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European Union (Withdrawal) Bill LCM - Interim Report



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Finance and Constitution Committee

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Introduction

1. The European Union (Withdrawal) Bill [hereafter the Bill] was introduced in the House of Commons by the UK Government on 13 July 2017. The UK Government recognises that the Bill engages devolved competences in a range of areas and is therefore seeking the Scottish Parliament's legislative consent for the Bill. The Scottish Government published its Legislative Consent Memorandum (LCM) on 12 September 2017. The Finance and Constitution Committee [hereafter the Committee] has been designated as the lead Committee scrutinising the Bill with regard to legislative consent. The Delegated Powers and Law Reform (DPLR) Committee has also reported to the Committee on the LCM.
2. The Bill seeks to provide a framework for the treatment of EU law within the UK upon the exit of the UK from the European Union. In order to achieve this aim, the Bill seeks to perform four main functions. The Explanatory Notes to the Bill describe these four functions as follows ¹ —
 - Repeal the European Communities Act 1972;
 - Convert EU law as it stands at the moment of exit into domestic law before the UK leaves the EU;
 - Create powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement, and
 - Maintain the current scope of devolved decision making powers in areas currently governed by EU law.
3. The Bill is detailed and highly complex but in summary it—
 - Provides for changes to the law and to the legal systems of the UK on, or by reference to, “exit day”;
 - Creates a new body of law called “retained EU law” (discussed below). That body of law will include existing UK (including Scottish) legislation that gives effect to EU law, existing EU legislation that ‘automatically’ applies to and within the UK, and certain other legal rights, liabilities and obligations that are recognised and given effect by the UK courts as a result of the UK’s membership of the EU;
 - Gives guidance to the courts as to how they should interpret “retained EU law”;
 - Confers a range of powers on ministers (at UK Government level and in some cases at devolved administration level) to make changes to UK law in order to ensure that retained EU law operates effectively after the UK leaves the EU, to ensure that the UK continues to meet its international obligations and to implement the UK’s withdrawal agreement with the EU; and
 - Alters the legislative competence of the Scottish Parliament (and that of the National Assembly for Wales and the Northern Ireland Assembly) and the

executive competence of the Scottish Government (and the other devolved governments) by imposing new restrictions in relation to retained EU law.

4. In most circumstances, following a lead committee's report on an LCM, the Scottish Government would lodge a Legislative Consent Motion seeking the Parliament's consent to the UK Parliament legislating on devolved matters. The Scottish Government has indicated that it does not intend to lodge such a motion because it cannot recommend that the Parliament give its consent to the Bill as it stands. They state in their LCM that their objections to the approach taken in the Bill, and the impact the Bill would have on the future governance of the UK post withdrawal from the EU are "so fundamental" that they "cannot recommend that the Scottish Parliament gives consent, even conditionally, to the Bill in its current form".²
5. However, the Scottish Government has intimated that, depending on whether and how the Bill is amended and the outcome of other negotiations with the UK Government, it may lodge a supplementary LCM on the Bill in due course. That supplementary LCM may potentially include a draft legislative consent motion.
6. The Bill has completed the Committee Stage in the House of Commons. All amendments promoted by the Scottish Government and the Welsh Governments were unsuccessful at this Stage. While some amendments were agreed at Committee Stage which may be relevant to our consideration of the LCM the Committee has not yet had the opportunity to consider these. No amendments were agreed to Clause 11. The Committee notes, however, that the Secretary of State for Scotland has indicated that the UK Government intends to table amendments to Clause 11 at Report Stage in the House of Commons.³ This interim report details the Committee's view on the Bill as introduced.
7. The Committee issued a call for written evidence and has taken a wide range of oral evidence on the Bill.⁴ The Committee would like to thank all those who have provided evidence and also the Committee's advisers on the Bill, Christine O'Neill and Professor Nicola McEwen. The Committee will produce a final report on the LCM prior to the final amending stage in the House of Lords.

Clause 11: Impact on the Devolution Settlement

8. Clause 11 of the Bill has been a principal focus of the evidence submitted to the Committee. It is clear that the inclusion of Clause 11 in the Bill has affected significantly the Scottish Government's response to the Bill and is one of the principal reasons why a Legislative Consent Motion has not been lodged.
9. Section 29 of the Scotland Act 1998 provides, among other things, that an Act of the Scottish Parliament is not law to the extent that it is incompatible with EU law. Clause 11 of the Bill, as drafted, would remove this restriction on the Scottish Parliament's legislative competence but replace it with a new restriction. From the date on which the new restriction is brought into force, an Act of the Scottish Parliament would be outside the legislative competence of the Scottish Parliament if it modified (or conferred power by subordinate legislation to modify) 'retained EU law', unless that modification was already within legislative competence prior to exit day.
10. In other words, the Bill would allow the Scottish Parliament and the Scottish Ministers to continue to make, implement and give effect to retained EU law in all those areas in which it currently has power to do so but not to modify elements of EU law that are currently outside devolved competence because they are dealt with at a UK and / or EU level.

Retained EU law

11. The concept of 'retained EU law' is a new legal concept introduced by the Bill. Retained EU law is intended to consist of those parts of EU law that are to remain, or become, part of UK law after Brexit. Retained EU law will consist of three main components:
 - 'EU-derived domestic legislation' which comprises existing UK or devolved legislation (including subordinate legislation) that have been made to give effect to EU law;
 - 'Direct EU legislation' which is EU law that did not have to be implemented by domestic legislation as under EU rules it was treated as having effect within the UK 'automatically'. Such legislation tends to take the form of EU Regulations in areas such as state aid rules; and
 - Rights and remedies are preserved by Clause 4 of the Bill that have been recognised as being part of EU law even though not conferred by specific EU legislation (for example rights that are conferred by the EU Treaties) and can be relied upon by individuals and others, such as companies.
12. It is important to note that not all rights are to be preserved and, in particular, the Bill provides that the EU Charter of Fundamental Rights, which is considered later in this report, will not form part of domestic law after exit day. It is also important to note that the Bill not only preserves EU legislation and EU rights and remedies but it

also makes provision for how retained EU law should be interpreted by the courts after exit day.

The content of retained EU law

13. Another significant feature of ‘retained EU law’, that has the potential to cause difficulty in the practical application of the proposed new constraint on the Scottish Parliament’s legislative competence, is that it may be difficult to identify at any given time what ‘retained EU law’ is comprised of. This is a consequence of two issues.
14. Firstly, there is no exhaustive ‘list’ of legislative measures enacted within the UK that fall within the category of ‘EU-derived domestic legislation’. While it may be relatively easy to identify acts and statutory instruments that state expressly that their purpose is to implement EU law, it may be much harder to determine whether a particular piece of legislation is an enactment “relating otherwise to the EU or the EEA”.⁵
15. Secondly, the content of ‘retained EU law’ will, and indeed is expected to, change over time. Clause 6(7) of the Bill provides that retained EU law is not simply the law incorporated in UK law at exit day but is to be read “as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time”.⁶
16. As to modification ‘by or under this Act’, the Bill confers powers on the UK Government to use secondary legislation to ‘prevent, remedy or mitigate’ any failure of retained EU law to operate effectively or ‘any other deficiency in retained EU law’ arising from the withdrawal of the UK from the EU, including in areas of devolved competence. Regulations may be made using these powers before exit day and for a period of two years beginning on exit day.⁶
17. Schedule 2 confers similar, but not identical, powers on Scottish Ministers but only with regard to areas currently within the legislative competence of the Scottish Parliament or the wider executive competence of the Scottish Ministers. This issue is considered in more detail later in the report.
18. In addition, modification of retained EU law can be achieved at any time by the UK Parliament. Therefore, the content of retained EU law, and therefore the substance of the restriction on the Scottish Parliament’s legislative competence, is subject to change over time and as the result of legislative processes in which the Scottish Parliament and Government may not have had any input or influence.

UK Government Position on Clause 11

19. The UK Government state in their Explanatory Notes that the Bill amends each of the devolution statutes so as to maintain the current parameters of devolved competence as regard retained EU law. The UK Government state “that this is intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed”.⁷ The Parliamentary Under Secretary of State for Exiting the European Union, Robin Walker MP, outlined the UK Government’s rationale of the need for Clause 11 in the following terms—

” We currently operate under common frameworks under EU law, and clause 11 ensures that there will be certainty and stability because those common frameworks will remain in place, except in the areas where we have agreed that they will not be required. That provides the certainty and stability that businesses and investors are looking for. It also, of course, underpins the certainty with which we can negotiate with our European Union partners

Source: Finance and Constitution Committee 08 November 2017 [Draft], Robin Walker, contrib. 18⁸

20. UK Government ministers maintain that Clause 11 does not affect the current devolution settlements in Scotland, Wales and Northern Ireland. The UK Government is keen to stress that following agreement on common frameworks, the scope of devolved powers in each jurisdiction should increase. However, the UK Government has not made clear which powers would be devolved or the timescales involved. The Bill provides for the retained EU law restriction on the legislative competence of the Scottish Parliament to be dis-applied in whole or in part via an Order in Council procedure. This process could only be initiated by the UK Government. This would allow the Scottish Parliament to modify retained EU law, or some aspect of it, to the extent allowed by the relevant Order in Council. This procedure would, in effect, reduce the scope of the new restriction on the legislative competence of the Scottish Parliament. Orders in Council would require to be approved by the UK and Scottish parliaments.
21. In evidence to the Committee, UK Government ministers were keen to stress that Clause 11 should not be viewed in isolation. UK ministers emphasised that discussions were on-going with regard to the process for agreeing common frameworks which, assuming agreement is reached between the governments, would “reduce the scope of the impact of Clause 11”.⁹ In this sense, the Parliamentary Under Secretary of State described Clause 11 as “a temporary measure while decisions are taken on where common approaches are or are not needed”.¹⁰ There are, however, no provisions in the Bill to this effect. The Secretary of State for Scotland outlined the UK Government position on this issue in the following terms—

” It is important to make progress on the framework issues in order to put clause 11 into context and..... in order to fully understand its scope. Clearly, it is important that the maximum amount of agreement is reached as soon as possible on the areas in which there will be frameworks, the areas where there will be no frameworks and the areas in which there might be looser arrangements such as memorandums of understanding or concordats. I am very clear that it will not be possible to achieve legislative consent and agreement from the Scottish Government unless we have agreed the process by which those frameworks will be agreed.

Source: Finance and Constitution Committee 08 November 2017 [Draft], David Mundell, contrib. 26¹¹

Scottish Government Position

22. The Scottish and Welsh Governments both fundamentally reject this interpretation of the impact of Clause 11 on the devolution settlements across the UK. The

Scottish Government, in its LCM, emphasise a range of objections to the approach taken in the Bill. Firstly, the Scottish Government object, in principle, to the approach envisaged by Clause 11 of the Bill whereby it would be outwith the Scottish Parliament's competence to modify retained EU law in a way which would have been outside its competence immediately before withdrawal. Their view is the effect of Clause 11 would be to give "the Westminster Parliament and UK Government the unilateral power to make decisions in devolved areas previously affected by EU law".¹² Furthermore their view is Clause 11 introduces a new legal constraint on the competence of devolved institutions which cuts across the reserved powers model of devolution provided for in the Scotland Act 1998. Accordingly, the Scottish Government state in relation to Clause 11 that they reject—

” in principle the proposition that devolved competence should be constrained in this way on withdrawal from the EU. Policy responsibility and expertise for matters within devolved competence lie with the Scottish Government, accountable to the Scottish Parliament

Source: Scottish Government, Legislative Consent Memorandum, p.4, para.15

23. This objection to the approach taken in Clause 11 and its impact upon the devolution settlement is of sufficient importance for the Scottish Government to be unable to recommend consent to the Bill on this ground alone. In addition, they raise a number of further objections to the approach taken in the Bill. They stress that the new prohibition on modifying retained EU law would result in the legislative competence of the Scottish Parliament becoming more complex to assess. In particular, as retained EU law is amended over time then so the boundary of devolved competence will change.
24. The Scottish Government also notes that whilst there are time limits on the powers proposed for UK Ministers to modify retained EU law through secondary legislation, there is no time limit on the new limit on the Scottish Parliament's legislative competence. In addition, the Scottish Government highlight that the powers proposed for Scottish Ministers are more limited than those proposed for UK Ministers. In particular, Scottish Ministers would not have power to correct deficiencies in EU law where the deficiency was contained in 'direct EU legislation' or related to other EU law derived rights. This asymmetry in ministerial powers is discussed in more detail later in the report. Lastly, the Scottish Government noted in its LCM that it is working with the Welsh Government in seeking amendment¹³ of the Bill that it considers would address the Scottish Government's objections to the Bill.
25. Overall the Scottish Government conclude that—

” The Scottish Government rejects the overall approach of the Bill, which is to centralise control and decision-making in the UK Government and the Westminster Parliament. The Scottish Parliament and Government cannot be expected to continue as if the UK had not left the EU, while the Westminster Parliament is no longer bound by its EU obligations. On withdrawal, the governance of the UK must respect the devolution settlements, and recognise the powers and responsibilities of the devolved legislatures and administrations.

Given this fundamental difference of view on the future of the UK on withdrawal from the EU, the Scottish Government cannot recommend the Parliament consents to the Bill in its current form.

Source: Scottish Government, Legislative Consent Memorandum, p.9 para. 37-38

26. Following publication of the LCM, the UK Government provided the Scottish Government with a list of 111 areas identified by the UK Government where powers currently residing with the EU intersect with the devolution settlement in Scotland. This list of 111 areas is attached at **Annexe A** of this report. The Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell MSP, [hereafter the Minister] outlined the Scottish Government perspective on this list in the following terms—

” We believe that the nature of the list may indicate the areas that the UK Government may wish to re-reserve, because there is no indication that it does not wish to re-reserve them.

Source: Finance and Constitution Committee 20 September 2017, Michael Russell, contrib. 9¹⁴

27. The Welsh Government share a similar perspective to the Scottish Government that the effect of Clause 11 will be to undermine devolution. Professor Mark Drakeford AM, Cabinet Secretary for Finance and Local Government, summarised the position of the Welsh Government on Clause 11 as follows—

” It rolls back devolution. It says that, for an indefinite period of time and to an extent that the UK Government cannot explain to us, powers that we have had since the start of devolution will be taken back to Westminster and, at some future date, eked back out to us. In the meantime, UK ministers will have had all sorts of powers to interfere with those responsibilities. Therefore, we do not know when we will get the powers back and we do not know what they will look like by the time they come our way again. That is fundamentally unacceptable from a devolved perspective.

Source: Finance and Constitution Committee 04 October 2017, Professor Drakeford, contrib. 21¹⁵

28. Accordingly, the Scottish and Welsh governments reject the proposition that Clause 11 is a necessary provision that is required while agreement is reached on common frameworks and what powers can be brought within the legislative competence of the devolved legislatures.

29. In September, the Scottish and Welsh governments published a series of jointly agreed amendments¹³ intended to amend the Bill so that it “properly respects devolution and ensures that the Scottish Parliament and the National Assembly for

Wales do not have their competence restricted by EU withdrawal”.¹⁶ The Minister for UK Negotiations on Scotland's Place in Europe has stated that if the amendments proposed, or alternatives to the amendments which achieve the same effect, are made then the Scottish Government would bring forward a legislative consent motion on the Bill. Professor Mark Drakeford, in evidence to the Committee, was keen to stress that the amendments came as a package and that there was no hierarchy amongst them. He commented—

” Different aspects of the bill are interrelated so, as our amendments address those aspects, they are interrelated, too. At the moment, we do not have a sense of hierarchy for them in which one is more important than another; they come as a package and we will pursue them as such.

Source: Finance and Constitution Committee 04 October 2017, Professor Drakeford, contrib. 50¹⁷

30. As noted above, discussions have been on-going between the Scottish and UK governments with regard to the amendments the Scottish and Welsh governments have jointly proposed. Mr Russell characterised these discussions, in evidence to the Committee, as having been detailed and positive whilst emphasising that “the ball is very much in the UK Government's court”.¹⁸ He stressed that he was open to discussion on other approaches to dealing with the issue of Clause 11 beyond the amendments that have been proposed by the Scottish and Welsh governments. He summarised his position in the following terms—

” We have one means of amending the bill, which essentially expunges the issue of clause 11. If there is another solution that accepts that any changes take place by consent, that is something that we would be willing to discuss, and always have been willing to discuss.

Source: Finance and Constitution Committee 29 November 2017 [Draft], Michael Russell, contrib. 15¹⁹

31. The Minister also emphasised that even if agreement is reached on the process for agreeing common frameworks that the Scottish Government would be unable to recommend legislative consent if Clause 11 remains unchanged. In the event that the Scottish Government is unable to recommend consent, the Minister noted that the option of introducing a Continuity Bill remained an option albeit a “less desirable option”.²⁰

External Evidence

32. The evidence which the Committee obtained from a wide range of constitutional experts also tended to stress the impact of Clause 11 upon the devolution settlement. Professor Alan Page stated that Clause 11 would “reduce the intelligibility of the settlement”²¹ as well as making it more difficult for the Scottish Government to carry out the responsibilities set out in the Scotland Act 1998. Dr Kirsty Hughes considered that the Bill represented a “centralising approach [that] cuts across the existing devolution settlement”.²² Professor Rick Rawlings summarised his position on Clause 11 as follows—

” The sooner clause 11 of the Withdrawal Bill is cast aside, the better. Constitutionally maladroit, it warps the dialogue about the role and place of the domestic market concept post-Brexit. As such, the occupation of legislative and executive space in the Withdrawal Bill appears not only a risky venture but also a lazy one. An unthinking form of ‘Greater England’ unionism, which assumes only limited territorial difference, would be another way of characterising this.

Source: Professor Richard Rawlings, Written Evidence, p.13, para. 5

33. Professor Michael Keating considered that Clause 11 represented the UK Government taking “back powers for what appears merely to be reasons of convenience rather than of principle”.²³ Professor Aileen McHarg highlighted that the impact of the constraint on devolved competence in Clause 11 “messes up what is already a complicated boundary between devolved and reserved powers”²⁴.
34. Professor Jim Gallagher, whilst agreeing that the approach taken in the Bill was “not consistent with the UK's territorial constitution”²⁵, considered that Clause 11 was defensible “provided that the approach of reserving everything until it is actively devolved lasts for a defined period of time rather than permanently”²⁶. He envisaged the introduction of a ‘sunset’ period after which repatriated powers that correspond to devolved matters would revert to the Scottish Parliament, in line with Schedule 5 of the Scotland Act 1998.
35. The Committee sought views from constitutional experts on whether the Bill as currently drafted provides any guarantees to the devolved administrations, beyond verbal assurances from UK Government Ministers, that Clause 11 is a temporary measure or that the impact of Clause 11 will be diluted once agreement on common frameworks is reached. The response of Professor McHarg on this issue is indicative of the evidence the Committee received—

” Clause 11 is clearly not the only way in which necessary co-ordination post-Brexit could be achieved. It may be justifiable as a transitional measure but, as Michael Keating says, it is not, in fact, a transitional measure.

Source: Finance and Constitution Committee 01 November 2017 [Draft], Professor Aileen McHarg (University of Strathclyde), contrib. 9²⁷

Committee View on Clause 11

36. The Committee welcomes the recent progress which has taken place in negotiations between the Scottish and UK governments and notes the recent statement, on 6 December, by the Secretary of State for Scotland that the UK Government intends to table amendments to Clause 11.

37. The Committee concurs with the vast majority of the expert evidence it has received that Clause 11 represents a fundamental shift in the structure of devolution in Scotland. Regardless of whether the Scottish Parliament

obtains additional powers or not the effect of Clause 11 will be to adversely impact upon the intelligibility and integrity of the devolution settlement in Scotland.

38. The Committee does not agree that Clause 11 is necessary to enable the agreement of common frameworks. The Committee notes that there are no provisions in the Bill that guarantee that Clause 11 is a temporary measure.

39. The Committee is of the view that Clause 11, as currently drafted, is incompatible with the devolution settlement in Scotland. The Committee considers further that even if Clause 11 is designed to be a transitional measure it fails to fully respect the devolution settlement. The Committee therefore will not be in a position to recommend legislative consent for the Bill unless Clause 11 is replaced or removed.

40. In the event that the Scottish Government is unable to recommend legislative consent and decides to introduce a Continuity Bill then it is highly likely that there would be a reduced timetable for parliamentary scrutiny of such legislation. In such a situation the Committee recommends that the Scottish Government engages in early discussions with the Scottish Parliament regarding what mechanisms can be used to maximise the scope and time available for scrutiny of such legislation.

Clause 11: Alternative Approaches

41. In the course of taking evidence on the Bill, a range of alternative approaches for dealing with Clause 11 have been suggested. For example, Michael Clancy of the Law Society of Scotland outlined some of the alternatives available in the following terms—

” There are alternatives to be employed in connection with clause 11: for example, adopting it only on a transitional basis; repealing the EU constraint completely and leaving the EU competences to fall as determined according to schedule 5 to the Scotland Act 1998 once they are repatriated; replacing the cross-cutting EU constraint with new constraints; and repealing the EU constraint and amending schedule 5 to re-reserve the provisions that come back from Europe. Depending on your perspective, you could pick one of those options—they are not the only ones—and amend the bill accordingly.

Source: Finance and Constitution Committee 01 November 2017 [Draft], The Convener, contrib. 13²⁸

42. Professor Alan Page suggested that a combination of the reserved powers in Schedule 5 of the Scotland Act 1998 and a standstill provision could form a workable alternative to Clause 11. Such an approach, he suggested, would involve

a provision being included in the Bill where the UK Government and devolved administrations agree not to introduce any measures that would result in new barriers to living and doing business within the UK until such time as agreement is reached on common frameworks. Professor Page considered that such an approach “would avoid the undeniably damaging consequences of clause 11”. A standstill provision approach would require the removal of Clause 11 from the Bill and for the governments across the UK to reach an agreed replacement approach.

43. As outlined above, Professor Jim Gallagher suggested that placing a sunset clause on Clause 11 could make it more defensible. Professor Richard Rawlings suggested that should the UK Government be unable to accept the amendments put forward by the Scottish and Welsh governments that an alternative approach could be for the Bill to contain a power to—

” add, remove or modify reservations in the devolved settlement(s) to reflect frameworks agreed with the devolved administrations(s) for the realisation of the UK single market, subject to the approval of the relevant legislature(s).

Source: Professor Richard Rawlings, Written Evidence, p.14, para. 7

44. The Minister, whilst emphasising that the Scottish Government's proposed amendment to Clause 11 was his preferred approach, commented on Professor Rawling's proposed amendment in the following terms—

” I can see the way in which that might operate successfully and would meet our objections in terms of imposition, and that is the key issue. It has to be negotiated and agreed; it cannot be imposed. If any amendment or set of amendments were to come forward that removed the imposition and made sure that that was done, and could only be done, by agreement, we would be more than willing to discuss those amendments.

Source: Finance and Constitution Committee 29 November 2017 [Draft], Michael Russell, contrib. 17²⁹

45. **The Committee is not yet persuaded that any of these approaches to Clause 11 would be sufficient. The Committee reiterates that a resolution to the issue of Clause 11 requires to be found by the UK Government as a matter of priority regardless of whether the process of finding an agreed way forward on Common Frameworks has been arrived at.**

Common Frameworks

46. Throughout the Committee's evidence, we were made aware of the importance of what have come to be termed 'common frameworks'. This is a reference to the regulatory convergence and policy harmonisation provided for by EU law, including in areas where EU competence corresponds with devolved competence. However, despite their importance, common frameworks are not referenced at all on the face of the Bill.
47. The UK Government set out its view of how membership of the EU interacts with the devolved settlements in its White Paper on legislating for the UK's withdrawal from the EU.³⁰ The White Paper states that devolved settlements were premised on EU membership and the devolved legislatures are responsible for implementing common policy frameworks set by the EU in areas where they have competence such as agriculture and the environment. These common EU frameworks also provide common UK frameworks "including safeguarding the harmonious functioning of the UK's own single market."³⁰
48. Examples provided where common UK frameworks may be required include enabling the UK to agree free trade deals with third countries. The White Paper states that in order "to provide the greatest level of legal and administrative certainty," the UK Government "intends to replicate the current frameworks provided by EU rules through UK legislation."³⁰
49. The UK Government is also committed to working with the devolved governments to rapidly identify areas that do not need a common UK framework. These areas of EU law would then release competence(s) from the proposed retained EU law restriction by the order-in-council procedure and must be approved by both Westminster and the devolved legislatures.
50. The Scottish Government and the Welsh Government agree with the UK Government that once the UK leaves the EU there will be a requirement for some common UK frameworks to replace some of the common EU frameworks. However, as discussed above, they fundamentally disagree with Clause 11 of the Bill regardless of whether the process of finding a way forward on common frameworks has been resolved. Essentially this means that while both the UK Government and the devolved governments agree with the need for common UK frameworks they disagree about the starting point for those discussions.
51. The UK Government, as outlined above, believes that the starting point should be that the EU powers in devolved areas are repatriated to Westminster in order to provide certainty and stability to the UK Government, particularly with regard to negotiations with the EU. Consideration should then be given to what powers are included in common frameworks and what powers can then be devolved.
52. The Scottish Government and Welsh Governments, however, believe that as the EU powers fall within devolved competence, and in the case of the Scotland Act 1998 do not come under Schedule 5, that these competences should be repatriated to Edinburgh and Cardiff. The starting point is, therefore, which devolved powers should be included in common frameworks with the consent of the devolved governments and legislatures. The Scottish Government also has some

reservations about the description 'UK single market.'³¹ This is discussed in more detail below.

Approach

53. Both devolved governments have also emphasised that the process for identifying where frameworks are required and what they should contain must be by agreement and not imposed by the UK Government. The Scottish Government also states in the LCM that where legislation is required this “should be legislated for or consented to by the Scottish Parliament”.³²
54. The Secretary of State for Scotland confirmed to the Committee that the UK Government agrees that common frameworks cannot be imposed and that there is a need to develop processes to reach agreement. He told the Committee that he is very clear that it will not be possible to achieve legislative consent “unless we have agreed the process by which those frameworks will be agreed”.³³ One possible route he suggested may be through “the JMC operating effectively”.³³ The UK Government will seek to get agreement on what areas fall within legislative frameworks, the areas where there will be no legislative frameworks, the areas where there may be looser arrangements such as MoUs and concordats, and how each of these are to be agreed. It will not, however, be possible to agree the content of the frameworks within the timetable for consent.
55. The Minister for UK Negotiations on Scotland's Place in Europe set out the Scottish Government's view on common frameworks in his letter to the Committee dated 1 September 2017—

” There is nothing that would prevent – and a lot that supports – agreement on a framework using well established and successful forms of co-operation: namely legislation (in multiple parliaments or with legislative consent), by executive action, or by memorandum of understanding. However, frameworks must respect the devolved settlements, meaning that they must not constrain the legislative competence of the Scottish Parliament nor interfere with the democratic accountability of the Government to the Parliament.
56. The Minister subsequently wrote to the Committee on 17 October following the meeting of the JMC (EN) on 16 October at which a set of principles to guide negotiations on UK or GB common frameworks was agreed. The Minister explained that, importantly, those principles include respecting the devolution settlement and this “must mean that powers in devolved areas of responsibility currently exercised at EU level should revert to the Scottish Parliament.”³⁴
57. Each framework will set out a common approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action or mutual recognition depending on the policy area and the objectives being pursued. A number of options for the implementation of frameworks is also proposed including legislation, executive action and memorandums of understanding.
58. The governments agreed that frameworks will be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
 - ensure compliance with international obligations;
 - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
 - enable the management of common resources;
 - administer and provide access to justice in cases with a cross-border element;
 - safeguard the security of the UK.
59. Each framework will also be based on established conventions and practice, including that the competence of the devolved institutions will not normally be adjusted without their consent and maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules. The governments agree that this will lead to a significant increase in decision-making powers for the devolved administrations.
60. The Committee heard from some of our witnesses that while the publication of this document is welcome and a step forward much more detail is required. Professor Rawlings, for example, suggests the need for “some draft listings of areas where UK Ministers consider new regulatory frameworks” and “some prompt and detailed illustration of possible arrangements” in order to inform debate within each of the UK legislatures. His view is that the “good governance principle of transparency in this novel and important form of constitution-making demands nothing less.”
61. Professor Rawlings also highlighted the lack of clarity regarding the breadth of common frameworks. He asked to what extent will they be bilateral agreements between the Scottish Government and UK Government and to what extent will they be multilateral agreements involving the other devolved administrations? If the latter to what extent will these be UK frameworks and to what extent GB frameworks? For example, in relation to justice issues the existence of a separate Scottish legal system points towards a bilateral agreement with the UK Government in that area.
62. A number of witnesses also emphasised the need for effective parliamentary scrutiny and consultation with stakeholders and the wider public in developing and agreeing common frameworks. The RSPB, for example, would like to see common frameworks “developed and agreed by all four nations, subject to an appropriate level of scrutiny by all four legislatures and underpinned by a clear and agreed framework of guiding principles.”³⁵ This should include common standards that are at least as high as those set out in existing EU law.
63. Scottish Environment LINK raised concerns that there is “no clear way forward for agreeing which policy areas may require the introduction of UK frameworks” and emphasise that such “a dialogue needs to be initiated as soon as possible and involve stakeholders.” They point out that the JMC (EN) principles do not mention stakeholder engagement or address issues of transparency and inclusivity. Their view is that “we need to include as many stakeholders as we can and take those

views into account.”³⁶ They propose that the process for agreeing common frameworks should—

- Be based on robust evidence and data, including impact assessments;
- Provide ample opportunities for stakeholder engagement and input across the UK;
- Be jointly developed and agreed by the UK and devolved governments, as well as their respective legislatures.

64. The Law Society of Scotland agree that there is a need to engage civic society generally in this process.

65. The Minister updated the Committee on progress in the negotiations between the UK Government and the Scottish Government in agreeing an approach to common frameworks in his oral evidence on 29 November 2017. He identified five areas which required to be addressed before a solution could be found –

- Principles;
- Proof of concept (feasibility);
- Governance and dispute resolution;
- Political agreement on content from the list of 111 powers;
- Legislative approach.

66. The Minister informed the Committee that out “of those five pieces of progress that we need, we are probably reasonably well down the road on three of them. The other two require action”.³⁷ In relation to the need for legislation he stated that “I can imagine the common frameworks operating without legislation, but there is a potential for them to be legislated on”.³⁷ He also pointed out that there is not one standard common framework and there will be a degree of different arrangements.

UK Internal Market

67. The Committee notes the view of the JMC (EN) that common frameworks are necessary in order to enable the functioning of the UK internal market, while acknowledging policy divergence. The Committee sought to explore with witnesses what this means in practice. Professor McHarg, for example, told the Committee “it is really important that we understand the complexity and controversy of the concept of a UK single market” which she suggests is open to contestation in two areas—

- The degree to which the single market requires the harmonisation of laws and regulations and how far the requirement of harmonisation extends; and
- What range of goods and services should be included in the single market?

68. Professor McHarg points out that there “is little evidence of a principled approach to these questions as regards the current distribution of competences between the UK and the devolved levels.” Professor Keating questions why the starting point for the UK Government's approach to sustaining the UK single market is which devolved competences should be included in common frameworks.
69. He points out that the EU single market is not about particular competences. Rather it is a broad set of principles and a series of measures proposed by the European Commission, accepted by the Council of the European Union (by qualified majority vote among the Member states) and interpreted and enforced by the European Court of Justice (ECJ). These measures are also subject to the principles of proportionality and subsidiarity which stipulate that action should be taken at the lowest level of government which is practicable and should only be broad enough to achieve its aim.
70. Professor Keating points out that nothing like these mechanisms exist in the UK or in relation to devolution yet there may be many instances in which the internal market principle could impinge on devolution. For example, different standards in environmental matters or agricultural produce might be seen to infringe it and public health regulation might be challenged by industries like tobacco, alcohol or gaming. Professor Keating proposes, therefore, that the starting point for the UK internal market should also be a broad set of principles about free trade, free movement of trade, exercise of professions etc. and to reason from that rather than focusing on the compatibility of devolved competences with the internal market.
71. The Committee notes that the set of principles published by the JMC (EN) does not include subsidiarity, proportionality and the associated principle of conferral. Dr Pazos-Vidal from COSLA suggests that these principles should be “framed in very precise legal terms in the Bill.”³⁸
72. A number of our witnesses also highlighted a number of principles in relation to policy areas such as the environment which are embedded in EU treaties but not enshrined in domestic law. For example, general principles of international environment law, such as the precautionary principle and the polluter pays principle. The Committee heard that it is essential that future environment legislation should be based on these founding principles. The RSPB stated, for example, that this should “include the creation of any new common frameworks which should have those founding principles at their heart.”³⁹
73. The Bill states that these principles will continue to be recognised and available in domestic law. The Bill provides for reference to rulings made by the courts in relation to EU law to be used to interpret retained EU law. However, some of our witnesses pointed out that the general principles of EU law are broader than simply the judgements made by the ECJ and other courts. Moreover, the rights provided for in EU treaties are broadly applicable whereas, as Scottish Environment Link point out, a specific ruling applies to a specific piece of legislation in a narrowly defined way.
74. A number of our witnesses also raised concerns about a likely governance gap following Brexit. EU institutions such as the European Commission and the ECJ have a role in implementing, monitoring and enforcing EU law at a domestic level. The RSPB raised concerns that with the loss of those oversight and accountability mechanisms, retained EU law will not operate as effectively as it does now.

75. The Committee also heard about the need to avoid “asymmetrical constraints.” This relates to constraints applying to the devolved institutions without any equivalent constraint at a UK level. This would be different from the existing EU constraints which apply equally at both a UK and devolved level. The question arises therefore as to whether UK internal market constraints would also apply equally at both a UK and devolved level.

Compliance with international obligations

76. Where a consistent UK approach is necessary to uphold international agreements and obligations, the Scotland Act 1998 already provides scope to UK ministers to ensure compliance. Section 35 of the Scotland Act 1998 enables the Secretary of State to prohibit the Presiding Officer from submitting Bills for Royal Assent which contain provisions which are incompatible with international obligations. Section 58 of the 1998 Act provides the Secretary of State with a power to prevent or require action to secure compliance with international obligations. This includes requiring the Scottish Government to introduce primary legislation.
77. The Committee heard that these powers were introduced in the context of most of the UK’s international obligations being negotiated through the EU. The Committee also heard that the powers have never been used and were intended only as a backstop should other less formal cooperation fail.
78. Some of our witnesses raised concerns that the powers are by definition confrontational. Professor McHarg highlighted, for example, that while section 58 provides the Secretary of State with the power to require the Scottish Government to introduce primary legislation it does not require the Scottish Parliament to pass the Bill.
79. Professor Gallagher suggests that this approach is unlikely to be suitable for the complex arrangements needed to replace EU law and proposes a number of UK legal frameworks. These would need to be negotiated with the devolved institutions and subject to legislative consent. This could be done either on a bill by bill basis or through a specific procedure included in the Bill for replacing EU frameworks where necessary to meet international obligations and with the formal involvement of the devolved bodies. The Bill should explicitly recognise the need for UK wide frameworks to implement international obligations which replace EU obligations, and that such legislation would require devolved consent.

New Trade Agreements and International Treaties

80. While the UK remains a Member State, the EU retains exclusive competence to negotiate and agree trade agreements on the UK’s behalf; the UK cannot negotiate or conclude any trade deals with a third country. In total the EU is party to 36 regional or bilateral Free Trade Agreements, covering more than 60 countries.⁴⁰
81. The UK Government has published a Trade Bill which includes a commitment to “providing continuity in the UK’s existing trade and investment relationships with

these third countries.”⁴¹ The Trade Bill includes measures to implement “agreements with partner countries corresponding to the EU’s Free Trade Agreements (FTAs) and other trade agreements in place before the UK’s exit from the EU.”⁴¹

82. The UK Government states that this work needs to be completed before the UK leaves the EU “if there is to be continuity in the UK’s existing trade and investment relationships with these partner countries.”⁴¹ The Trade Bill includes a power for the UK Government to implement any changes to domestic laws which will be necessary for the UK to meet obligations arising from these agreements.
83. Trade agreements must include an assurance that domestic legislative frameworks are consistent with the commitments in the agreement. The UK Trade Bill Explanatory Notes state that, “in most cases the implementation of any obligations within these UK trade agreements can be dealt with through the EU (Withdrawal) Bill.”⁴¹ This is because the Bill is intended to preserve EU law once the UK leaves the EU and allow it to be amended to make it work in a UK context.
84. A number of witnesses raised the question of what input the devolved institutions will have into negotiating the international agreements which will be needed once the UK leaves the EU. There is no legal requirement for the UK Government to consult the devolved institutions on international agreements. However, there is a concordat between the UK Government and each of the devolved governments with respect to international relations.
85. The Concordat between the UK Government and the Scottish Government states that—
 - ” The UK Government recognises that the devolved administrations will have an interest in international policy making in relation to devolved matters and also in obligations touching on devolved matters that the UK may agree as a result of concluding international agreements.⁴²
86. The Concordat, therefore –
 - ” reflects a mutual determination to ensure that there is close co-operation in these areas between the UK Government and the Scottish Ministers with the objective of promoting the overseas interests of the UK and all its constituent parts.⁴²
87. The House of Commons Library explains that the Concordat while not binding in law—
 - ” promises cooperation on exchanging information, formulating UK foreign policy, negotiating treaties and implementing treaty obligations. It also provides for Ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams and for apportioning any qualitative treaty obligations, as well as imposing penalties should the devolved bodies default on any agreed liability.⁴³

88. In relation to dispute resolution the Concordat states that issues will normally be resolved through bilateral discussions at official level or if necessary through political level at the JMC.
89. The Committee also notes that although relations with the EU are a reserved matter the UK Government recognises that the devolved governments have an interest in areas of devolved competence. This is reflected in the role of the JMC (Europe) and wider consultation with the devolved governments in developing the UK negotiating position at an EU level. The devolved governments also have the opportunity to directly influence the EU institutions.
90. A number of our witnesses representing sectoral organisations also emphasised the benefits of the existing EU legal order and the opportunities which exist to influence the EU policy-making process. This includes directly at an EU level and at Member State level but also at a devolved and regional level. This process is also governed by a number of Treaties agreed by the Member States and the European Parliament also has a scrutiny function. The Committee also heard that the EU policy-making process also provides for softer mechanisms for policy development through the Open Method of Coordination (OMC).
91. There is no equivalent policy-making process within the UK. A number of our witnesses suggested that a similar process will now need to be developed within UK decision-making processes in relation to negotiating international agreements. Mechanisms will need to be developed which will allow the devolved institutions to have a role in these negotiations and to allow wider civic and public engagement in the process.
92. The Committee heard that this is of particular importance in relation to trade agreements. Professor McHarg, for example, emphasised that the current mechanisms which “allow the devolved Governments to influence EU policy making are replicated in relation to international trade policy, because this will become so much more important an issue.”⁴⁴ However, we also heard that this will be challenging.
93. Professor Rawlings’ view, for example, is that “the area of international trade and its relationship with devolution will be a controversy that will run and run.”⁴⁵ He highlights the UK Government's new board of trade which treats the devolved governments just like any other stakeholder. His view is that this is very much a top-down approach and the UK Government is “sending out quite a negative set of messages in that regard.”⁴⁵
94. The EU policy-making process is relatively open and based on a number of treaties agreed by the Member States. Both the devolved institutions and devolved stakeholders have the opportunity to influence the process both directly with the EU institutions and indirectly via the UK Government. The European Parliament also has a scrutiny function.
95. The Committee heard some examples where sub-state institutions have a role in international negotiations. Professor Jeffery explained to us that, for example, the Belgian regions can act in external affairs in areas where they have competence. In Germany there is a “permanent treaty commission” which co-ordinates between

regional and central government where international treaties touch on regional competencies.

96. Professor Keating highlighted the Canadian Free Trade Agreement which was signed by the federal and provincial governments in April 2017. This replaced an earlier agreement on internal trade and includes the alignment of regulatory standards and opening up of public procurement. There is also a regulatory reconciliation process whereby a government can submit concerns about a potential barrier to trade to the Regulatory Reconciliation and Cooperation Table (RCT). The RCT is responsible for promoting regulatory cooperation across Canada. ⁴⁶
97. The Scottish Government's view is that the Scottish Parliament should have the power to enter international agreements and to take part in trade negotiations that impact on devolved areas. ⁴⁷ It is proposed that this could be achieved either through an arrangement with the UK Government or by virtue of an independent international legal personality.

The Committee's View on Common Frameworks

98. The Committee notes that while the primary purpose of the Bill is to provide continuity through converting EU law into domestic law this will nevertheless result in substantial changes to the devolution settlement. The Scottish Government has stated that a “fundamental reconsideration of the UK’s constitutional arrangements” is required while the Welsh First Minister has suggested that the “relationship between devolved administrations and the UK Government must now be placed onto an entirely different footing.”

99. The Committee welcomes the progress which has been made between the UK Government and the devolved governments in developing an approach to agreeing common UK frameworks and notes that this work is on-going. In particular, the Committee welcomes the commitment to respect the devolution settlement.

100. The Committee also welcomes the commitment from the UK Government that common frameworks will not be imposed. The Committee strongly believes that both the process for agreeing common frameworks and the actual content must be arrived at through agreement and not imposed. The Committee also strongly believes that this process is not solely a matter for governments but must be transparent and inclusive. The Committee therefore recommends the following—

- The Scottish Parliament must have the opportunity to consider the approach to common frameworks currently being negotiated at governmental level prior to being asked to give consent to the Bill;**

- **The Bill should be amended to include the approach to agreeing common UK frameworks, including the need for parliamentary consent and consultation with stakeholders;**
- **Where non-statutory arrangements are appropriate, such as Memorandums of Understanding and Concordats between governments, there must be opportunities for parliamentary oversight;**
- **Common frameworks, if binding, must apply equally to both UK and devolved governments;**
- **Clarity is required around which frameworks will be bilateral and which are multilateral and if the latter which are UK wide and which are GB wide.**

101. **The Committee also recognises that significant further work is required in relation to the scrutiny of developing and agreeing common frameworks. In particular, the Committee heard evidence on the application of the general principles of EU law to common frameworks including the principles of subsidiarity and proportionality. The Committee believes that this is a critically important area of work and will consider it further. The Committee will also be writing to relevant subject committees inviting them to begin considering what common UK frameworks may look like in areas covered by their respective remits.**

102. **The Committee also believes that significant further work is required in considering arrangements to replace the current EU policy-making processes across the UK. Consideration will also need to be given to addressing the governance gap in relation to the monitoring, implementation and enforcement of common UK frameworks. The Committee intends to return to this issue.**

103. **Consideration will also need to be given to the interaction between the Bill, common frameworks and the negotiation of new international agreements including trade deals. In the first instance it is anticipated that the Committee will have a role in scrutinising the Trade Bill LCM.**

104. **The Committee also intends to examine further the impact of the new international obligations including trade agreements on the devolved settlement with regard to the role of the devolved institutions, stakeholders and the wider public in influencing and informing the UK Government's negotiations.**

105. **Finally, further consideration is required in relation to the funding of devolved competences which are currently funded at an EU level. The UK's net contribution to the EU will revert to the UK Government. There are a number of options available as to how this funding will then be distributed across the UK and the Committee intends to consider this further including how the funding of obligations and commitments arising from common frameworks should be agreed. Again, the Committee intends to return to this issue.**

Dealing With Deficiencies Arising From Withdrawal

Clause 7

106. As discussed above in relation to 'retained EU law', the Explanatory Notes to the Bill state that Clause 7 gives UK Ministers powers to make secondary legislation to deal with problems or deficiencies that would arise from the UK's withdrawal from the EU.
107. Clause 7 contains one of a number of "Henry VIII" powers to be conferred by the Bill. That is to say, the power to remedy deficiencies in retained EU law "may make any provision that could be made by Act of Parliament"⁴⁸ and may be used to amend primary legislation.
108. Clause 7 also provides that the power to remedy deficiencies in EU law may be used in a range of ways including (among other things):
 - to provide for functions of EU bodies or UK public authorities to be exercisable by other public authorities or to be abolished, replaced or 'otherwise modified'⁴⁹; and
 - to create new public bodies.
109. There are express limitations on the use of the powers conferred by Clause 7: it may not be used for example to impose or increase taxation, to make retrospective provision or to amend, repeal or revoke the Human Rights Act 1998. It may also not be used to amend or repeal the Northern Ireland Act 1998, a point discussed further below.
110. As noted above, the power conferred by Clause 7 to make regulations is time limited. No such regulations may be made after the end of the period of two years beginning with exit day.⁵⁰
111. The House of Lords, Delegated Powers and Regulatory Reform (DPRR) Committee states that Clause 7 "is notable for its width, novelty and uncertainty."⁵¹ It raised concerns about the power in Clause 7(1)(a) to prevent, remedy or mitigate "any failure of retained EU law to operate effectively" and asked by what standards the failure to operate effectively is to be judged. This uncertainty is exacerbated by the uncertainty of the scope of 'retained EU law' which is discussed earlier in this report.
112. The DPRR Committee also raised concerns about the power in Clause 7 to prevent, remedy or mitigate "any other deficiency in retained EU law".⁵² It views this as a very wide power and proposes that the "appropriateness" test in Clause 7 should be "circumscribed in favour of a test based on necessity."
113. That position is supported by the Law Society of Scotland (LSS). Michael Clancy explained to the Committee that the LSS has promoted amendments, many of

which have been tabled in the House of Commons, to change the standard from “appropriate” to “necessary.”⁵³

114. The DPLR Committee explored these issues with both Scottish Ministers and UK Ministers. The Minister for UK Negotiations on Scotland's Place in Europe “intimated that he was not unsympathetic to the idea of narrowing the power.” The Under Secretary of State at the Department for Exiting the European Union suggested, however, that the necessity test would not always work if different solutions are possible.
115. As noted at paragraph 6 above the House of Commons amended the Bill at Committee Stage. The Bill as amended now imposes requirements on the UK Ministers to make explanatory statements in relation to regulations or draft regulations under Clauses 7, 8 and 9. The statements will be published and must, in particular, deal with the appropriateness of the regulations and their relationship to equalities legislation as well as providing specified further information.
116. The Bill as amended now also requires statutory instruments to be laid for a 10 day standstill period during which time a “sifting committee” within the UK Parliament can provide a view as to whether the negative or affirmative procedure should be used.
117. The Committee has not had the opportunity to consider the impact of these amendments but understands that they do not apply to devolved Ministers. The Committee notes that further consideration will need to be given to these issues and notes that a working group of Scottish Parliament and Scottish Government officials is currently looking at the need for any changes to the scrutiny process here as a consequence of the Bill.

118. The Committee is concerned by the breadth of the powers conferred by Clause 7 of the Bill and in particular by the apparent transfer to government (from the legislature) of such extensive law making powers.

119. The Committee supports the recommendation of the DPLR Committee that the powers in Clause 7 “should only be available where Ministers can show that it is necessary to make a change to the statute book, even if they cannot show that the particular alternative chosen is itself necessary.”

UK ministerial powers in devolved areas

120. The powers in the Bill to deal with deficiencies arising from withdrawal are wide and include the power for UK Ministers to legislate in devolved areas without a formal role for the devolved institutions. Professor Page explained to us that UK Ministers currently have only limited subordinate law making powers under the Scotland Act 1998⁵⁴ in devolved areas. Under the Bill UK Ministers “will gain far reaching powers to legislate in the devolved areas.” These include powers in devolved areas to—

- correct deficiencies in retained EU law;
 - ensure continued compliance with the UK's international obligations;
 - to implement the withdrawal agreement.
121. Professor Page's view is that it “is contrary to the principles on which the devolution settlement is based” for these powers to be exercised as proposed in the Bill with no statutory requirement for UK Ministers to obtain the consent of Scottish Ministers or the Scottish Parliament.
122. While the Delegated Powers Memorandum states that UK Ministers would “not normally” use the powers in Clause 7 in devolved areas without the agreement of the devolved governments there is no requirement in the Bill to obtain that agreement. The evidence that the Committee has received has been consistent in the view that the Sewel Convention does not apply to the making of secondary legislation.
123. The Scottish Government also points out that some areas including ‘direct EU legislation’ incorporated under Clause 3 and other EU derived rights incorporated under Clause 4 can only be amended by a UK Minister even if within a devolved area of competence. The Scottish Government states in its LCM that this is not acceptable:
- ” Given the scope of the powers in the Bill the Scottish Government believes that there should be a formal legislative requirement for Scottish Ministers to consent to the exercise of the powers in devolved areas.
124. Both the Scottish Government and the Welsh Government have published proposed amendments to the Bill which would impose this procedural constraint.
125. However, even if those amendments were made, they would not confer on the devolved legislatures a similar power of consent. The Scottish Government recognises this in its LCM and proposes to discuss this further with the Parliament and other interested parties. The Minister also explained to the Committee that “we want to set up a mechanism to ensure that we do not exercise our own powers until we have consulted”.⁵⁵
126. The Secretary of State for Scotland was asked by the Committee whether consideration should be given to extending the Sewel Convention to the powers in the Bill which allow UK Ministers to make statutory instruments in devolved areas. He responded that he was “quite happy to look at that.”⁵⁶ The Minister told the Committee that he “would be very happy to enter into constructive discussions with the Secretary of State about changes to that process.”⁵⁷
127. One option proposed by the Scottish Government is a process similar to that which operates when UK Government ministers exercise powers under Section 57(1) of the Scotland Act 1998. Section 57(1) empowers UK Government ministers to implement EU obligations in devolved areas. That power is exercised with the consent of Scottish Ministers who then notify the relevant subject committee and the Culture, Tourism, Europe and External Relations Committee.

128. The DPLR Committee's view is that the section 57(1) process is insufficient for these purposes and recommends that the Scottish Parliament should be able to scrutinise the Scottish Ministers' position before they grant consent.

129. **The Committee is deeply concerned that Clauses 7 to 9 in the Bill would allow UK Ministers to make statutory instruments in devolved areas without any statutory requirement to seek the consent of Scottish Ministers or the Scottish Parliament. The Committee considers that this cuts across the devolution settlement.**

130. **The Committee supports the amendments published by both the Scottish Government and the Welsh Government which require UK Ministers to seek the consent of the devolved administrations prior to making statutory instruments in devolved areas as provided for in Clauses 7 to 9 of the Bill.**

131. **The Committee also emphasises the need for parliamentary scrutiny of Scottish Ministers' proposals prior to consent being given to UK Ministers. The Committee, therefore, welcomes the commitment by the Minister to work with the Parliament to "set up a mechanism to ensure we do not exercise our own powers until we have consulted."**

132. **The Committee also welcomes the commitment by both the Secretary of State and the Minister to consider extending the Sewel Convention to the powers in the Bill which allow UK Ministers to make statutory instruments in devolved areas. The Committee recommends that the Parliament should be consulted as part of this process with a view to considering how this would work in practice.**

133. **The Committee supports the view of the DPLR Committee that there should be a process which provides an opportunity for the Parliament to scrutinise Scottish Ministers' proposals before they grant consent to the UK Government to make subordinate legislation in devolved areas.**

134. **The Committee notes that a working group of Scottish Government and Scottish Parliament officials is currently examining these issues including the Bill as amended and we look forward to considering their findings prior to the publication of our final report on the LCM.**

Restrictions on the Powers of Scottish Ministers

Schedule 2

135. Schedule 2 to the Bill is entitled “Corresponding Powers Involving Devolved Authorities” and makes provision for powers to be conferred on the Scottish Ministers, the Welsh Ministers and Northern Ireland departments which are similar but not identical to the powers conferred on UK Government ministers by Clauses 7 to 9 of the Bill.
136. As noted above, a number of restrictions apply to the devolved Ministers’ use of the powers in the Bill which do not apply to UK Ministers. Both the Scottish Government and the Welsh Government have published a number of amendments which would remove those restrictions. At the same time the Scottish Government recognises that there are significant concerns about the very broad scope of the Henry VIII powers proposed in the Bill and “would be supportive of amendments which sought to define these more narrowly.”⁵⁸ However, the Scottish Government’s position, as a matter of principle, is that “devolved Ministers should have the same powers in respect of matters falling within devolved competence as UK Ministers are being given.”⁵⁸
137. Some of our witnesses raised concerns in relation to the restrictions placed on the powers of Scottish Ministers in the Bill. Dr Lock, for example, pointed out that it “is not entirely clear why Scottish Ministers should be categorically excluded from powers to modify direct EU legislation so far as it falls within the devolved competence.”
138. Dr McCorkindale, Professor McHarg and Professor Mullen in a joint submission noted that the Bill “frees UK Ministers from the constraints of EU law in a way that is not replicated at the devolved level” and that “Scottish Ministers are therefore conferred a more limited and complex suite of powers.” They suggest that the constraints on Scottish Ministers “constitute a significant centralisation in relation to areas such as agriculture and fisheries where much of the relevant legislation is by way of direct EU law and therefore beyond the scope of the powers of the devolved Ministers.”
139. The DPLR Committee received conflicting evidence on whether Scottish Ministers should have the power to amend retained direct EU legislation and directly effective Treaty rights. Their view is that this is an “immensely important issue and one that is at the heart of shaping how common frameworks will work.”⁵⁹
140. The LCM states that Scottish Ministers “should have the power to make corrections in all areas of devolved law, whatever the original nature of the relevant retained EU law.” At the same time the Scottish Government “accepts that powers for UK Ministers should be exercisable in devolved areas” in order to ensure proper functioning of the statute book after Brexit and subject to the consent of Scottish Ministers.

141. **The Committee supports the principle that Scottish Ministers should have the same powers as UK Ministers in the Bill in relation to devolved competences. But we are also strongly of the view that these powers as currently drafted are too broad and must be subject to robust parliamentary scrutiny whether exercised in London or Edinburgh. The Committee, however, recognises that the Bill as amended during the Committee Stage in the House of Commons may or may not address some of these concerns. As noted above the Committee has not yet had the opportunity to consider these amendments but we will do so prior to the publication of our final report.**

Status of Devolution Acts

142. As discussed above, the Bill confers powers on Ministers in the UK Government and devolved administrations to address deficiencies in retained EU law. However, the Bill provides particular protection to the Northern Ireland Act 1998 whereby delegated powers to remedy deficiencies in retained EU law may not be used to amend or repeal the Northern Ireland Act 1998. Robin Walker MP outlined the UK Government's rationale for this variation in the level of protection afforded to the devolution acts as follows—

” A correcting power to the Government of Wales Act 1998 and the Scotland Act 1998 is retained. That is limited to correcting deficiencies and is provided as a contingency to prevent the creation of gaps in the statute book. Because the Northern Ireland Act 1998 is the main statutory manifestation of the Belfast agreement, which was agreed by the UK Government and the Irish Government, any changes to it beyond those that are already set out in the schedule to the bill would have to be delivered by primary legislation.

Source: Finance and Constitution Committee 08 November 2017, Robin Walker, contrib. 125⁶⁰

143. Professor Rawlings considered that the UK Government rationale for protection of the Northern Ireland Act 1998 was a sensible position to take but failed to address why the equivalent Scottish and Welsh legislation was not afforded a similar level of constitutional protection. In a similar vein, the Institute for Government contended that all the devolution acts are “fundamental constitutional laws” and should not be subject to amendment by secondary legislation and should be afforded the “same level of protection from amendment”⁶¹ as the Northern Ireland Act 1998.

144. The Minister for UK Negotiations on Scotland's Place in Europe noted that the differential treatment of the Northern Ireland Act did not amount to “equitable treatment”⁵⁵ and that there were issues to be addressed in that regard. The DPLR Committee in its report on the LCM considered this issue and stated that “it believes that protection should also be afforded to other constitutional statutes including the Scotland Act 1998”⁶² and suggested that a ‘constitutional protection clause’ be inserted into the Bill.

145. The Committee recognises that the Northern Ireland Act 1998 is, in part, a product of an international agreement between the governments of the Republic of Ireland and the UK. Nevertheless, the Committee considers that the devolution acts are fundamental constitutional acts and should have an equal status in terms of the provisions in the European Union (Withdrawal) Bill.

146. The Committee is particularly concerned that the use of delegated powers to amend the Scotland Act 1998 would not engage the Sewel Convention, circumventing a key principle of the current devolution settlement whereby

changes to the powers of the Scottish Parliament by Westminster will normally require the consent of the Scottish Parliament.

Inter-Governmental Relations (IGR)

147. The absence of trust in the negotiations between the UK Government and Scottish and Welsh Governments has been a recurring theme in the evidence, including from the Scottish and Welsh governments, received by the Committee. Whilst there has been recent progress in discussions within the JMC-EN the dysfunctional nature of IGR in the UK has been the subject of many reports by parliamentary committees and much academic commentary. The Committee has heard similar evidence during its consideration of the LCM.
148. The prospect of Brexit intensifies the need for urgent reform of IGR and for an effective system of IGR to be put in place as part of the Brexit process. The current machinery around joint ministerial committees tended to be viewed as a starting point, albeit insufficient, for developing inter-governmental machinery to deal with Brexit. Professor Rawlings suggested that the JMC-EN would not be sufficient to deal with a post-Brexit environment and that new joint ministerial committees dealing with international trade and the domestic single market would be required. Professor Keating emphasised that currently joint ministerial committees neither make policy or arbitrate disputes and that both functions would be necessary post-Brexit.
149. The Welsh Government, in its policy paper ‘Brexit and Devolution’⁶³, proposed a UK Council of Ministers potentially established on a statutory basis and organised along lines similar to the EU Council of Ministers, with an independent adjudication mechanism and supported by an independent secretariat. Expert evidence heard by the Committee tended to be supportive of this approach but considered that such an approach would be unacceptable to the UK Government. For example, Professor Rawlings commented in this regard that—

” Attractive though that is, it has no political traction in Whitehall and Westminster. It is just too much of a jump for the UK Government to accept.

Source: Finance and Constitution Committee 15 November 2017 [Draft], Professor Rawlings, contrib. 69⁶⁴

150. Generally, witnesses proposed that IGR be taken forward through consensus and agreement as much as possible. However the issue of joint decision making tended to be viewed by witnesses as, in the words of Professor Page, “a nettle that must be grasped”.⁶⁵ Professor Drakeford suggested that the Welsh Government proposal was intended to provide a means of stimulating debate on this issue whilst noting that “there is very little appetite in Whitehall for engaging in such discussions”.⁶⁶ The Minister for UK Negotiations on Scotland's Place in Europe placed an emphasis upon ‘co-decision making’ and suggested that there may be a range of solutions. He commented—

” The Welsh anticipate a system of qualified majority voting in any such arrangements. That might work on occasion; it might be too complex on others. I will qualify my answer and say that there is variable geometry, according to the subject and the agreement.

Source: Finance and Constitution Committee 20 September 2017, Michael Russell, contrib. 27⁶⁷

151. The Committee has also heard evidence that alongside an effective structure of IGR that there is a need for improved inter-parliamentary relations. In this regard, the Committee highlights and welcomes the recent establishment of the Inter-Parliamentary Forum on Brexit which brings together the Conveners and Chairs of Committees scrutinising Brexit-related issues in the Scottish Parliament, National Assembly for Wales, House of Commons and House of Lords. The Forum is intended to provide a setting to discuss the process of the UK's withdrawal from the European Union, and collective scrutiny of that process in legislatures across the UK⁶⁸.

152. The Committee recognises that the current structure of IGR has been widely recognised as not fit for purpose for a considerable period of time. The process of Brexit requires that this situation is finally addressed as a matter of urgency.

153. The Committee notes the proposals set out by the Welsh Government. The Committee considers that a new structure of IGR requires to be placed on a statutory basis including establishing a process for joint decision making. This new structure requires to be supported by an independent secretariat and provide a mechanism for independent dispute resolution.

154. The Committee also recommends that inter-parliamentary co-operation is a key component of scrutiny of the Brexit process and considers that the Inter-Parliamentary Forum on Brexit will form a central part of this process.

Scope of Legislative Consent

155. The Bill is a relevant Bill within Rule 9B.1.1 of the Standing Orders as it contains provisions within the legislative competence of the Parliament and alters the legislative competence and the executive competence of the Scottish Ministers. The Explanatory Notes to the Bill highlight four areas where the UK Government is seeking the legislative consent of the Scottish Parliament. These are:
- “The preservation and conversion of EU law, because some areas in which laws are being preserved and converted would be within devolved competence.
 - The replication of the EU law limit on the devolved institutions and the power to vary that limit, because this will alter the competence of the devolved institutions.
 - The conferral on the devolved administrations of the power to make corrections to the law, the power to implement a withdrawal agreement, the power to implement international obligations, as well as the power to incur preparatory expenditure and the power to impose and modify fees and charges as this will alter the competence of the devolved administrations or give them the power to act in relation to devolved matters.
 - The repeal of the ECA, as the devolution statutes refer to the ECA to impose an EU law limit on devolved competence, a limit that the repeal of the ECA will alter.⁶⁹”
156. The Scottish Government LCM⁷⁰ identifies a number of additional clauses in the Bill where it considers that consent is also required. These are principally:
- Clause 5: Exceptions to saved and incorporated retained EU law, such as removing the Charter on Fundamental Rights from UK domestic law
 - Clause 6: Interpretation of retained EU law
 - Clauses 7 and 9: Regulation making powers for UK Ministers including in areas of devolved competence
157. Table One below provides an overview of where the Scottish and UK Government consider consent is required in terms of the Clauses in the Bill. Where there is a divergence between the position of the Scottish and UK Government with regard to whether legislative consent is required this is highlighted in bold.

Table One: Legislative Consent by Clause

Provision	Scottish Government Position – LCM needed?	UK Government Position – LCM needed?
Clause 1	Yes	Yes
Clause 2 & Schedule 1	Yes	Yes
Clause 3	Yes	Yes
Clause 4	Yes	Yes
Clause 5	Yes	No
Clause 6	Yes	No
Clause 7	Yes	No
Clause 8	Yes	Yes
Clause 9	Yes	No
Clause 10 & Schedule 2	Yes	Yes
Clause 11 & Schedule 3	Yes	Yes
Clause 12 & Schedule 4	Yes	Yes
Clause 13 & Schedule 5	Yes	No
Clause 14 & Schedule 6	No	No
Clause 15	No	No
Clause 16 & Schedule 7	Yes	Yes
Clause 17, Schedule 8 & 9	Yes	No
Clause 18	No	No
Clause 19	No	No

Source: Adapted from Annex A of the UK Government Explanatory Notes to the Bill, and Annex B to the Scottish Government Legislative Consent Memorandum.

158. **The Committee notes the view of the Scottish Government with regard to the areas of the Bill that require legislative consent. The Committee recommends, given the need for clarity and certainty in this process, that the Scottish and UK governments reach agreement on the areas of the Bill that require legislative consent as a matter of urgency.**

Charter of Fundamental Rights

159. Whilst the Bill generally seeks to preserve and convert EU law into UK legislation there are exceptions to this approach including, for example, that the Bill provides for the principle of the supremacy of EU law not to apply to legislation made on or after exit day. Schedule 1 to the Bill contains various other exceptions including provisions that make it clear that there is to be no right to challenge retained EU law on the grounds that the EU instrument on which it is based is invalid; that remove rights to challenge state actions on the grounds of a failure to comply with the general principles of EU law; and that remove rights to claim ‘Francovich’ damages.

160. Clause 5 makes express reference to the Charter of Fundamental Rights, providing that “the Charter of Fundamental Rights is not part of domestic law on or after exit day”⁷¹. The Explanatory Notes to the Bill comment on the rationale for this latter exception as follows—

” Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter does not form part of domestic law after exit, this does not remove any underlying fundamental principles which exist, and EU law which is converted will continue to be interpreted in light of those underlying rights and principles.

Source: Explanatory Notes to the Bill, p.27, para. 100

161. The Scottish Government's LCM notes that it has particular “objections”⁷² to the repeal of the Charter of Fundamental Rights however it does not set out what these objections are. A number of respondents, primarily from a legal perspective, raised concerns regarding the implications arising from the exclusion of the Charter. For example, the Law Society of Scotland commented—

” We recommend that the UK Government should reconsider the removal of the Charter of Fundamental Rights and take stock of concerns which are held by many about the potential for the erosion of human rights which may occur as the result of the removal of the Charter and the creation of difficulties for the UK Courts interpreting retained EU law in the absence of the Charter.

Source: Law Society of Scotland, Written Submission, p.7

162. A range of respondents, including the Law Society of Scotland and Professor Aileen McHarg of Strathclyde University, stated that the Bill as currently drafted would result in a diminution of citizens’ rights and that it was not possible to identify exactly what the fundamental rights or principles are that exist irrespective of the Charter.

⁷³ Professor McHarg went on to observe more broadly, by reference to Schedule 1 to the Bill, that a consequence of the Bill would be that citizens would have no independent right of action based on breach of the general principles of EU law. Professor McHarg noted that—

” A person will not be able to challenge a decision by a Government minister or a public body on the basis of a breach of those principles, but they will be able to draw upon those principles as an aid to interpretation of retained EU law. However, a further complication is that neither the pre-Brexit nor the post-Brexit case law of the European Court of Justice will be binding on the domestic courts, so the UK Government will be able to decide whether to depart from, for example, the interpretation that has been given to legal certainty or the meaning that is being given to fundamental rights.

Source: Finance and Constitution Committee 01 November 2017, Professor McHarg, contrib. 127⁷⁴

163. Lastly, Dr Tobias Lock of Edinburgh University highlighted that the effect of the exclusion of the Charter from domestic law would result in a change to the powers of the Scottish Parliament. He noted that—

” The Charter currently only applies where the Scottish Parliament legislates within the scope of EU law. However, in some areas the Charter provides stronger protection than the European Convention on Human Rights. Examples include an express right to the protection of personal data, children's rights, a more comprehensive right to a fair trial, and many social rights.

Source: Dr Tobias Lock, Written Submission, p.6

164. The Committee notes the Motion agreed by the Scottish Parliament on 10 January 2017⁷⁵ in relation to the Charter of Fundamental Rights and recommends that the Scottish Government set out in detail its objections to the Bill's provisions on the Charter.

Conclusion

165. **Given the issues raised above in this Interim Report, the Committee is not in a position to recommend legislative consent on the Bill as currently drafted. The Committee will produce a final report on the LCM prior to the final amending stage in the House of Lords.**

Annexe A

Powers returning from the EU that intersect with the devolution settlement in Scotland

166.
 1. Agricultural Support
 2. Agriculture - Fertiliser Regulations
 3. Agriculture - GMO Marketing & Cultivation
 4. Agriculture - Organic Farming
 5. Agriculture - Zootech
 6. Animal Health and Traceability
 7. Animal Welfare
 8. Aviation Noise Management at Airports
 9. Blood Safety and Quality
 10. Carbon Capture & Storage
 11. Chemicals regulation (including pesticides)
 12. Civil judicial co-operation - jurisdiction and recognition & enforcement of judgments in civil & commercial matters (including B1 rules and related EU conventions)
 13. Civil judicial co-operation - jurisdiction and recognition & enforcement of judgments instruments in family law (including B1a, Maintenance and civil protection orders)
 14. Civil judicial cooperation on service of documents and taking of evidence
 15. Criminal offences minimum standards measures - Combating Child Sexual Exploitation Directive
 16. Control of major accident hazards
 17. Cross border mediation
 18. Data sharing - (EU fingerprint database (EuroDac))
 19. Data sharing - European Criminal Records Information System (ECRIS)
 20. Data sharing - False and Authentic Documents Online (FADO)
 21. Data sharing - passenger name records
 22. Data sharing - Prüm framework

23. Data sharing - Schengen Information System (SIS II)
24. Efficiency in energy use
25. Elements of Reciprocal Healthcare
26. Elements of the Network and Information Security (NIS) Directive
27. Elements of Tobacco Regulation
28. Energy Performance of Buildings Directive
29. Environmental Impact Assessment (EIA) Directive
30. Environmental law concerning energy planning consents
31. Environmental law concerning offshore oil & gas installations within territorial waters
32. Environmental quality - Air Quality
33. Environmental quality - Chemicals
34. Environmental quality - Flood Risk Management
35. Environmental quality - International timber trade (EUTR and FLEGT)
36. Environmental quality - Marine environment
37. Environmental quality - Natural Environment and Biodiversity
38. Environmental quality - Ozone depleting substances and F-gases
39. Environmental quality - Pesticides
40. Environmental quality - Spatial Data Infrastructure Standards
41. Environmental quality - Waste Packaging & Product Regulations
42. Environmental quality - Waste Producer Responsibility Regulations
43. Environmental quality - Water Quality
44. Environmental quality - Water Resources
45. Environmental quality - Biodiversity - access and benefit sharing of genetic resources
46. Equal Treatment Legislation
47. EU agencies - EU-LISA
48. EU agencies - Eurojust
49. EU agencies - Europol

50. EU Social Security Coordination
51. Fisheries Management & Support
52. Food and Feed Law
53. Food Compositional Standards
54. Food Geographical Indications (Protected Food Names)
55. Food Labelling
56. Forestry (domestic)
57. Free movement of healthcare (the right for EEA citizens to have their elective procedure in another member state)
58. Genetically modified micro-organisms contained use
59. Good laboratory practice
60. Harbours
61. Hazardous Substances Planning
62. Heat metering and billing information
63. High Efficiency Cogeneration
64. Implementation of EU Emissions Trading System
65. Ionising radiation
66. Land use
67. Late payment (commercial transactions)
68. Legal aid in cross-border cases
69. Migrant Access to benefits
70. Minimum standards -housing & care: regulation of the use of animals
71. Minimum standards legislation - child sexual exploitation
72. Minimum standards legislation - cybercrime
73. Minimum standards legislation - football disorder
74. Minimum standards legislation - human trafficking
75. Mutual recognition of professional qualifications
76. Mutual recognition of criminal court judgements measures & cross border cooperation - European Protection Order, Prisoner Transfer Framework

Directive, European Supervision Directive, Compensation to Crime Victims Directive

77. Nutrition health claims, composition and labelling
78. Onshore hydrocarbons licensing
79. Organs
80. Plant Health, Seeds and Propagating Material
81. Practical cooperation in law enforcement - Asset Recovery Offices
82. Practical cooperation in law enforcement - European Investigation Order
83. Practical cooperation in law enforcement - Joint Action on Organised Crime
84. Practical cooperation in law enforcement - Joint investigation teams
85. Practical cooperation in law enforcement - mutual legal assistance
86. Practical cooperation in law enforcement - mutual recognition of asset freezing orders
87. Practical cooperation in law enforcement - mutual recognition of confiscation orders
88. Practical cooperation in law enforcement - Schengen Article 40
89. Practical cooperation in law enforcement - Swedish initiative
90. Practical cooperation in law enforcement - European judicial network
91. Practical cooperation in law enforcement - implementation of European Arrest Warrant
92. Procedural rights (criminal cases) - minimum standards measures
93. Provision of legal services
94. Provision in the 1995 Data Protection Directive (soon to be replaced by the General Data Protection Regulation) that allows for more than one supervisory authority in each member state
95. Public sector procurement
96. Public health (serious cross-border threats to health)
97. Radioactive Source Notifications – Trans-frontier shipments
98. Radioactive waste treatment and disposal
99. Rail franchising rules
100. Rail markets and operator licensing

101. Recognition of insolvency proceedings in EU Member States
102. Renewable Energy Directive
103. Rules on applicable law in civil & commercial cross border claims
104. Sentencing - taking convictions into account
105. State Aid
106. Statistics
107. Strategic Environmental Assessment (SEA) Directive
108. Tissues and cells
109. Uniform fast-track procedures for certain civil and commercial claims
(uncontested debts, small claims)
110. Victims rights measures (criminal cases)
111. Voting rights and candidacy rules for EU citizens in local government elections

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