme Court reference for the Continuity Bill, it may also have to decide whether (and if so, how) to accommodate it alongside the *EUW Bill* itself.

1. How the Government changed original Clause 11

Summary

The most important part of the dispute over legislative consent and the *EUW Bill* concerned what was originally clause 11. This section provides an overview of what this clause originally would have done and what it would do now that it has been amended in the House of Lords.

1.1 Clause 11 as introduced

No longer required to legislate "compatibly with EU law"

This clause would have removed the existing requirement in the *Scotland Act 1998*, *Government of Wales Act 2006*, and *Northern Ireland Act 1998* that the devolved institutions cannot legislate "incompatibly" with EU law.

New requirement "not to modify retained EU law"

The original clause 11 would have also created a new restriction on devolved competence. It would have inserted into section 29 of the *Scotland Act*, for instance, a requirement that:

> an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law.

Exceptions to the requirement

It provided two exceptions where this new restriction does not apply.

"No restrictions on existing powers" exception

The first exception would have allowed devolved legislatures to modify retained EU law:

> so far as the modification would, immediately before exit day have been within the legislative competence of the [devolved legislature].

In practice this meant the devolved legislatures could still modify certain aspects of "EU-derived domestic legislation", provided that the subject matter was in a devolved policy area. This might include an Act or set of regulations made under section 2 of the *European Communities Act*, passed to implement EU law in a devolved policy area.

Power to "release" parts of retained EU law from restrictions

The second exception would have been:

> so far as Her Majesty may by Order in Council provide.

This form of secondary legislation could have been used, with the approval of the Commons, Lords and devolved legislature, to "release" elements of retained EU law from the general restriction at a later date. Crucially, no "release" would happen without the UK Government's explicit consent as only it can lay the Order in draft. The effect of original clause 11 as a whole was to withhold all repatriated powers in EU law until such a time as the UK Government and Parliament agreed otherwise.

1.2 Clause 15 as amended by the Lords on Report

Following amendments made at Lords Report stage, clause 11 was effectively replaced. It was also renumbered to reflect other changes in the Bill, and is now clause 15.

Key presumption "reversed"

The most fundamental change to the clause was to do away with a general requirement that devolved legislatures "not modify" retained EU law. Instead of retaining the repatriated powers except insofar as they were explicitly "released", the opposite principle would instead apply.

Unless UK Ministers explicitly stipulated to the contrary in regulations, retained EU law would not be protected from modification by devolved institutions:

> An Act of the [devolved legislature] cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

These regulations would require the approval of the Commons and the Lords but not the devolved legislature.

Sunset provisions

The original clause 11 did not provide for time limits on restrictions on devolved competence. The new clause 15 does. No regulations may be made more than 2 years after exit day. No set of regulations can have effect for longer than 5 years. Once regulations expire, restrictions on devolved competence imposed by them are lifted unless further primary legislation provides otherwise or imposes new restrictions. Primary legislation would likely be "common framework" Bills like the Agriculture or Fisheries Bills.

Opportunity to make a "consent decision"

The new clause 15 does not require UK Ministers to get the consent of either the devolved legislature or the devolved authority before making regulations to restrict their competence in relation to retained EU law. However, the procedure for making regulations does require that the devolved legislature is given the opportunity (40 days) to make a "consent decision" before a draft is laid before the Commons and Lords. A "consent decision" is defined as any one of three decisions:

- a decision to agree a motion consenting to the laying of the draft;
- a decision not to agree a motion consenting to the laying of the draft; or
- a decision to agree a motion refusing to consent to the laying of the draft

Where a Minister intends to lay a draft without the devolved legislature having agreed to it, she would be under a statutory duty to make an explanatory statement why. Any statement made by the devolved authority explaining why the devolved legislature has not given consent must also be laid before both Houses.

2. Why did devolved legislatures contemplate withholding consent?

Summary

The Scottish and Welsh Governments originally recommended that legislative consent should not be given to the *EUW Bill*. They believed that the *EUW Bill*, as introduced, would undermine the existing constitutional position of their respective devolved institutions.

The devolved governments were concerned that the new proposed limits on devolved competence in relation to "retained EU law" would unduly restrict the development of policy in what were currently devolved areas. They were also concerned that these restrictions would allow common frameworks to be "imposed" on devolved legislatures without their consent. Both the Scottish and Welsh Ministers also argued there were insufficient safeguards on the use of the *EUW Bill*'s delegated powers for UK Ministers in devolved areas and in relation to the devolution statutes.

The UK Government maintained that some restrictions currently imposed by EU law on devolved competence needed to be preserved, at least on an interim basis. It said this was necessary until common frameworks, protecting the UK's internal market and other shared interests, could be secured. It did not include consent requirements for the exercise of the Bill's delegated powers by UK Ministers.

2.1 Factors indicating a risk of withheld consent

It is very unusual for a devolved legislature actively to withhold its consent from a UK Parliament Bill.[1] It had happened only 9 times between 1999 and April 2018. By contrast, more than 300 legislative consent motions had been passed across the three devolution settlements in the same period.[2]

Consent was at risk of being withheld in relation to the *EUW Bill* for several reasons. First and foremost, there was disagreement between the UK Government and the Scottish and Welsh Government as to whether several of its core provisions impacting on devolution should be included in the Bill at all. This was particularly relevant in the context of elements of original **clause 11** and **Schedule 3**, where the powers of devolved institutions have their competence and functions restricted in new ways.

Secondly, it would have been difficult for the UK Government to avoid passing a Bill that would legislate with regard to devolved matters. With other Bills, the UK Government might have opted to remove relevant provisions completely in the event broader agreement could not be reached. Among the *EUW Bill* clauses the UK Government agrees engage the legislative consent convention are those that retain EU law and which empower UK Ministers to prevent or remedy breaches of international law.[3] Were these provisions to have been omitted completely, or were

1 I.e. explicitly to vote down a legislative consent motion rather than not to table one.
2 Institute for Government, Brexit and the Sewel (legislative consent) Convention, 16 January 2018
3 Clauses 2-4 and 8

Parliament somehow to "carve-out" changes to the law in relation to matters within devolved competence, the operation of the statute would be significantly impaired.

Thirdly, there was what Lord Hope of Craighead, former Deputy President of the UK Supreme Court and current crossbencher, described as a considerable issue of "mistrust" between the Governments about how the powers in the *EUW Bill* would affect devolved relationships in future.[4] Previously working arrangements were informal, relying on a Memorandum of Understanding and series of Concordats, and by resolving issues through Joint Ministerial Committees.[5] The devolved authorities expressed doubts that these structures were suitable to mitigate risks posed by the process of EU withdrawal.

Fourthly, the Scottish Parliament and National Assembly for Wales both sought to legislate pre-emptively in devolved areas that overlapped with the provisions covered by the *EUW Bill*, using the so-called *Continuity Bills*. The presence of contingency legislation strongly suggested, at a minimum, that they were sceptical an agreement could be reached.

2.2 Devolved authorities' perspective

The Scottish and Welsh Governments lodged legislative consent memoranda with their respective legislatures in relation to the *EUW Bill*.[6] These raised several concerns about how the Bill's provisions would alter the powers of the devolved legislatures and the functions and powers of the devolved executive bodies.

Limits on legislative competence

As introduced, the *EUW Bill* would have removed the requirement in the devolution statutes not to legislate "incompatibly with EU law".[7] In its place, **clause 11** would require devolved institutions not to "modify retained EU law", subject to specific exceptions.[8] The Scottish and Welsh Governments opposed the imposition of this new requirement. They both believed that this amounted to a "power grab" because these new limitations were of a wholly domestic nature unlike those they would replace.[9] The UK Parliament's powers in this area of retained and protected law, and the delegated powers of UK Government Ministers in those areas,

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4 HL Deb 12 March 2018 Vol 789 c1394

5 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, October 2013

6 Scottish Government, Legislative Consent Memorandum – European Union (Withdrawal) Bill and Welsh Government, Legislative Consent Memorandum – European Union (Withdrawal) Bill

7 Section 29(2)(d) *Scotland Act 1998*, section 108(6)(c) *Government of Wales Act 2006* and section 6(2)(d) *Northern Ireland Act 1998*

8 The exceptions are where modification would have been within competence before exit day (i.e. devolved derived EU legislation can be modified) or where an Order in Council expressly provides for the "release" of retained EU law from being protected from modification.

9 Scottish Government, Minister for UK Negotiations on Scotland's Place in Europe, Brexit talks update, 8 March 2018

could be used to reduce the policy space currently enjoyed by sub-state legislatures in devolved subject areas. As Mark Drakeford AM, Cabinet Secretary for Finance and Local Government put it:

> Language around devolving "significant brand new powers" is misleading and unhelpful. These powers are not being handed to the National Assembly, they are already here. We should instead be focusing on establishing new systems to take these areas forward together. It is only through cooperation and jointly designed approaches that we can ensure stability and a functioning internal market once we leave the European Union.[10]

The Scottish and Welsh Governments did not dispute that there is a need for "common frameworks" to replace elements of those EU frameworks that currently operate throughout the UK. They argued, however, that any such frameworks should be created only with the specific consent of the devolved legislatures. The justification for this was that those EU frameworks intersect with policy areas for which devolved authorities, rather than the UK Government, is currently, domestically, responsible.

Limits on devolved delegated powers

Schedule 2 of the Bill confers powers on devolved authorities to amend legislation (including primary legislation) for purposes connected with the UK's withdrawal from the EU. There were three discrete powers: one to make corrections in connection with withdrawal; one to prevent or mitigate breaches of international obligations arising from withdrawal; and one to implement any withdrawal agreement reached between the UK and the EU.

The Bill as introduced would have imposed several restrictions on how devolved authorities could use these powers. Devolved authorities faced the same restrictions on their ability to modify elements of retained EU law as their respective legislatures. Beyond that, their powers could not be used without the consent of UK Ministers in certain circumstances. This applied to regulations made to have effect before exit day or which related to quota arrangements.

The Scottish and Welsh Ministers opposed the restrictions that would prevent them from modifying retained EU law. They also argued certain consent requirements in relation to the Schedule 2 powers should be downgraded to requirements to consult UK Ministers.

Scope of UK Ministers' delegated powers

The original Bill conferred three delegated powers on UK Ministers of particular importance to the devolution settlement. The powers to modify law, including primary legislation and retained EU law, under **original clauses 7-9** of the Bill, could be used by UK Ministers in relation to devolved policy areas. These powers could also be used to modify the devolution statutes without the consent of any devolved institutions.

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10 Welsh Government, Written statement - UK Government's analysis of where they consider EU law to intersect with devolved competence, 14 March 2018

The Scottish and Welsh Governments argued that these powers should only be able to be used in relation to devolved matters or to modify the devolution statutes where the Scottish or Welsh Ministers granted consent. For UK Ministers to legislate in relation to devolved matters, they maintained, would cut across their functions. To legislate to modify the devolution statutes would circumvent the legislative consent process that would arise if those modifications were made by an Act of Parliament.

2.3 UK Government's perspective

Limits on competence

The UK Government believes, in the absence of protections against devolved institutions modifying elements of retained EU law, there is a risk of regulatory divergence. This could, it argues, undermine strategically important areas of common UK-wide concern in relation to, among other things, its internal market.

The UK Government rejects the argument that restrictions of this nature amount to a "power grab". It points out that the instruments the devolved legislatures and executives would be prevented from modifying are the transposed version of instruments they were never able to modify under the current settlement. The Scottish Parliament could not, for example, modify direct EU legislation, such as an EU regulation, even if it intersected exclusively with devolved policy areas.

They argue that any powers not protected from modification are therefore new devolved powers: they would allow the devolved legislatures to do things they have never previously been able to do since they were created in 1999.[11] UK-wide common frameworks to protect these interests were not necessary when the devolution settlements were delivered, because EU-wide frameworks achieving the same ends already existed.

Scope of UK Ministers' delegated powers

The UK Government took the view that the *EUW Bill*'s approach to delegated powers of UK Ministers in devolved areas is consistent with the existing devolution settlement. There is not a legal requirement, for instance, that UK Ministers refrain from exercising their delegated powers under the *European Communities Act 1972* (*ECA*) without consent. The UK Government's Explanatory Notes to the Bill state, in any case, that it did share the Scottish and Welsh Governments' assessment that **original clause 7** (the correcting power) and **original clause 9** (the withdrawal agreement implementation power) were covered by the constitutional conventional requirement for legislative consent.[12]

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11 Cabinet Office, UK Government publishes analysis on returning EU powers, 9 March 2018

12 The UK Government does appear to accept the legislative consent convention applies to clause 8 (the power to remedy or prevent breaches of international obligations). See Explanatory Notes to the European Union (Withdrawal) Bill, 13 July 2017, p60

3. Joint Ministerial Committee discussions (September 2017 to March 2018)

Summary

The Joint Ministerial Committee on European Negotiations agreed, in October 2017, a set of principles governing "common frameworks" that may be "necessary" to protect a range of strategic UK-wide interests. However, it has not yet reached intergovernmental agreement as to which policy areas, currently controlled by the EU, require UK-wide legislative or non-legislative common frameworks. The UK Government published a Framework Analysis setting out its preliminary view, but aspects of how it categorises certain EU powers have not yet been agreed by the devolved authorities.

There was no agreement reached in March to changes to **clause 11** of the *EUW Bill*. The UK Government sought agreement, circulating draft amendments between the administrations, but did not receive it. At that meeting, it communicated its intention to table and debate those amendments in the Lords Committee stage, but not to push those amendments to a vote.

3.1 Role of the Committee

The Joint Ministerial Committee on EU Negotiations (JMC (EN)) was established to facilitate discussion between the UK Government and the devolved authorities. Its focus concerned matters arising from steps being taken to withdraw the UK from the EU. It is attended by Ministerial representatives of the UK Government, Scottish Government and Welsh Government. In the absence of a functioning Northern Ireland Executive, a senior civil servant attends on its behalf.[13]

This forum has been used to shape discussions about the areas of disagreement in relation to the *EUW Bill*. The Committee sought to reach consensus as to where there should be UK-wide common frameworks and how the *EUW Bill* and subsequent legislation should deliver them.

3.2 Consensus on Common Framework Principles

Currently, the UK participates in EU-wide "common frameworks". These commit Member States to common standards and approaches to aspects of policy areas that fall within the competence of the EU's institutions under the EU Treaties. Many of these frameworks support the implementation of the European Union's single market. Devolved authorities must comply with the requirements of those frameworks in the policy areas they control. They do so in the same way that the UK Government must comply for domestic matters in England and reserved matters for the UK as a whole.

When the UK ceases to be a Member State, EU frameworks will no longer apply to it (unless and to the extent otherwise agreed). The UK Government

13 Joint Ministerial Committee (EU Negotiations) Communique, 16 October 2017, p1

believes it necessary, to protect the UK's "internal market", to re-create some, but not all, of the EU's arrangements at a pan-UK level.

At the October 2017 meeting of the Joint Ministerial Committee, a set of common framework "principles" were agreed by the governments. These outlined six purposes for which "necessary" common frameworks would be created, namely 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.[14]

That "principles" agreement also set out some political constraints on common frameworks that were to be established. These constraints were intended to "respect the devolution settlements and the democratic accountability of the devolved legislatures". Any frameworks were to:

- 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.[15]

The Communiqué also specifically acknowledged the need for frameworks to recognise the "economic and social linkages" between Northern Ireland and the Republic of Ireland and to respect the Belfast Agreement.[16]

3.3 No consensus for specific Common Frameworks

Identification

It has proved more difficult for the JMC (EU) to reach consensus as to what common frameworks are in fact "necessary". The starting point of the Committee was to identify the areas where returning EU powers would intersect with devolved policy areas. The Scottish Government published a working list of 111 policy areas where they believed there was a devolved intersect.[17] Similar lists were drawn-up in relation to Wales (identifying 64

14 Joint Ministerial Committee (EU Negotiations) Communique, 16 October 2017, p2
15 Joint Ministerial Committee (EU Negotiations) Communique, 16 October 2017, p2
16 Joint Ministerial Committee (EU Negotiations) Communique, 16 October 2017, p3
17 Letter from Mike Russell MSP, Minister for UK Negotiations on Scotland's Place in Europe to Bruce Crawford MSP, Convener of the Scottish Parliament Finance and Constitution Committee, 19 September 2017

areas) and Northern Ireland (identifying 141 areas) to facilitate JMC (EU) discussions.[18]

At the March 2018 meeting of the JMC (EU), UK Ministers presented a "Framework Analysis" of the intersection between EU law powers and devolved policy areas.[19] It identified:

- 49 policy areas where "no further action" was required;
- 82 policy areas where "non-legislative common frameworks" may be required; and
- 24 policy areas where further discussion was needed to ascertain whether "legislative common framework arrangements" might be needed "in whole or in part".

The working document also identified 12 policy areas where the UK Government believed policy was currently reserved, but which would be the subject of ongoing discussions with the devolved legislatures.

This Framework Analysis had not been agreed to by either the Scottish or Welsh Ministers.[20] The Scottish Government specifically disputed the categorisation of some of the powers the UK Government believes are reserved, including aspects of state aid and public sector procurement.[21] Mark Drakeford AM, Cabinet Secretary for Finance and Local Government, expressed the view that the "overall number of areas in each group" is "largely meaningless". What mattered more was that the areas in the legislative common frameworks group were very broad including "Agricultural Support" and "Fisheries management and support".[22]

Implementation

The JMC (EU) did not reach agreement about what should happen (in the interim) to returning EU powers. David Mundell MP, Secretary of State for Scotland, originally made a commitment that the Government would bring forward amendments to clause 11 of the Bill at Report Stage in the Commons.[23] This did not happen.[24]

At the meeting of the JMC (EU) on 8 March 2018, the UK Government intimated its intention to bring forward amendments to clause 11 in the Lords. The content of these amendments had not been agreed with the

18 Institute for Government, Brexit, devolution and common frameworks, 22 November 2017

19 Cabinet Office, Framework Analysis: Breakdown of Areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland, 9 March 2018

20 Scottish Government, Statement from Mike Russell MSP, Minister for UK Negotiations on Scotland's Place in Europe, 8 March 2018; Welsh Government, Written Statement – UK Government's analysis of where they consider EU law to intersect with devolved competence, Mark Drakeford AM, Cabinet Secretary for Finance and Local Government, 14 March 2018

21 John Swinney and Michael Russell, Westminster is using Brexit to put devolution at risk. Scotland will not stand for it, *The Guardian (Online)*, 21 February 2018

22 Written Statement – UK Government's analysis of where they consider EU law to intersect with devolved competence, Mark Drakeford AM, Cabinet Secretary for Finance and Local Government, 14 March 2018

23 HC Deb 6 December 2017, Vol 632 c1021

24 BBC News, Delay to Brexit bill amendments confirmed, 9 January 2018

Scottish and Welsh Governments. The original intention had been to agree those amendments with the devolved authorities before introducing them. In those circumstances, the UK Government indicated that it would not be pressing its amendments to a vote at Committee Stage.

4. Early proposals to amend the Bill (September 2017 to March 2018)

Summary

The Scottish and Welsh Governments published suggested amendments to the *EUW Bill* in September 2017. They maintained that if these amendments were accepted, they would revisit their recommendations against their legislatures granting consent to the Bill. Those amendments were tabled in the Commons stages of the Bill but the desired changes were not made.

In March 2018 the UK Government moved (then withdrew) an amendment that would significantly alter the operation of clause 11 of the Bill in the Lords Committee Stage. If adopted, this approach would effectively have "reversed" the original Bill's presumption that all retained EU law in devolved areas is protected from modification. Instead UK Ministers would have to specify by regulations the areas they wish to protect and to report on a quarterly basis their progress towards replacing a restriction with one or more common frameworks.

These proposals were thought insufficient by the Scottish and Welsh Governments. They maintained this new approach fell short of guaranteeing common frameworks are legislated for only with the consent of the devolved legislatures. They also noted there was no legal guarantee that powers, once "protected" from modification, would be "released" at a later date.

The Lords Committee Stage considered other amendments to devolved provisions in the Bill. In relation to original clause 11, a sunset clause was suggested in debate by several Peers as a compromise that might secure agreement. The Government also committed to address devolution-related concerns about UK Ministers' delegated powers at Report Stage.

4.1 Scottish and Welsh Government proposals

The Scottish and Welsh Governments indicated that their parties' Westminster MPs would table amendments to the *EUW Bill*, with a view to addressing the concerns they had raised in their respective legislative consent memoranda. On 19 September 2017, First Ministers Nicola Sturgeon and Carwyn Jones wrote to the Prime Minister. That correspondence included a document of proposed amendments to the Bill which, if adopted:

> would make the Bill one which we could consider recommending to the Scottish Parliament and the National Assembly for Wales.[25]

The Scottish and Welsh Governments indicated that their parties' Westminster MPs would table amendments to the *EUW Bill*, with a view to addressing the concerns they had raised in their respective legislative consent memoranda.

The document contained four different types of amendment. They would:

- require the consent of the relevant devolved legislature before a UK Government Minister could use the delegated powers in the Bill to amend a devolution statute (re **clauses 7-9**);
- require the consent of the relevant devolved executive before a UK Government Minister could use delegated powers in the Bill to make

[25] Joint Letter from the First Ministers of Scotland and Wales to the Prime Minister, 19 September 2017

provision that the devolved ministers could, competently, have made themselves (re **clauses 7-9**);

- remove the requirement that devolved legislatures and authorities cannot modify retained EU law (re **clause 11** and **Schedule 2**); and
- replace certain consent requirements for the exercise of devolved delegated powers with requirements merely to consult UK Ministers (re **Schedule 2**).

Of the changes sought by those proposed amendments, the only changes agreed to during the passage of the *EUW Bill* by Lords Committee stage included the fourth category. The UK Government acquiesced to having a right to be consulted about, rather than to have a right of veto over, certain regulations made under **Schedule 2 Part 1** (the correcting power), but not in relation to **Parts 2**-**3** (concerned with compliance with international obligations or implementing the withdrawal agreement).[26]

4.2 Lords Committee stage proposed amendments to delegated powers

UK Minister modifying devolution statutes

At Lords Committee stage, Lord Hope of Craighead (Cross-bencher and former Supreme Court Justice) and Baroness Suttie (Liberal Democrat Lords Spokesperson for Northern Ireland) moved, but later withdrew, two amendments to **original clause 7**. These would have prevented its powers being used to modify the devolution statutes without the relevant devolved legislature's consent.[27] These amendments were grouped for debate with four others imposing equivalent restrictions on the powers contained in **original clauses 8** and **9**.[28] Lord Hope explained that:

> If the modification which is being proposed were to be the subject of a Bill coming through both Houses in this Parliament, [the Sewel] convention would come into play and, in accordance with it, a question would be asked about whether the consent of the Scottish or Welsh legislatures should be obtained.

The problem, he believed, was that:

> The convention does not apply to delegated legislation, only to primary legislation. The power which is being given by these clauses enables Ministers to bypass the Sewel convention. No doubt that is not their intention, but that is the way it may seem to be from the standpoint of the devolved institutions.[29]

Lord Bourne of Aberystwyth, Parliamentary Under-Secretary of State for the Wales Office, indicated in the debate that the UK Government would

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26 Schedule 2 para 5 was amended so that correcting regulations coming into effect before exit day or removing reciprocal arrangements for public bodies would only require consultation rather than consent.

27 Lords Amendments 90-91

28 Lords Amendments 130-31 and 148-49

29 HL Deb 12 March 2018 Vol 789 c1394

bring forward amendments at Lords Report stage to address concerns about the use of delegated legislation to alter the devolution statutes.[30]

UK Ministers legislating in devolved policy areas

Lord Hope and Baroness Suttie also moved amendments that sought to address the risk that UK Government Ministers could exercise powers under **original clause 7** in areas in which it would be competent for devolved authorities to make provision.[31] They were debated alongside amendments making equivalent provision for **original clause 8**.[32]

The amendments would have required any Minister of the Crown seeking to make regulations under **original clauses 7-8** to secure the consent of any devolved authority that could have made them instead. Lord Hope explained:

> How the areas of government within devolved competence should be administered is seen—certainly in Cardiff and Edinburgh—as the responsibility of the devolved authorities. They have that responsibility by virtue of the democratic vote under which Members of these legislatures were elected. Their quite correct position is that it should not be for UK Ministers to enter into the area that is devolved to them without their consent, especially in the exercise of the power… to make any provision under these two clauses that could be made by an Act of Parliament.[33]

The debate concentrated on whether it was appropriate to include a consent requirement on the face of the Bill. The powers of devolved authorities to make provision under section 2(2) of the *ECA* are held concurrently with UK Ministers, but there is no legal requirement for consent where UK Ministers propose to legislate in devolved areas.

It was suggested by Lord Mackay of Clashfern that this area might better be dealt with under a memorandum of understanding between the UK Government and the devolved authorities.[34] This was the approach taken to limit the likelihood that delegated legislation under the *ECA* would be made in devolved areas without the consent of devolved authorities. Under the current arrangements, it is accepted that the UK Government will involve the devolved Administrations "as directly and fully as possible in decision making on EU matters which touch on devolved areas". The current MoU says the following about the implementation of EU obligations:

> For matters falling within the responsibility of the devolved administrations, it is for the devolved administrations to consider, in bilateral consultation with the lead Whitehall Department, and other Departments and devolved administrations if appropriate, how the obligation should be implemented and administratively enforced (if appropriate) within the required timescale, including whether the

30 HL Deb 12 March 2018 Vol 789 c1397
31 Lords Amendments 102-03
32 Lords Amendments 124-25
33 HL Deb 12 March 2018 Vol 789 c1421
34 HL Deb 12 March 2018 Vol 789 c1424

> devolved administrations should implement separately, or opt for GB or UK legislation.[35]

Where concurrent powers exist, therefore, the working assumption is that the devolved authority takes the initiative. It will decide at first instance whether it is best to legislate separately or through a UK-wide instrument.

Lord Bourne resisted the amendments at this stage, stressing the UK Government's commitment that it "will not normally use the powers" in relation to matters within devolved competence "without the agreement of the devolved Administrations". He drew attention to the fact that, under the *ECA*, concurrent powers have:

> routinely been used to make a single set of regulations to implement directives relating to devolved matters… if a deficiency arises within [a] statutory instrument and we all agree on the best way to correct it, it makes little sense for four Administrations to make four sets of regulations to make the same amendment.[36]

Lord Bourne did, however, commit to consider further, and ahead of Report, whether there are ways that this issue could be better addressed through a memorandum of understanding. On that basis, Lord Hope and Baroness Suttie withdrew their amendments.

4.3 Lords Committee stage UK Government proposed amendments to clause 11

The UK Government indicated at the meeting of the JMC(EN) on 8 March 2018 that it would table amendments to the *EUW Bill* in the Lords in relation to **clause 11** and its associated **Schedules 2** and **3**.[37] The content of the amendments, however, had not been agreed to by either the Scottish Government or the Welsh Government. Although these amendments, tabled by Lord Callanan, were moved at Committee Stage by Lord Keen of Elie, they were subsequently withdrawn.[38] The Government intended to return to the matter on Report.

What would the amendments have changed?

The **original clause 11** operates on a presumption that all retained EU law that affects devolved areas should not be able to be modified by a devolved legislature unless the *EUW Bill* (or a future Order in Council) expressly provides otherwise. The proposed Government amendments tabled in the Lords would effectively reverse this presumption. The new scheme would allow the devolved legislatures to modify retained EU law unless, and to the extent that, the UK Government imposes a specific restriction by regulations under affirmative procedure. It provides that:

The proposed Government amendments tabled in the Lords would effectively have reversed the presumption that every all retained EU law that affects devolved areas should be protected from modification.

The new scheme would allow the devolved legislatures to modify retained EU law unless, and to the extent that, the UK Government imposes a specific restriction by regulations under affirmative procedure.

35 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive Committee, October 2013, p34
36 HL Deb 12 March 2018 Vol 789 c1432
37 Joint Ministerial Committee (EU Negotiations) Communique, 8 March 2018
38 Lords Amendment 302A

> [An Act of the devolved legislature] cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

Under the proposed replacement for **clause 11**, any regulations made to restrict devolved competence could only be passed after the UK Government has *consulted* with the relevant devolved legislature. Devolved legislative or executive *consent*, however, still would not have been a statutory requirement.

The proposed amendments to clause 11 also sought to provide assurances that any regulations restricting the competence of the devolved legislatures are intended to be temporary. The Government proposed to impose on itself a statutory "reporting" requirement. Every three months following Royal Assent it would have to explain to Parliament what progress it had made in developing common frameworks and to justify the preservation of any clause 11 restrictions still in force.

There was not, however, a sunset provision in this proposed new clause. Legally, it would be possible for the UK Government to impose restrictions on devolved competence (where it intersects with retained EU law) on an indefinite basis.

Why hasn't this new proposal been acceptable to the Scottish and Welsh Governments?

The Scottish and Welsh Governments did not believe this proposed replacement for clause 11 did enough to protect the competencies of the devolved legislatures. Mike Russell MSP, Minister for UK Negotiations on Scotland's Place in Europe, explained the position of the Scottish Government in an open letter to MSPs on the 12th March 2018:

> The amendments replace the previous blanket reservation of devolved areas which are subject to retained EU law, with a power for the UK Government to make regulations in the UK Parliament imposing such a restriction in any such devolved areas. In exercising this power the UK Government would only be under a duty to *consult* the devolved administrations and provide information to the UK Parliament on the effect of the regulations and that consultation. There would be no need for such changes to be agreed by the Devolved Parliaments or Governments.

He maintained further that:

> It therefore remains essential that any regulations made under this power be approved by the devolved legislatures as well as by the UK Parliament, in line with the current and long standing constitutional arrangements in the devolution settlements.

The UK Government's amendment would have only required the approval of the Commons and the Lords to "protect" a retained EU law power from modification. Moreover, it would not require any devolved consent, whether legislative or ministerial.

The Scottish Government doubted the "temporary" nature of the reservations imposed by UK Government order made under **proposed new**

clause 11. They were particularly concerned about the knock-on effect of a temporary reservation:

> Any matters covered by regulations will in effect be reserved, even if on a temporary basis. That would mean that the devolved legislatures could not be certain that the Sewel convention, through which their agreement is sought for primary legislation, would apply in the normal way to UK legislation, made in relation to those matters. The UK Government have refused to confirm that it would.

Any common framework implemented by Act of Parliament, legally, could be imposed even without devolved consent. However, if the content of a common framework dealt only with areas outside of devolved competence, even if those matters were only temporarily outside of competence, it would mean that the legislative consent convention would not apply to that framework. This would reduce the influence devolved authorities would have in shaping the terms of any such common framework.

If the content of a common framework dealt only with areas outside of devolved competence, even if those matters were only temporarily outside of competence, it would mean that the legislative consent convention would not apply to that framework.

This would reduce the influence devolved authorities would have in shaping the terms of any such common framework.

This does not necessarily mean that common frameworks would in fact be imposed without the approval of the devolved Parliaments or Ministers. The UK Government could still, politically, seek their agreement to any such scheme. The potential absence of a "requirement" for consent for common frameworks, however underpinned the continuing objection of the Scottish Government even to the **proposed new clause 11** of the Bill. As John Swinney MSP, Deputy First Minister for Scotland put it:

> I cannot see how, in all honesty, we as a Parliament can agree to the revised terms of clause 11 in the UK bill, because it does not make provision requiring the agreement of this Parliament or this Government. Without that, we will have things done to us, in terms of devolved competence, that the founders of our Parliament would not have approved of.[39]

In response to a question by Steffan Lewis AM, the First Minister of Wales indicated agreement with the position outlined by several Scottish Ministers on the **proposed new clause 11**. The prospect that, once regulations have been made to restrict the Assembly's competence, those retained powers could then be incorporated into a common framework without the Assembly's consent "would not be acceptable" to the Welsh Government:

> I discussed this with Nicola Sturgeon yesterday. We are both in the same place, which is that it's not adequate that the powers should remain in one place and that we then see those powers used in a way that is not of benefit to Scotland or Wales.[40]

4.4 Possibility of a sunset provision to clause 11

Alongside the Government's proposals to replace the **original clause 11**, several Peers, including Lord Dunlop (former Parliamentary Under-Secretary of State for Scotland and Northern Ireland) and Lord McConnell of Glenscorrodale (former First Minister of Scotland) raised the possibility that

39 SP OR 13 March 2018, c30
40 National Assembly for Wales, Questions to the First Minister, 13 March 2018, cc16-17

it might be made the subject of a sunset clause. This would place a legal time-limit on the imposition of a protection from modification for aspects of EU law, rather than just a quarterly reporting a requirement as the UK Government proposed. Any areas where EU powers currently restrict legislative and executive action in devolved areas not replaced by a common framework by the cut-off date would then be "released" to the devolved legislatures. This proposal was also suggested by Professor Jim Gallagher, Research Fellow at Oxford University, Nuffield College.[41]

Several Lords expressed the view that a sunset clause should be given further consideration. Lord Dunlop said of the notion:

> A sunset clause of suitable length to Ministers' regulation-making powers in Clause 11… would allow sufficient time for the frameworks to be agreed while providing the devolved Administrations with the backstop safeguard against the risk of powers becoming stuck indefinitely in the holding pattern.[42]

Lord McConnell said of the idea of a sunset clause:

> I welcome the steps that have already been taken to put in place restricted time scales, which might yet include a sunset clause—that might be very wise—to be clear about the reversal of the principle; to devolve things unless they have to be reserved.[43]

The UK Government had two concerns about a sunset clause being applied to these provisions. Chris Skidmore, then Minister for the Constitution in December 2017, said that a sunset clause would "create an artificial cliff edge" that would be counterproductive to attempts to secure agreement to common frameworks either before or after exit day.[44] It was also not yet clear how long any such sunset clause should last if it were to be included in the Bill. Amendments tabled in the Lords have suggested a sunset clause of anything between two and five years following the making of regulations to restrict devolved competence.[45] Lord Keen of Elie, the Advocate General for Scotland, indicated that if the UK Government were to consider a sunset clause, it would likely be nearer to the latter than the former:

> A sunset clause has been suggested, and I have already expressed a view about that. Clearly, we are listening to the idea that a sunset clause might run for five years.[46]

41 The Herald, Deal to avoid UK constitutional crisis over Brexit 'achievable', 1 November 2017
42 HL Deb 21 March 2018 Vol 790 c389
43 HL Deb 21 March 2018 Vol 790 c371
44 HC Deb 4 December 2017 Vol 632 c810
45 Lords Amendments 302F and 318E (not moved)
46 HL Deb 21 March Vol 790 c404

5. Continuity Bills and the Supreme Court (March to May 2018)

Summary

The Scottish and Welsh Governments introduced "Continuity Bills" before their respective legislatures. The Bills sought, on the interpretation of the Scottish and Welsh Governments, to "protect" devolved competence and functions from what they call a "power grab" by the UK Government under the provisions of its the *EUW Bill*. These Bills were scrutinised under "emergency" legislative procedures, potentially enabling them to be passed before the *EUW Bill* received Royal Assent. The Bills completed their legislative stages in the devolved legislatures on 21 March 2018.

The legislative competence of the Continuity Bills is disputed. The Scottish Parliament's Presiding Officer concluded that the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* would be outside of its legislative competence. The National Assembly for Wales' Presiding Officer, however, concluded that the *Law Derived from the European Union (Wales) Bill* falls within the Assembly's competence. The UK Government has exercised its powers under the devolution statutes to "refer" these Bills to the UK Supreme Court before Royal Assent. The purpose of such a reference is to establish whether the Bills fall within the powers of their respective legislatures. The law officers made their references within the statutory 4-week deadline, on 17 April 2018.

Should the Continuity Bills be held to be within competence, their provisions would cut across key provisions of the *EUW Bill* in devolved areas. The Welsh Government has agreed to take steps to repeal its Continuity Bill following the Intergovernmental Agreement reached in April between the UK and Welsh Governments.

5.1 Why were these Bills introduced?

On 27 February 2018, the Welsh Government tabled the *Law Derived from the European Union (Wales) Bill* (*Welsh Continuity Bill*). The Scottish Government followed suit on 28 February 2018 by introducing the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* (*Scottish Continuity Bill*).

These Bills were introduced to make provision for the continuity of EU law after exit day in relation to matters falling within the devolved competence of the National Assembly for Wales and the Scottish Parliament. This was considered necessary by the two devolved Governments because of the likelihood that legislative consent will not be given to the *EUW Bill* insofar as its provisions relate to devolved matters. If the UK Government were to remove the provisions not consented to in order to pass its own Bill in compliance with the legislative consent convention, this would leave "gaps" in devolved areas that, currently, intersect with EU law.

In some respects, therefore, the "Continuity Bills" proposed to fulfil a similar function to the legislation introduced by the Scottish Parliament after consent was withheld to parts of the *Welfare Reform Bill* in 2012.[47] Even though the Scottish Government disapproves of the policy of leaving the European Union (just as it did aspects of UK Government welfare

[47] See Brexit: Devolution and legislative consent, Commons Library Briefing Paper, 18/08274, 29 March 2018, Annex p45

reform) it recognises the need to ensure that implementation of that policy is coherent when it intersects with devolved areas and institutions.

Both the Scottish and Welsh Governments stated from the outset that they would have preferred an agreed UK-wide approach to legal continuity. One of the objectives of these Bills was therefore to attempt to influence the negotiations in the JMC(EN). If further concessions were to be forthcoming to the devolved provisions in the *EUW Bill*, the Scottish and Welsh Governments would potentially seek to repeal all or part of any Continuity Act that received Royal Assent. As Mike Russell MSP, Minister for UK Negotiations on Scotland's Place in Europe explained:

> The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill is contingency planning. It provides a sensible scheme for preparing devolved law for withdrawal from the EU. However, if the UK Government's European Union (Withdrawal) Bill can be agreed, and if this Parliament consents to it, our continuity bill will be withdrawn. Even if the continuity bill is passed by this Parliament, it contains provisions for its own repeal. If a deal can be reached with the UK Government, we would be able to come to Parliament with a proposal to give consent to the European Union (Withdrawal) Bill, and to repeal this one.[48]

5.2 What would these Bills do?

The Continuity Bills would have had five main effects. They would:

- retain in domestic law elements of EU law currently operating in devolved areas;
- give powers to devolved Ministers to correct deficiencies arising from withdrawal from the EU;
- give powers to devolved Ministers to remedy or prevent breaches of international obligations arising from EU withdrawal;
- give powers to devolved Ministers to make provision corresponding to EU law after exit day; and
- impose a consent requirement on UK Government ministers making regulations that modify or otherwise affect the operation of retained EU law in devolved areas.

In terms of both structure and content, therefore, the two Bills were very similar to the *EUW Bill* (as introduced).

5.3 How did these Bills differ from the *EUW Bill?*

Retention of EU law

In relation to the extent to which EU law is retained, there were two key differences.

Firstly, the status of the Charter of Fundamental Rights was different in the Continuity Bills, both from the original *EUW Bill* and from each other.

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48 SP OR 27 February 2018, c60

- Sub-clause 5(4) of the *EUW Bill* expressly provided that the Charter is not a part of UK law from exit day onwards. This was not to be taken, however, to repudiate rights that are otherwise retained by other instruments or principles of EU law.
- The *Scottish Continuity Bill* expressly incorporates the Charter into Scots Law in relation to devolved areas. It also preserves a right of action for a breach of the general principles of EU law or the Charter.[49]
- The *Welsh Continuity Bill* requires any provision of EU derived Welsh law to be interpreted compatibly with the general principles of EU law and the Charter. However, it would not, as such, provide that the Charter is itself incorporated into domestic law in devolved areas.[50]

The second key difference would have been the treatment of *Francovich* damages in the *Scottish Continuity Bill*.[51] The *EUW Bill* as introduced simply proposed to abolish the principle of state liability from exit day onwards.[52] Sub-clause 8(2) of the *Scottish Continuity Bill* would preserve a right of action under the state liability principle where that right of action accrued before exit day, regardless of whether or not proceedings to enforce that right were commenced before exit day.

Amendments made to the *EUW Bill* in the Lords, in relation to the Charter and *Francovich* damages, would have made the two Bills more similar. It is not yet clear, however, whether the Commons will agree to those amendments.

Delegated powers to modify devolved retained EU law

Proposed delegated powers of devolved ministers also differ substantially from those contained in the original *EUW Bill*. Key differences include that:

- the *Scottish Continuity Bill* does not include a power to implement the withdrawal agreement;
- both Continuity Bills include a power to allow for modifications to devolved retained EU law to reflect changes to EU law made after exit day;[53]
- the *EUW Bill*'s restrictions on the types of retained EU law that devolved authorities can modify are not replicated in the Continuity Bills;
- the use of delegated powers under the *Scottish Continuity Bill* must satisfy a "necessity" test rather than an "appropriateness" test;[54] and
- the *Scottish Continuity Bill*'s delegated powers cannot modify the *Equality Acts*, interfere with the independence of the judiciary, or

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49 Clause 5(1-2) *Scottish Continuity Bill*
50 Clause 7 *Welsh Continuity Bill*
51 *Francovich v Italy* (C-6/90) EU:C:1991:428 (19 November 1991)
52 Schedule 1 para 4 *EUW Bill*
53 Clause 13 *Scottish Continuity Bill*; clause 11 *Welsh Continuity Bill*
54 Clauses 11(1)(b) and 12(1)(b) *Scottish Continuity Bill*; Lords Report stage amendments to be considered by the Commons would also impose a "necessity" test

modify either the *Scotland Act 1998* generally or the protected provisions of the *Scotland Act* in s31(5) specifically.

Both Continuity Bills also include a provision that imposes a requirement that modifications made by delegated powers of UK ministers in devolved areas require consent of the Scottish or Welsh Ministers.[55] Professor Aileen McHarg and Chris McCorkindale (both of the University of Strathclyde) described this provision as "novel", since it purports to restrict powers exercised by UK Ministers under UK acts, rather than those exercised under the Scottish Parliament's own legislation.[56] These provisions, assuming that they are legislatively competent, would have the same effect as Lord Hope of Craighead's withdrawn amendments in relation to clauses 7-9 of the *EUW Bill*.[57]

Scrutiny of delegated powers

There are three notable differences in the way that the Continuity Bills provided for scrutiny of regulations made by Scottish and Welsh Ministers:

- any regulations subject to the affirmative procedure would have to be laid for 60 days rather than 40 under both Continuity Bills;
- the *Scottish Continuity Bill* replicates for Scottish Ministers the requirement in the *EUW Bill* that UK Ministers must publish explanatory statements in relation to certain regulations. The *EUW Bill* does not impose this requirement on devolved authorities; and
- there was no replication of the "sifting committee" provided for in the *EUW Bill*'s Schedule 7 to scrutinise the procedure used with respect to statutory instruments.

5.4 Why did these bills follow an emergency procedure?

Each of the Continuity Bills were designated as "emergency bills" for the purposes of the Standing Orders of the Scottish Parliament and National Assembly for Wales. If the Parliament or Assembly approves a request made by a Government minister, this allows for the stages of a Bill to progress far more quickly, and potentially with less time for scrutiny, than would normally be the case. The Scottish Parliament agreed on 1 March to cover all three stages of its Continuity Bill within a 3-week period.[58] The Welsh Assembly agreed a very similar timetable on 6 March.[59] The time allocated to consider the Bills at Committee stage was particularly short. There were 231 amendments lodged in relation to the Scottish Continuity Bill, considered in just a single 11-hour session.[60]

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55 Clause 17 *Scottish Continuity Bill*; clauses 13 and 14 *Welsh Continuity Bill*

56 A. McHarg and C. McCorkindale, Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Part I), U.K. Const. L. Blog, 6 March 2018

57 See section 4.2 above

58 SPICe Briefing, UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, SB 18/18, 6 March 2018

59 Motion NDM6673, 6 March 2018

60 BBC News, Holyrood Brexit bill powers reined in by MPs, 14 March 2018

The reason for designating these Bills as emergency legislation has to be understood against the context of the progression of the *EUW Bill*, which was (then) expected to reach its final stages in May. These Bills would have no capacity to leverage concessions in relation to the devolution impacts of the *EUW Bill* unless they were ready to be made law before the *EUW Bill*.

There were further complications that explain the perceived urgency of this legislation. If the *EUW Bill* is given Royal Assent, with the devolution provisions to which the Scottish and Welsh Governments object, it would render several of the key elements of the Continuity Bills explicitly beyond the competence of the devolved legislatures. This would further diminish the Bills' capacity to, as their sponsoring Governments saw it, protect the continuity of EU law in devolved areas in the manner of their choosing.

5.5 Legality of the Continuity Bills

The legality of the Continuity Bills was challenged by a reference to the Supreme Court on grounds of legislative competence. An Act of the Scottish Parliament or of the National Assembly for Wales is not law insofar as its provisions are outside of competence. If any provisions were found not to be competent, this could leave a gap in the operation of retained EU law in relation to devolved areas. There is a particular risk this scenario would materialise if the Continuity Bills received Royal Assent and the provisions of the *EUW Bill* were amended so as not to apply in relation to areas of devolved competence.

Presiding Officers and Law Officers' Statements

When the *Scottish Continuity Bill* was introduced, the Presiding Officer of the Scottish Parliament published a statement under the Standing Orders of the Parliament.[61] It stated that he believed the Bill fell outside of the competence of the Scottish Parliament. By contrast, the Presiding Officer of the National Assembly for Wales made a statement that that she believed the *Welsh Continuity Bill* fell within the legislative competence of the National Assembly for Wales.[62]

It should be noted that a Presiding Officer's statement as to legislative competence is of no consequence to whether that Bill can proceed. The Lord Advocate made a statement before the Scottish Parliament to the effect that he believed the Bill was within competence.[63] The purposes of these statements are:

- to inform the legislature as to the risks that a Bill would be held to be beyond competence by the courts; and

61 Presiding Officer's Statement on Legislative Competence, UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, 27 February 2018

62 For discussion on the reasons for those decisions, see A. McHarg and C. McCorkindale, Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Part II), U.K. Const. L. Blog, 7 March 2018

63 SP OR 28 February 2018, c19

- to provide the legislature with opportunities to change the Bill either to eliminate or reduce those risks.

References to the Supreme Court

The UK Government's decision to refer the Bills to the Supreme Court before they are given Royal Assent could prevent them from taking effect.[64] Under section 33 of the *Scotland Act*, either the Advocate General for Scotland or the Attorney General for England and Wales can refer a Bill of the Scottish Parliament. The Attorney General can also refer a Bill of the National Assembly for Wales under section 112 of the *Government of Wales Act*. Such a reference is unprecedented in the context of Scottish devolution but there have been several such references in relation to Welsh devolution.[65]

The UK Government lodged its references for both Bills to the Supreme Court on 17 April 2018. It is possible that the proceedings of these court cases will have an indirect effect on the timetabling of the UK Government's efforts to pass the *EUW Bill*, especially if further amendments have to be made either to accommodate or to override the Continuity Bills' provisions.

Following the Intergovernmental Agreement published on 25 April 2018, it is expected that the UK Government will withdraw its reference for the Welsh Continuity Bill.[66] It will then be allowed to receive Royal Assent, but in with the expectation that the Welsh Government will immediately take steps to repeal it using the power in clause 22 of the Bill.

The Supreme Court has announced that the *Scottish Continuity Bill* hearing will take place on 25 and 26 July.[67]

5.6 Effect if the Continuity Bills are lawful

Were the *Scottish Continuity Bill* to be held to be within competence (and therefore allowed to become law) the passage of the *EUW Bill* would become more complicated. The precise impact would depend on how the UK Government decided to proceed. If it were to accept the role of a *Continuity Bill* in the EU withdrawal process, several amendments would need to be made to the *EUW Bill* to avoid duplication or contradiction, before seeking Royal Assent.

As a matter of law, however, Parliament could opt to take a different course. Were it considered necessary and desirable, the *EUW Bill* could be amended to override elements of the *Continuity Bill* with which the UK Government disagrees.

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64 On the procedural requirements of this reference procedure, see The Supreme Court on Devolution, Commons Library Research Paper 16/7670, 27 July 2016, pp5-8

65 *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales* [2012] UKSC 53; *Agriculture Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43; Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3

66 See section 5 below

67 The Herald, Supreme Court date set for cross-border Brexit fight, 10 May 2018

No consideration has yet been given to how the *Continuity Bill* would operate with regard to any transition phase agreed by the UK Government and the European Union. It is also possible that the anticipated *European Union (Withdrawal Agreement and Implementation) Bill* could modify or repeal any *Continuity Acts*.

6. Revised UK Government proposals (April 2018)

Summary

The UK Government revised the legislative and political proposals it brought forward at Lords Committee stage. New proposals were presented to the devolved authorities in late April 2018. These proposals included two key components: a refined set of Government amendments to the Bill (to be made at Lords Report stage) and a proposed Intergovernmental Agreement. These were made public by the UK Government on 25 April 2018.

The proposed amendments to the Bill, like those debated but withdrawn at Committee stage, would "reverse" the presumption found in **original clause 11**: UK ministers would have to specify in regulations which parts of retained EU law they wished to protect from modification by devolved legislatures. The most important difference between the Government's proposals at Committee stage and at Report stage was that the latter included sunset provisions for the **replacement clause 11**. These would prevent clause 11 (subsequently clause 15) regulations being made more than two years after exit day, and would limit their effect to five years.

The UK Government also published an Intergovernmental Agreement containing several political commitments. It addresses how the Government intends to use its *EUW Bill* powers and how it will approach legislation affecting future UK common frameworks. The Agreement also stipulates reciprocal undertakings for devolved authorities.

The Welsh Government agreed to this package of proposals. It also agreed to repeal its *Continuity Bill*. In return, the UK Government agreed to withdraw its Supreme Court reference in relation to the *Welsh Continuity Bill*. That Bill must first gain Royal Assent before the powers in the *Continuity Bill* itself can be used to repeal it.

The Scottish Government rejected the revised proposal. It still seeks legal guarantees for consent before clause 11 regulations can be made. It believes it inequitable that devolved institutions would be restricted by law while the UK Government's reciprocal commitments are not legally binding. It also has concerns about the length of the sunset provisions, which could restrict the Scottish Parliament's competence for up to seven years after exit day.

6.1 The revised UK Government offer

In late April, the UK Government made further proposals to the devolved authorities, building on the amendments debated (but withdrawn) at Lords Committee stage. There were two key elements to this revised offer: additional amendments to the *EUW Bill* itself and a series of political commitments contained in a proposed Intergovernmental Agreement. The amendments, like those tabled and debated in Lords Committee stage, would "reverse the presumption" about whether a devolved legislature could modify retained EU law.

Differences from Committee stage amendments

Unlike the Committee stage proposal, the new proposal contains sunset provisions. No new regulations made under what is now clause 15 would be able to be made more than two years after exit day and no such regulations

would be able to stay in force for more than five years after they come into effect.

Any regulations to restrict devolved competence must be laid for approval before both Houses of Parliament. The new amendments impose an additional requirement that regulations must not be laid until either 40 days have passed since the devolved authorities were provided with a draft instrument, or a "consent decision" has been taken. A "consent decision" is a decision:

- to agree a motion consenting to the laying of a draft instrument;
- not to agree a motion consenting to the laying of a draft instrument; or
- to agree a motion refusing consent to the laying of a draft instrument.

Where consent is not given, the UK Minister making regulations must provide an explanatory statement setting out why she intends to make the regulations regardless. She must also lay before both Houses any statement of reasons given by a devolved authority for the devolved legislature having refused consent. The effect of this provision is to provide greater Parliamentary scrutiny of a decision by a UK Minister to proceed with clause 11 regulations without consent.

The Intergovernmental Agreement

Beyond the amendments themselves, the UK Government also published an intergovernmental agreement on 25 April 2018. The Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks has been agreed to by the UK Government and Welsh Government but not by the Scottish Government. There are several political undertakings in this agreement that seek to address the concerns raised by the devolved authorities.

The Agreement states that the UK Government will "not normally" ask the UK Parliament "to approve clause 11 regulations without the consent of the devolved legislatures". Where agreement is not reached, UK Ministers would have to justify why they pursued any regulations without consent:

> In the absence of the consent of the devolved legislatures, UK Ministers will be required to make an explanatory written statement to the UK Parliament if a decision is taken to proceed. This will be accompanied by any statement from the relevant devolved Ministers on why, in their view, the consent of their legislature has not been provided.[68]

This effectively seeks to "extend" the Sewel Convention, which is concerned with primary legislation, to any secondary legislation made under clause 11.

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68 Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, 25 April 2018, p2

The Intergovernmental Agreement also clarifies the role of the Sewel Convention in relation to future UK Parliamentary Bills that would implement common frameworks:

> Under this agreement, the UK Government has committed to ensure that clause 11 regulations will not affect the operation of the Sewel convention and that related practices and conventions in relation to future primary legislation, including legislation giving effect to common frameworks, will continue to apply. Accordingly, those established practices and conventions will operate as if clause 11 regulations had not been made.[69]

The rationale of clause 11 restrictions is to prevent devolved authorities causing regulatory divergence before common frameworks are agreed in protected areas. The *EUW Bill* itself does not prevent UK Ministers from bringing about regulatory divergence in policy areas they control in relation to England (or indeed any devolved country) even where they would form part of a common framework. The Intergovernmental Agreement, however, does include a political commitment that the UK Government will not cause the law in England to diverge from the rest of the UK:

> For England, temporary preservation will be given effect by the UK Government committing not to bring forward legislation that would alter areas of policy in so far as the devolved legislatures are prevented from doing so by virtue of clause 11 regulations, for as long as those regulations are in force.[70]

In signing up to this agreement, the Welsh Government has also undertaken to "secure the repeal of" its Continuity Bill at the earliest available opportunity before the *EUW Bill* receives Royal Assent. The UK Government has, reciprocally, agreed to withdraw the reference it has made to the Supreme Court with respect to that Bill.[71] It is necessary to allow the *Welsh Continuity Bill* to receive Royal Assent before Welsh Ministers can exercise its repeal provisions through secondary legislation.

6.2 Welsh Government response

Mark Drakeford, Cabinet Secretary for Finance, made a statement on behalf of the Welsh Government on 24 April indicating that they would agree to the revised offer made by the UK Government. The Welsh Government would therefore table a supplementary legislative consent memorandum recommending that the National Assembly for Wales should consent to the Bill.[72] The memorandum was lodged on 27 April. Drakeford said of the deal:

> We have always recognised the need for UK-wide frameworks where the EU rule book will no longer apply. The original draft Bill meant powers already devolved would have been clawed back by the UK Government post-Brexit and only Ministers in London would have

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69 Ibid.

70 Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks p1

71 Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks p2

72 BBC News, Not Scots Brexit powers deal despite UK-Welsh agreement, 24 April 2018

> had the right to decide if and when they were passed back to the devolved parliaments.
>
> This was totally unacceptable and went against the will of the people of Wales who voted for devolution in two referendums. We are now in a different place. London has changed its position so that all powers and policy areas rest in Cardiff, unless specified to be temporarily held by the UK Government.
>
> These will be areas where we all agree common, UK-wide rules are needed for a functioning UK internal market. London's willingness to listen to our concerns and enter serious negotiations has been welcome.

In a statement to the National Assembly for Wales on 25 April 2018, Mark Drakeford gave seven reasons why he believed the agreement "provides sufficient protection for our devolution settlement". These can be summarised as follows:

- the new clause 11 reverses the original presumption and is therefore "more compatible" with a reserved powers model of devolution;
- the Sewel Convention will be extended to the making of clause 11 regulations and reasons for disagreement must be given and scrutinised where regulations are made without consent;
- the restrictions will now be temporary because of the inclusion of the sunset clause;
- the Intergovernmental Agreement promises that the Sewel Convention will be taken to apply to framework Bills;
- the UK Government promised in the Intergovernmental Agreement not to legislate for England in areas where devolved authorities are temporarily prevented from legislating;
- the consultation requirements and the need for "consent decisions" in relation to regulations represents a starting point for a "more collaborative process of inter-governmental working"; and
- the Intergovernmental Agreement "codifies" commitments that the UK Government will not "normally" use the powers in clauses 7-9 with regard to devolved matters without consent.

The Cabinet Secretary acknowledged that the agreement represented a compromise on the Welsh Government's desired position:

> The outcome is not perfect, of course. We would have preferred there to be no clause 11 and for each Government to trust each other's undertakings not to legislate in areas where we agree UK-wide frameworks are needed until such frameworks have been agreed. We have repeatedly been clear we were prepared to give such assurances and to accept similar assurances from the other Governments. Others have sought stronger reassurances that no part of the United Kingdom, including England, could develop its own legislation in relation to these areas where a UK-wide framework is needed until such a framework had been negotiated and agreed, and this agreement provides that reassurance.
>
> Of course, there are those who argue that it is unacceptable, even in extreme circumstances, that Parliament could act to impose constraints on devolved competence. But until a new constitutional

"The outcome is not perfect, of course. We would have preferred there to be no clause 11 and for each Government to trust each other's undertakings not to legislate in areas where we agree UK-wide frameworks are needed until such frameworks have been agreed."

Mark Drakeford, Cabinet Secretary for Finance, 25 April 2018

> settlement for the whole United Kingdom is negotiated—for which this Government has long argued—it is the constitutional reality that Parliament retains that role. This agreement, like the Sewel convention, does no more than recognise that fact while underlining the political imperative of Parliament acting on the basis of consent where devolved issues are at stake.

6.3 Scottish Government response

Rejection of the revised offer

On behalf of the Scottish Government, Mike Russell made a statement to the Scottish Parliament on 24 April 2018. He indicated that the revised offer was still not acceptable to it. Two key objections persevered. Firstly, the sunset clause still allows devolved competence to be restricted for what it considers too long a period. It is concerned that, in that time, Scottish law in devolved areas will fail to keep pace with developments in EU law in relation to, for example, environmental protection.[73]

The Scottish Government also believes there is a lack of reciprocity in the revised offer: it relies on legal restrictions for devolved authorities but only political restrictions for the UK Government. As Mike Russell put it:

> The UK Government's latest proposals continue to give Westminster the power to prevent the Scottish Parliament from passing laws in certain devolved policy areas… The UK Government says that that ban—or legal constraint—needs to be in place to prevent the Scottish Parliament from legislating on devolved matters, such as farming or fishing, while framework discussions are taking place. However, it has never proposed—and has indicated that it could not accept—such a legal constraint for England. Any constraint placed on the UK Government will, therefore, be purely voluntary.[74]

"The UK Government has never proposed – and has indicated that it could not accept – such a legal constraint for England. Any constraint placed on the UK Government will, therefore, be purely voluntary."

Mike Russell, Minister for EU Negotiations on Scotland's Place in Europe, 24 April 2018

Such an approach is unacceptable to the Scottish Government. It noted it was being asked to trust political assurances given by the UK Government. In return, the UK Government seeks not just political assurances but legal guarantees as to the conduct of devolved authorities:

> During the same period, Westminster politicians—or those who might replace them, of whatever political or constitutional hue—would have a totally free hand to pass legislation that would directly affect Scotland's fishing industry, our farmers, our environment, our public sector procurement rules, the safe use of chemicals and our food safety—the list is long, while our Parliament's hands would be tied.
>
> …although discussion and political agreement might have reduced the number of areas that might be subject to such restrictions to 24, under the UK Government's proposals there will be nothing in the withdrawal bill that limits possible restrictions in those areas. Again, we are being asked to take that on trust. How could we recommend

73 SP OR 24 April 2018, cc13-14
74 SP OR 24 April 2018, c13

> giving consent to a bill that would place Scotland in such a vulnerable position in these uncertain political times?[75]

The Scottish Government was not satisfied with a governmental commitment not "normally" to make regulations without consent (provided consent was not unreasonably withheld) for several reasons. Firstly, this commitment was not a legislative one: it is not contained in the amendments to the Bill. Secondly, however:

> It would still be for the UK Government and, ultimately, the House of Commons to determine what was normal and what was not. It would also be for Westminster to decide whether the Scottish Parliament was acting reasonably on any occasion on which it opted to withhold consent.[76]

Mike Russell articulated the Scottish Government's scepticism as to the UK Government's historical approach to commitments of this type. He referred to the remarks of the Advocate General in *R (Miller) v Secretary of State for Exiting the European Union*.[77] In that case the UK Government and the devolved authorities litigated the meaning and status of the Sewel Convention, particularly in the context of EU withdrawal:

> We cannot forget that the UK Government has gone out of its way during the Brexit process to remind people that it can legislate on any matter at any time. Indeed, in relation to the Sewel convention, the UK Government lawyers told the Supreme Court:
>
> > "Whether circumstances are 'normal' is a quintessential matter of political judgment for the Westminster Parliament"
>
> … Notwithstanding the more benign language that is now being used, the effect of the UK Government's latest proposals remains that the Scottish Parliament's powers could be restricted for a period of up to seven years without its consent. That is not something that the Scottish Government could recommend that the Parliament approves.[78]

Proposed alternatives

The Scottish Government outlined two alternative approaches that could secure its consent. These were options that had previously been argued for by both it and the Welsh Government. The first option would remove the new constraints in clause 11 completely from the Bill. Mike Russell explained what he believed should replace legal restrictions in this scenario:

> The Scottish and UK Governments could then agree on equal terms not to introduce legislation in devolved policy areas while negotiations on frameworks were taking place. In that way, the Scottish Government is offering exactly the same "certainty" that is being offered by the UK Government. We could do so, as we have indicated, within a written and signed document that showed that neither side would unreasonably withhold agreement.

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75 SP OR 24 April 2018, cc13-14
76 SP OR 24 April 2018, c14
77 [2017] UKSC 5
78 SP OR 24 April 2018, c14

> We believe that if such a voluntary agreement is good enough for Westminster, it should also be good enough for Holyrood. That solution would also demonstrate equity of treatment.

The other alternative would have preserved clause 11 but imposed a statutory consent provision for regulations made under it. The Scottish Government argued that this would be consistent with the existing statutory consent mechanisms by which devolved competence or functions could be changed (otherwise than by Act of Parliament). Orders in Council under sections 30 and 63 of the *Scotland Act 1998* can be made only with the express approval of the Scottish Parliament. Mike Russell explained:

> We could agree to abide by the present system [where] any regulations that would prevent the Scottish Parliament from legislating on devolved matters for a temporary period of time must be introduced only when that is agreed to by the Scottish Parliament. That means that amendments to clause 11 must make it clear that absolute Scottish Parliament consent is required. There must be no override power for UK ministers in the withdrawal bill. That would be consistent with the way in which other order-making powers are currently exercised and with the devolution settlement. That proposal is one that we have repeatedly made to the UK Government.[79]

"We believe that if such a voluntary agreement is good enough for Westminster, it should also be good enough for Holyrood."

Mike Russell, Minister for EU Negotiations on Scotland's Place in Europe, 24 April 2018

79 SP OR 24 April 2018, c14-15

7. Government amendments made at Report stage (May 2018)

Summary

The UK Government made its proposed amendments to the **original clause 11** (now **clause 15**) of the *EUW Bill* at Lords Report stage. These were agreed to without a division. **Clause 15** now requires UK Ministers to specify in regulations the areas of retained EU law they wish to protect from modification by devolved institutions. Regulations cannot be made more than 2 years after exit day and cannot have effect for more than 5 years.

Lord Hope of Craighead (former Supreme Court justice) moved but then withdrew amendments to the government's **clause 11** amendments. These amendments to the amendments, if agreed to, would have satisfied the Scottish Government's outstanding demands. They would have required UK Ministers to secure the consent not just of the Commons and Lords but also Holyrood before imposing restrictions on devolved competence in relation to retained EU law.

The Lords approved a number of other UK Government amendments to the Bill which responded to concerns the devolved authorities had expressed about the use of delegated powers. **Original clause 7** (now **clause 9**, the correcting power) cannot now be used to amend the devolution statutes. **Original clause 8** (the international obligations power) has been removed completely from the Bill. The powers in **original clause 9** (now **clause 11**, the withdrawal implementation power) will now need to be authorised by further primary legislation unless the *EUW Bill* is further amended to reverse the effect of the amendment moved by Dominic Grieve MP and passed at Commons Committee stage. There is now therefore less of a risk that these powers will be used in ways that will undermine the devolution settlements.

The requirement that devolved authorities secure UK Government consent before making regulations under **Schedule 2** taking effect before exit day or impacting on quota arrangements has now been downgraded to a requirement to consult. This was one of the four demands made by the devolved authorities in their legislative consent memorandums.

The aggregate effect of these amendments has been to narrow the extent of the dispute between the UK and Scottish Governments to new **clause 15** and **Schedule 3**.

7.1 UK Government amendments agreed to

The UK Government moved its new amendments at Lords Report stage on 2 May 2018. The effect of these amendments is explained at sections 1 and 6 of this paper. In brief, however, the amendments:

- "reversed" the operation of the clause so UK Ministers would now have to specify in regulations the areas of retained EU law they wish to protect from devolved institutions;
- placed a time limit at 2 years after exit day for making these regulations;
- placed a time limit of 5 years on the effect of any set of regulations; and
- create a statutory process for requiring UK Ministers making regulations without devolved consent to justify why they have done so to Parliament when laying the draft regulations.

The amendments were agreed, unamended, without a division. On the same day, a further meeting of the JMC (EN) took place but no agreement was reached between the UK and Scottish Governments.[80]

7.2 Scottish Government representations

The First Minister of Scotland wrote to the Lord Speaker on 26 April, explaining why her Government could not endorse the proposed government amendments to clause 11.[81] Annexed to that letter were two sets of amendments to the UK Government's own amendments. They would have given effect to either of the two proposed "alternatives" outlined by the Minister for EU Negotiations on Scotland's Place in Europe in his statement to the Scottish Parliament.

The SNP does not have any representation in the House of Lords. It was therefore unable to table either of these sets of amendments at Lords Report stage. Lords Hope of Craighead and Mackay of Clashfern, however, agreed to take forward amendments on the Scottish Government's behalf so that they could be debated.[82]

Those two Lords opted to table amendments for the second of Mike Russell's proposals. If agreed to, the instrument for restricting competence under clause 11 would no longer be "regulations" requiring only the consent of the Commons and Lords. Instead the relevant instrument would be an Order in Council under the "Type A" procedure set out in the *Scotland Act 1998*.[83] This would impose a legal requirement that UK Ministers secure the Scottish Parliament's agreement before they could restrict its competence.

Lord Keen of Elie, the Advocate General, rejected the proposal to amend the new clause 11:

> As regards their proposed amendments, they would, by different routes, result in a situation in which one of the devolved Administrations would effectively hold a veto over the implementation of UK-wide legislation for the maintenance of the UK internal market. That, I respectfully suggest, could not and would not be appropriate.[84]

In the event, Lord Hope withdrew the amendments before the House voted on the government amendment. This allowed the Government amendment to be agreed to unamended.

7.3 Reconsideration of the sunset provisions

Lord Wallace of Tankerness moved, but then also withdrew, an amendment that would have reduced the time for which clause 11 regulations could

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80 BBC News, Still no Scots-UK deal after Brexit powers talks, 2 May 2018
81 HL Deb 3 May 2018 Vol 790 c2134
82 Amendments 89DAAA-E and G
83 Schedule 7 *Scotland Act 1998*: Type A procedure is used for Orders made under sections 30 and 63 of the Act, which modify legislative competence and executive functions respectively.
84 HL Deb 3 May 2018 Vol 790 c2166

have effect from 5 years to 3 years. Lord Keen of Elie explained why 5 years had been arrived at:

> there have been considerable and in-depth discussions between officials as well as Governments with regard to these provisions. In light of those detailed discussions, particularly at official level, it was concluded that a period of five years would be appropriate for the second part of the sunset provision. That is why we have arrived at the period of five years, and we feel that in light of the advice given in that context, it would be appropriate to maintain that period of five years. I cannot say that there is some formula I can apply to justify five years; it is based on the in-depth analysis that has been carried out over a period of time since October last year with regard to how we will deal with these frameworks.[85]

In an intervention, Lord Wallace asked the Minister whether Scottish Government officials were involved in that determination and whether any supporting materials for the decision would be published. The Advocate General clarified that there was not "any official report to that effect" that he could publish.

7.4 Other notable changes

Other developments at Report stage have addressed some of the original issues raised by the devolved authorities in relation to delegated powers. The Government's amendments addressed both the exercise of delegated power by UK Government ministers and that by devolved authorities. In relation to **original clause 7** (the correcting power, now **clause 9**) for instance, there are now statutory requirements that the UK Government does not use this power to amend the devolution statutes. The Government has continued to resist, however, amendments placing a legal consent requirement for UK regulations in devolved areas. **Original clause 8** has also been removed from the Bill completely.

Original clause 9 (now **clause 11**) is not expected to be used until Parliament has approved any withdrawal agreement, unless further changes are made to it before Parliament grants the Bill Royal Assent. This is the case because of the amendment moved successfully by Dominic Grieve MP in Commons Committee stage in December. It requires Parliament to approve a withdrawal agreement by further enactment before clause 9 powers can be used. These changes combine to reduce the risk of Henry VIII powers being used in devolved areas in contentious ways without consent.

Other changes have downgraded certain "vetoes" previously possessed by UK Government ministers over regulations made by devolved authorities under **Schedule 2** of the Bill. Regulations taking effect before exit day or relating to quota arrangements will now only require consultation, which was one of the original demands of the devolved governments in their legislative consent memorandums.

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[85] HL Deb 3 May 2018 Vol 790 c2165

In aggregate, these changes have narrowed the dispute between the UK and Scottish Governments. The main point of disagreement is now confined to the provisions contained in **original clause 11** (now renumbered as **clause 15**) and **Schedule 3**.

8. Legislative Consent Motions and next steps (May 2018)

8.1 Committee Scrutiny of Memorandums

The Scottish and Welsh Governments lodged revised legislative consent memorandums with their respective legislatures on 25 April. These reflected the UK Government's Lords Report stage proposals. Pursuant to their legislative consent processes, these were scrutinised by committees of the legislatures. The External Affairs and Additional Legislation and the Constitutional and Legislative Affairs Committees of the Welsh Assembly published their reports on 14 May. The Finance and Constitution and the Delegated Powers and Law Reform Committees of the Scottish Parliament published their reports on 10 and 8 May respectively.

Neither of the Welsh Committees expressed a view on whether legislative consent should be granted or withheld. The External Affairs Committee noted, however, that "while considerable progress" had been made, its stated "six objectives" at the outset of the legislative consent process had not been met in full. It focused on recommendations for how the Assembly's own procedures should be developed to strengthen scrutiny of draft clause 11 regulations in the absence of further changes to the Bill.[86]

The Finance and Constitution Committee's report concluded that the Scottish Parliament should withhold consent for the revised clause 11 (now clause 15) and Schedule 3.[87] The Scottish Conservative members of the Committee dissented on this point. The Committee's report on the original memorandum about clause 11 (as introduced) had been, by contrast, unanimously agreed. The Committee did not express a view as to whether consent should be granted or withheld for other parts of the *EUW Bill*.

8.2 Consent Motions

The Scottish Parliament and Welsh Assembly each debated motions tabled by their respective governments on granting legislative consent on 15 May 2018.

Scottish Parliament

The Scottish motion (S5M-12223) as introduced said the following:

> That the Parliament notes the legislative consent memorandums on the European Union (Withdrawal) Bill lodged by the Scottish Government on 12 September 2017 and 26 April 2018, and the reports of the Finance and Constitution Committee of 9 January and 10 May 2018, and, because of clause 15 (formerly 11) and schedule 3, which constrain the legislative and executive competence of the

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86 External Affairs and Additional Legislation Committee, European Union (Withdrawal) Bill: Progress towards delivering our six objectives, 14 May 2018, pp12-16

87 Finance and Constitution Committee, Report on European Union (Withdrawal) Bill Supplementary LCM, 10 May 2018, p23

> Scottish Parliament and Scottish Government, does not consent to the European Union (Withdrawal) Bill.

An amendment to the motion, tabled by Neil Findlay MSP, was agreed to. It added the words:

> and calls on both the UK and Scottish governments to convene cross-party talks in an attempt to broker an agreed way forward.

A proposed amendment from Adam Tomkins MSP would have converted the motion into one recommending granting legislative consent. It was defeated. The amended motion was agreed to by 93 votes to 30. Only Conservative MSPs voted against the motion.

Welsh Assembly

The Welsh motion (NDM6722) stated the following:

> The National Assembly for Wales, in accordance with Standing Order 29.6, agrees that provisions in the European Union (Withdrawal) Bill in so far as they fall within or modify the legislative competence of the National Assembly for Wales should continue to be considered by the UK Parliament.

This motion was approved by the Assembly by 46 votes to 9. Only Plaid Cymru AMs voted against the motion.

8.3 What happens next?

Unless the Scottish Parliament changes its mind and grants consent, the UK Government has three "options" (short of abandoning the legislation completely) for taking forward the *EUW Bill*.

Firstly, it could ask Parliament to present the *EUW Bill* in its current form for Royal Assent despite the absence of consent. This would be an unprecedented course of action but would be within Parliament's legal powers. If it did this, it would still have to find a way to reconcile the *Scottish Continuity Bill*'s provisions with the Bill, in the event that some or all of it were held to be within devolved competence by the Supreme Court.

Secondly, it could agree to the Scottish Government's demands, by removing the clause 15 restrictions on devolved competence or by adding a consent requirement for any regulations made under it. If it did this, the Scottish Government would likely repeal its Continuity Bill by agreement, along similar lines to the commitment made by the Welsh Government in relation to their Continuity Bill.

Thirdly, the UK Government could offer to make other concessions (whether or not statutory) to try to secure the agreement of Holyrood.

Regardless of which of these options is adopted, the UK Government could also choose to revisit the relationship between retained EU law and the devolution settlements in subsequent primary legislation. It will be necessary, in any case, that the *Withdrawal Agreement and Implementation Bill* (*WAI Bill*) addresses the question of devolved competence between exit day and the end of the expected transition period (i.e. from March 2019 until December 2020). EU law is expected to continue to have full force and effect in the UK, but could no longer rely on the *ECA* as a conduit.

BRIEFING PAPER
Number 08275
23 May 2018

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