

21 March 2018

My Lords,

Clauses 7-9: Protections for Devolution Statutes and Concurrent Power

I am writing following the constructive debate on Monday 12 March at Committee stage regarding the interaction between the main powers for UK ministers in the EU (Withdrawal) Bill and the devolution statutes and devolved matters.

The debate reflected the careful consideration noble Lords have given to this issue and was characteristically thoughtful. I am grateful for the constructive tone of the discussions. It is in this spirit that I hope we can continue consideration of the subject of devolution in this Bill.

Since our debate, my colleagues and I have had the opportunity to discuss in more detail with some Peers the Government's proposed amendments on clause 11, which were tabled on Monday 12 March. On behalf of Ministers, I would also like to take the opportunity to thank colleagues from across the House for the further constructive approach taken here. Our objectives, to reach agreement with the Scottish and Welsh governments and ensure we have a functioning statute book with maximum legal certainty, are shared ones. I look forward to the considered debate we shall have on clauses 10 and 11 today. In the meantime, I would like to reassure that we continue to discuss the clause 11 proposals with the Scottish and Welsh governments and will be paying close mind to the suggestions put forward in this House to improve this legislation.

Ahead of that debate on the broader devolution questions raised by this Bill, I wish to address in brief a number of the points raised during the debate to provide further clarity, and to answer those questions where I undertook to do so. I have also attached as an annex a paper that provides additional information on the frameworks process and the engagement between the UK Government and devolved administrations to date. We intend to place this in the House library to further facilitate the debate and scrutiny of the Government's approach on devolution.

Engagement with the devolved administrations on common frameworks:

Before I move onto the specific points raised in the debate on Monday 12 March, a number of colleagues have asked me to set out in more detail the considerable engagement that has taken place with the devolved administrations on future common frameworks. I would like to highlight the ongoing and intensive discussions that have taken place between the UK Government and the devolved administrations at both ministerial and official level. Following discussions at JMC(EN) last October,

Ministers from the UK, Welsh and Scottish Governments, and officials from the Northern Ireland Civil Service, commissioned an expansive body of policy work to explore areas where frameworks may be needed. This resulted in the first set of 'deep dive' policy workshops between the administrations and an agreed list of further topics to be explored on a multilateral basis. There was also ministerial agreement on the set of principles around which the frameworks work would be undertaken. A progress report was discussed at JMC(EN) in December and the Chancellor of the Duchy of Lancaster has maintained a strong dialogue with the devolved administrations through bilateral calls and constructive multilateral meetings at JMC(EN) in February and March.

Officials have taken forward a considerable programme of detailed policy workshops focused primarily on those policy areas where we think legislative frameworks may be required, in whole or in part. Since January, officials from the UK Government and the devolved administrations have come together for 27 separate sessions over 35 days. Generally speaking, these workshops have taken broad policy areas and broken them down into component parts to test how far commonality between the UK Government and the devolved administrations might be required. Discussions have also started on a range of cross-cutting issues such as the approach to the UK internal market and governance. I believe this is an unprecedented process of engagement with the devolved administrations and that good progress has been made in many of these policy areas. All of our discussions are guided by the principles agreed with the Scottish and Welsh Governments in October and report to JMC(EN). We have included further detail on our frameworks engagement at Annex A, which is also to be circulated to Peers interested in the devolution debate.

International obligations:

During the debate, Lord Hope raised the reservation of international relations in paragraph 7 of Schedule 5 to the Scotland Act 1998, and that this does not extend to the observance or implementation of international obligations, obligations under the Human Rights Convention and obligations under EU law. He rightly noted that this creates a division of responsibility between the UK Parliament and the Scottish Parliament for these areas. It is for this reason that we have made available in Part 2 of Schedule 2 to the Bill a power for devolved ministers that corresponds to the power for UK ministers in clause 8. This means that Scottish Ministers (and the Welsh Ministers and Northern Ireland departments) will, rightly, be responsible for amending domestic law in devolved areas to remedy any breach of our international obligations that might arise from exit.

Lord Hope also noted that the Bill does not seek to correct the reference to EU obligations in paragraph 7(2)(a) of Schedule 5 to the Scotland Act, which will no longer make sense once we have left the EU. I can provide reassurance that this has not been overlooked. In bringing forward amendments to protect the Scotland Act and the Government of Wales Act from modification under the clause 7(1) power, as I stated during the debate, we will table the amendments that would have been made using that power on the face of the Bill. However, for corrections to the lists of reservations in those Acts, we have undertaken to use the existing powers (in section 30 of the Scotland Act and section 109 of the Government of Wales Act) to make those changes. This ensures that where correcting a deficiency within a reservation, the change will require the approval the relevant devolved legislature.

The Scottish Government has agreed to this approach. Therefore, this correction to Schedule 5 will be brought forward in due course through an Order in Council under section 30. I would be happy to share further information with Lord Hope on this should it be helpful.

The Sewel Convention and legislative consent:

A number of Peers rightly raised the Sewel Convention in relation to both the UK Government's powers and new frameworks that may be established. I think it is important to put this Government's commitment to Sewel beyond doubt. We have, in the Scotland Act 2016 and again in the Wales Act 2017, explicitly recognised the importance of the Sewel Convention. We have also shown the sincerity of our position not only by seeking legislative consent motions for this Bill, but also by the significant movement we have made in order to secure them.

In relation to Lord Hope's point that the concurrent powers are a means to bypass the Convention. I wish to repeat that we have made a commitment that we will not normally use these powers in relation to devolved matters without the agreement of the devolved administrations.

I should also be clear that our primary intention is for the devolved administrations to make the amendments that are needed to devolved domestic legislation using the powers conferred on them in Schedule 2. As we discussed, the powers proposed for the UK Government in clauses 7, 8 and 9 are held concurrently. This follows the practice in s2(2) of the European Communities Act 1972. The primary purpose of such powers would be to achieve administrative efficiency and they will not be used to substantively alter the devolution settlements or to enact new policy in devolved areas. I believe that I can also provide some further reassurance regarding the question of legislative consent in relation to the future arrangements in those areas of intersection between EU law and devolved competence, which Baroness Finlay raised. The current framework of legislative consent is not being changed by this Bill. In those areas where we might determine that a framework is to be established through legislation, we will seek consent according the same criteria that we would for any other Bill. This includes seeking consent in accordance with the Sewel Convention, and it also means following the usual practice of seeking consent where legislation amends the legislative competence of the devolved legislatures or the executive competence of the devolved administrations.

Memorandum of Understanding:

I am very grateful to Lord Hope for raising the matter of the Memorandum of Understanding (MoU) regarding what it says on intergovernmental working on implementation of EU law, and to Lord Mackay for his suggestion of how we might use this to set out the working practices for the powers in this Bill. I committed to take this away and I have already had the opportunity to discuss this with Lord Hope.

As was raised in the debate, the MoU states that UK Government will involve the devolved administrations 'as directly and fully as possible in decision making on EU matters which touch on devolved areas'. I share Lord Hope's assessment that this system has worked remarkably well in practice, and I wish to recognise that it does so through the sincere commitment each administration has for the MoU and the

mutual respect that it fosters. Importantly, it achieves this without a need for a legislative underpinning.

We have always envisaged that the work to the prepare our statute book for exit day should be undertaken in a similar manner to the work we currently undertake to implement EU laws as it is of a similar nature. I therefore believe that we should be seeking to take the successful working practices of the latter and apply them to the former. It may well be that amendment of the MoU would be the right way to achieve this.

I would like to thank you again for the thoughtful and productive tone of this debate and I sincerely hope that we continue with debate on the proposals for clause 11 in that same vein.



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Gweinidog Llywodraeth y DU dros Gymru

Annex A: Common frameworks: background and engagement with the devolved administrations

Background

Under the current devolution settlements, the devolved legislatures and administrations cannot act incompatibly with EU law. This results in common rules - or **'frameworks'** - across the UK in a range of policy areas, from agriculture and fisheries, to food labelling and chemicals regulation. While the UK Government and devolved administrations make different choices on implementation in some policy areas, these common rules provide a range of benefits: creating a functioning internal UK market; helping the UK to fulfil its trade and other international obligations; and protecting our common resources.

As we prepare to leave the EU, the UK Government is working with the devolved administrations to determine where common working practices will need to be maintained. We believe that there will be many areas where no future common framework will be required. Where a framework is needed, this could take a variety of forms. In some areas legislation will be needed, e.g. to set minimum standards that apply in all four parts of the United Kingdom. In other areas, more informal working practices set out in a memorandum of understanding will suffice.

Frameworks principles

The devolved administrations agree that common frameworks will be needed in some areas.

The grounds upon which frameworks will be created are set out in the principles that were agreed by the UK, Scottish and Welsh Governments at a meeting of the Joint Ministerial Committee (EU Negotiations) in October 2017. The full document is annexed to this note. The principles make clear that common 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.

Frameworks analysis

These principles guide the detailed work that we have been doing with the devolved administrations to explore the areas where frameworks are and are not envisaged. To increase the transparency of this process, the UK Government published its provisional analysis on 9 March. This is part of an ongoing dialogue with the devolved administrations, not a final position. It sets out the 153 areas of EU law that intersect

with competence in Northern Ireland, Scotland or Wales, along with our assessment of whether a future legislative or non-legislative framework may be required.

The analysis indicates that we will only require legislative frameworks in a minority of areas. Moreover, our ongoing discussions with the devolved administrations suggest that within these areas, legislation may only be required in relation to specific elements, rather than the entire policy area. We only want to see legislative frameworks where absolutely necessary.

Elsewhere, we think that common approaches are either not required at all or we can achieve these through our governments working together in more informal ways, building on the existing practices we have now. In these areas - which form the vast majority of areas we have had to consider - we intend that the powers returning from Brussels to flow back directly to Edinburgh, Cardiff and Belfast after exit. This will increase the decision making powers of the devolved administrations.

Engagement between the UK Government and the devolved administrations on frameworks

Together with the devolved administrations we have made significant progress over the last few months in our intensive discussions and analysis on what future frameworks should look like. Extensive engagement has taken place at both Ministerial and official level, and on a bilateral and multilateral basis, overseen by JMC(EN).

At official level, bilateral discussions on specific framework policy areas began in summer 2017. In November 2017, three multilateral policy 'deep dives' took place in the areas of agriculture, justice and home affairs and public health. The outcomes were considered at JMC(EN) on December 12 2017 and a further programme of engagement was agreed.

Since January 2018, 27 further 'deep dive' policy sessions over 35 days have been held, focusing primarily on those policy areas where legislative frameworks may be required in whole in part. The deep dive sessions are intensive multilateral policy workshops, generally taking place over 1-2 days each. They have been managed by independent facilitators from within Government and have largely taken place at neutral venues, some in the devolved nations.

Discussions have also begun on a range of cross cutting issues including the approach to the internal market and governance. These discussions are ongoing, guided by the frameworks principles agreed at JMC(EN).