

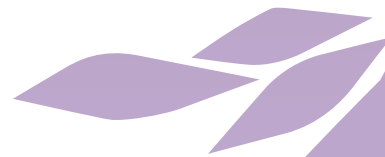


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Finance and Constitution Committee Comataidh Ionmhais is Bun-reachd

Report on European Union (Withdrawal) Bill Supplementary LCM



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Finance and Constitution Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any report or other document laid before the Parliament by members of the Scottish Government containing proposals for, or budgets of, public revenue or expenditure or proposals for the making of a Scottish rate resolution, taking into account any report or recommendations concerning such documents made to them by any other committee with power to consider such documents or any part of them;

(b) any report made by a committee setting out proposals concerning public revenue or expenditure;

(c) Budget Bills; and

(d) any other matter relating to or affecting the revenue or expenditure of the Scottish Administration or other monies payable into or expenditure payable out of the Scottish Consolidated Fund.

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Introduction

1. The Scottish Government lodged a Legislative Consent Memorandum (LCM) on the European Union (Withdrawal) Bill (“the Bill”) on 12 September 2017. The Finance and Constitution Committee (“the Committee”) published an interim report on the LCM on 9 January 2018. The Scottish Government lodged a supplementary LCM on the Bill on 26 April 2018. The supplementary LCM addresses a number of amendments tabled by the UK Government at Report Stage in the House of Lords and other amendments to the Bill agreed during its passage through the House of Commons. This report provides a summary of the Committee’s views and recommendations on the supplementary LCM and Bill as amended prior to third reading in the House of Lords on 16 May 2018. In particular, the report addresses the extent to which the Committee’s concerns as set out in our interim report have been addressed during the passage of the Bill through Westminster and by the supplementary LCM.
2. The Committee also notes the Delegated Powers and Law Reform (DPLR) Committee report on the supplementary LCM.

Clause 11: Impact on the Devolution Settlement

3. As set out in our interim report, Clause 11 of the Bill was a principal focus of the evidence submitted to the Committee. The Committee concurred with the vast majority of the expert evidence we received that Clause 11 as originally drafted represented a fundamental shift in the structure of devolution and was incompatible with the devolution settlement in Scotland. The Committee therefore concluded in our interim report that we would not be in a position to recommend legislative consent unless Clause 11 was replaced or removed.

Clause 11 Amendments

4. The UK Government tabled amendments to Clause 11 at Report Stage in the House of Lords which were subsequently agreed. The UK Government's supplementary delegated powers memorandum published alongside the amendments states that they contain powers "to apply restrictions on the legislative competence" of the devolved institutions. The effect of which is "to preserve the current boundaries of devolved competence in order to maintain consistency of law in a policy area which prior to exit would have been provided by EU law." In relation to the scope of these powers the UK Government's view is that this is "closely linked to the scope of the existing EU law constraints on the devolved competence."
5. As introduced, Clause 11 would have imposed a new restriction on the legislative competence of the Scottish Parliament. An Act of the Scottish Parliament would have been 'not law' to the extent that it modified or conferred power to modify retained EU law (except where the modification would have been within legislative competence prior to exit day). The agreed amendments remove this restriction on the legislative competence of the Scottish Parliament and replace it with a different restriction.
6. If the Bill as amended is passed, an Act of the Scottish Parliament would be 'not law' if it modified or conferred power to modify retained EU law where the modification is of a kind specified in regulations made by UK Government. The Committee's Adviser on constitutional issues explains that-
 - ” “The restriction on the Scottish Parliament's legislative competence would therefore not be of the 'blanket' nature originally envisaged by Clause 11 and the onus would be on the UK Government to make regulations specifying the limits on the Scottish Parliament's powers to change retained EU law.”
7. The power of the UK Government to make Clause 11 regulations would be subject to a sunset clause. Any regulations could not be made more than 2 years after exit day and would, in effect, 'expire' 5 years after they have been made if not revoked earlier.
8. The amendments also incorporate a mechanism by which the consent of the Scottish Parliament is to be sought to any regulations proposed to be made by the UK Government under this provision. However the Committee's Adviser points out that the Scottish Parliament would not be able to refuse consent as regulations can

be made by UK Government once the Scottish Parliament has made a 'consent decision', even if that is a decision refusing consent. Clause 11 (2) (4) of the Bill as amended defines a consent decision as—

- (a) a decision to agree a motion consenting to the laying of the draft;
- (b) a decision not to agree a motion consenting to the laying of the draft, or
- (c) a decision to agree a motion refusing to consent to the laying of the draft.

9. In addition to the amendments to the Bill the UK Government has also made a number of political commitments in a proposed Intergovernmental Agreement and Memorandum of Understanding on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks.
10. The proposed Intergovernmental Agreement states that the UK Parliament will “not normally” be asked “to approve clause 11 regulations without the consent of the devolved legislatures.” The proposed Agreement also states that the UK Government commits to make regulations through “a collaborative process” and that the devolved administrations “commit not to unreasonably withhold recommendations of consent.” Where consent is withheld UK Ministers “will be required to make an explanatory written statement to the UK Parliament if a decision is taken to proceed” accompanied by any statement from the relevant devolved Minister as to why consent has not been provided. The requirement for explanatory statements is a statutory requirement in terms of the UK Government amendments agreed in the Lords. There is also a political commitment from the UK Government not to bring forward legislation to modify retained EU law as it applies to England in areas covered by the clause 11 regulations as those regulations are in force.
11. In a letter to the Committee dated 2 May 2018 the Secretary of State for Scotland stated that the UK Governments amendments to Clause 11 “reflect a presumption that powers returning from EU in otherwise devolved areas would flow directly to the devolved legislatures.” He also stated that it would not be consistent with devolution “for an administration in one part of the UK to effectively have a veto on issues that affect the whole of the UK.”
12. The Secretary of State was asked by the Committee whether he trusted the Scottish Government. He responded that he did and that “all our work with the Scottish Government reinforces that.” In relation to Clause 11 he told the Committee that the UK Government has made “it absolutely clear from the outset that an amendment that simply deleted clause 11 would not be acceptable” on the basis of ensuring that “there is clarity and certainty on what happens in respect of the legal competence that returns from the EU when we leave it.”
13. He explained that the UK Government has “made significant changes to clause 11” and ensured that there is now “a presumption of devolution other than in the areas in which both Governments agree that there will be a need for UK-wide frameworks.” He also stated that it “is absolutely the case that every power and responsibility currently exercised by this Parliament will continue to be exercised the day after we leave the EU and thereafter. There is absolutely no evidence or legal basis to suggest otherwise.”

The Scottish Government Position

14. The Scottish Government has published a supplementary LCM which states that it does not agree with the UK Government's amendments to clause 11 and schedule 3 and is therefore unable to recommend that the Scottish Parliament consents to the Bill. Instead the Scottish Government proposes its own "straightforward changes" in the supplementary LCM and these are considered by the Committee below.
15. The Scottish Government's view is that the UK Government's proposals would retain the power to restrict the competence of the Scottish Parliament even where it "expressly votes against it" and that this is "inconsistent with the principle that changes should only be made with the explicit consent of the devolved legislature involved." Furthermore, the Scottish Government states that respect "for this principle is essential to maintaining a meaningful devolution settlement in a constitutional system which claims unlimited parliamentary sovereignty for the UK Parliament."
16. Whilst the Scottish Government recognises that there is a political commitment to not normally introduce clause 11 regulations without the consent of the devolved institutions it responds that it will be for the UK Government and UK Parliament to determine "what is normal and what is not" and whether the Scottish Parliament is "acting reasonably" if it withholds consent. The supplementary LCM also highlights that the clause 11 amendments "provide only for regulations to proceed following a 'consent decision' regardless of what the decision is" and while there will be a legislative constraint on the devolved administrations there will be only a voluntary one on the UK Government. The Scottish Government's view is that the proposals therefore "embody an imbalance and a lack of trust between the governments of the UK."
17. The supplementary LCM includes two alternative approaches to clause 11 and schedule 3 of the Bill. The first approach would be to remove all restrictions on devolved competence from the Bill, which in the Scottish Government's view "would leave the legislatures and governments of the UK on a level playing field following withdrawal from the EU." The second approach "would be to provide for the explicit consent of the Scottish Parliament to any proposals to constrain competence" through a requirement that any such constraints be given effect by Order in Council (the mechanism also used for changes made under sections 30 and 63 of the Scotland Act 1998).
18. The supplementary LCM states that if either set of amendments were made "the Scottish Government would be prepared to recommend legislative consent to the Withdrawal Bill as a whole" and to also agree the proposed Inter-Governmental Agreement as amended to take the suggested changes into account. If these amendments are not made the supplementary LCM includes a number of options regarding legislative consent as follows—
 - Refuse to give consent to the Bill as a whole;
 - Give partial consent to specific provisions in the Bill;
 - Consent to the Bill except for specific provisions.

19. The LCM also links these options to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill ('Continuity Bill') which has been passed by the Parliament but has been referred to the Supreme Court by the UK Government's law officers prior to being submitted for royal assent. The Scottish Government's view is that if consent to the Bill as a whole is refused, the Continuity Bill "would provide the legislative framework for continuity of EU retained law in devolved areas, and the powers for Scottish Ministers to ensure it operates effectively." However, it is recognised that this would "present a number of practical issues" arising both from the volume of statutory instruments and the interaction with legislation from the UK Parliament. A further option therefore is to provide partial consent to the Withdrawal Bill which would then "operate in tandem" with the Continuity Bill.
20. The Minister for UK Negotiations on Scotland's Place in Europe was asked by the Committee on 2 May 2018 whether the Scottish Government wants to have a veto in relation to Clause 11. He responded that the issue at stake is changes to the devolved competences without the consent of the Scottish Parliament and "not about vetoing individual decisions about frameworks." In particular, he emphasised that the proposals "would, uniquely, for the first time ever in devolution, give UK Ministers the right to use secondary legislation to alter the devolved competences of the Scottish Parliament."
21. The Minister was also asked by the Committee whether he agreed that the UK Government amendments essentially "copy and paste the Sewel convention into the Clause 11 process." He pointed out that there is no statutory provision in the Bill which would give effect to the Sewel convention. As noted above, there is a similar provision to the Sewel convention in relation to the approval of Clause 11 regulations in the Inter-Governmental Agreement.
22. The Minister was then asked whether he would support the Clause 11 amendments if the words "not normally" were written into the text of proposed new section 30A in the Scotland Act 1998. He responded that the Scottish Government has provided two options to address its concerns with Clause 11 as included in the supplementary LCM.
23. The Minister was also asked whether the Scottish Government would recommend consent to the Bill if Clause 11 was removed and replaced with an amended intergovernmental agreement where the Scottish Government made a political commitment, on exactly the same basis as that made by the UK Government, not to introduce legislation in areas in which common frameworks are likely to be needed. The Minister responded "Yes – without equivocation."

The Welsh Government Position

24. The Welsh Government's position is that it would have preferred the process for agreeing common frameworks to be based on trust and without the need for legislative constraints. But it also recognises that the amendment to Clause 11 and the Intergovernmental Agreement represent "a significant step forward and a recognition that the default position is that responsibility for policy in areas devolved to Wales should continue to lie with the National Assembly." In particular, it welcomes the removal of the blanket restriction on the devolved legislatures

amending retained EU law and that only in areas where it is agreed that frameworks are needed should there be “a new, temporary, constraint” which is “clearly much more compatible with the ‘reserved powers’ model of devolution.”

25. The Welsh Government also welcomes the UK Government’s commitment to “not normally” table clause 11 regulations in the UK Parliament without the consent of the National Assembly for Wales (NAW). If, however, clause 11 regulations are laid without the consent of the NAW the view of the Welsh Government is that the UK Parliament “will be asked, on the basis of even-handed information, to decide if the regulations should be made.” The Welsh Government views the political commitment by the UK Government not to legislate in England in areas where the legislative competence of the devolved institutions is constrained as an “explicit assurance of a ‘level playing field’ in terms of legislation.”
26. The Minister for UK Negotiations on Scotland’s Place in Europe was asked by the Committee why the Welsh Government has reached an agreement with the UK Government on consent to the Bill but not the Scottish Government. He responded that he disagrees with the analysis of the Welsh Government “because I believe that the changes to legislative competence that are being proposed are contrary to the devolution settlement.”
27. The Secretary of State for Scotland was asked the same question by the Committee. He responded that we “were very close to getting agreement. I do not understand why, with Mr Russell having said so often that the Welsh and Scottish Governments had absolutely common interests, the view is now that they do not.”

Committee View on Clause 11 Amendments

28. **The Committee welcomes the progress which has been made by the UK Government and the devolved Governments in seeking an agreement to amend Clause 11 of the Bill. The Committee also recognises that all parties are committed to finding an agreement and that the UK Government and Welsh Government have done so. The Committee’s firm view is that it is desirable for an agreement also to be reached between the UK Government and the Scottish Government.**

29. **At the same time the Committee recognises there remains a fundamental disagreement between the two governments regarding the principle of consent to alterations of the legislative competence of the devolved institutions. The Scottish Government’s view is that the UK Government’s clause 11 amendments are “inconsistent with the principle that changes to competence should only be made with the explicit consent of the devolved legislature involved” (s.30 and s.63, Scotland Act 1998). For example, a section 30 Order must be approved by the Scottish Parliament and both Houses of the UK Parliament before it is made and can come into force.**

30. **To address these concerns the UK Government has given a political commitment that it will not normally use the clause 11 regulations without the consent of the devolved parliaments. It has also given a political commitment not to bring forward legislation to modify retained EU law applying in England in areas covered by the clause 11 regulations for as long as those regulations are in force and constrain the devolved legislatures from making equivalent modifications.**

31. **It is not clear to the Committee why the UK Government should be subject to only voluntary constraints while the devolved governments should be subject to statutory constraints. The Committee's view is that the devolved settlement cannot function effectively without mutual trust between all of the governments across the UK. On this basis the Committee can see no reason why the Scottish and Welsh Governments should not also be asked to commit, on a non-legislative basis, to a political constraint not to bring forward legislation in areas where common frameworks are likely to be needed. This would mean, as the Committee stated in our interim report, that Clause 11 is not necessary to enable the agreement of common frameworks. The Committee also notes that this remains the preferred position of the Welsh Government.**ⁱ

32. **The Committee therefore recommends that Clause 11 is removed from the Bill and the Inter-Governmental Agreement is amended to provide for the same political constraint not to bring forward legislation where common frameworks are likely to be needed to apply equally across all of the governments of the UK.**ⁱⁱ

ⁱ Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this paragraph.

ⁱⁱ Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this sentence.

Common Frameworks

33. The Committee noted in our interim report the importance of what have come to be termed ‘common frameworks.’ This is a reference to the regulatory convergence and harmonisation provided for by EU law, including in areas where EU competence corresponds with devolved competence. However, as the Committee pointed out in our interim report, despite their importance, common frameworks were not referenced at all on the face of the Bill as introduced in the House of Commons.
34. The delegated powers supplementary memorandum published alongside the Clause 11 amendments explains that the powers conferred by Clause 11 are required to allow the creation of common UK frameworks where these are required following Brexit. The proposed Intergovernmental Agreement states “that this is likely, in whole or in part, in 24 areas” where “common frameworks with a legislative underpinning may be required.” These 24 policy areas were published by the UK Government on 9 March 2018 and are detailed at Annexe A of this report. Two further policy areas are also identified that could be subject to clause 11 regulations. These are:
- Food Geographical Indications; and
 - State Aid.
35. The UK Government has published a framework analysis setting out areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland. This states that there are:
- 49 policy areas where no further action is required;
 - 82 policy areas where non-legislative common frameworks may be required; and
 - 24 areas where legislative frameworks might be needed.
36. 111 of these areas fall within the devolved competence of the Scottish Parliament. In addition the framework analysis includes 12 further policy areas that the UK Government believes are reserved but are subject to ongoing discussions with the devolved administrations. There is no legislative provision within the Bill stipulating which areas within the framework analysis will be covered by Clause 11 regulations.
37. The Secretary of State for Scotland told the Committee that the list of 24 areas where legislative frameworks might be needed has been agreed with the Scottish Government. Both he and the UK Minister for the Constitution were asked by the Committee whether there is anything in the Bill that prevents the UK Government from adding to the list. The Minister responded that “the legislation is there to process what is in the agreed list” which “can evolve, and that has already happened.” The Secretary of State explained that the list of 24 is not on the face of the Bill “because the strong view is that by doing so in primary legislation we would limit the flexibility to go forward.” But under the terms of the Intergovernmental Agreement the UK Government “would not normally add to the list without the agreement of the Scottish Government and Welsh Government.”

38. As set out in our interim report 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 on 8 November 2017 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.” In further evidence to the Committee on 3 May 2018 he stated that “we are not in the business of imposing frameworks” and that the “methodology of agreeing common frameworks is not set out in the bill or in the intergovernmental agreement.”
39. The Secretary of State was then asked by the Committee “what is preventing you from giving a guarantee that you will not impose a framework?” He responded that “we are not seeking to impose frameworks. We are seeking to find a mechanism by which we can agree those frameworks”.
40. The UK Government’s Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks states that–
- ” “Further discussions are now required to define the precise scope and form of future common frameworks. Deep dives in May and June 2018 will refine policy thinking on legislative frameworks and cross-cutting issues in conjunction with a broader review of intergovernmental relations.”
41. The Memorandum also states that discussions on non-legislative frameworks are also underway and that the JMC (EN) will retain oversight of the frameworks programme.
42. The Inter-Governmental Agreement states that the Bill will contain a duty on UK Ministers regularly to report to the UK Parliament on progress on implementing common frameworks and that these reports will be sent to the devolved administrations which will be shared with the devolved legislatures. Any primary legislation giving effect to common frameworks will be subject to the Sewel Convention.
43. The Minister for UK Negotiations on Scotland’s Place in Europe explained to the Committee on 31 January that common frameworks “cannot be imposed either in subject or in content” and that “there must be an agreement between equals.” The Minister was asked by the Committee what dispute resolution mechanisms would apply where the governments cannot agree on the content and operation of frameworks and specifically whether there would be a role for the courts. He responded that there are already many mechanisms in existence to resolve issues including, for example, “some fairly complex and long-standing arrangements between Governments for discussing issues of contention on fisheries.”
44. On this basis his view was that it “is unlikely that we would want to construct a system that is very legalistic in its operation if there are existing mechanisms that can be used.” He gave a commitment that “when we get to the stage of visualising the frameworks in detail” he would be happy to discuss the issues with the Committee “in more detail and give examples of how they will and will not work, so that they can be scrutinised.”
45. In further oral evidence to the Committee on 2 May 2018 the Minister stated that–

” “there needs to be a discussion of post-Brexit relationships in these islands The Welsh have been constructive and positive about starting that discussion and pushing it forward. We have not been quite as quick in that regard, but we are keen to take part in it.”

46. The Committee notes that the Inter-Parliamentary Forum on Brexit has also begun to look at this issue.
47. The supplementary LCM reiterates the Scottish Government’s view that while it recognises the need for common UK frameworks these must be agreed and not imposed. It also states that if either of the Scottish Government’s proposed amendments in relation to Clause 11 are agreed then it would support the provisions of the proposed Inter-Governmental Agreement on developing UK frameworks.

Committee View on Common Frameworks

48. The Committee welcomes the progress which has been made by the UK Government and the devolved Governments in identifying areas which may be subject to common frameworks.

49. However, the Committee is firmly of the view that any agreement in relation to common frameworks is dependent on an agreement to the outstanding issues in relation to Clause 11. This is because it is difficult to envisage how agreement could be reached on the content of a common framework if there is a disagreement about whether a clause 11 regulation is required. ⁱⁱⁱ

50. As the Committee stated in our interim report, we strongly believe that both the process for agreeing common frameworks and the actual content must be arrived at through agreement and not imposed. The Secretary of State for Scotland confirmed to the Committee on 8 November 2017 that the UK Government agrees that common frameworks cannot be imposed and that there is a need to develop processes to reach agreement.

51. The Committee’s view is that this commitment that common frameworks will not be imposed is contradicted by the “consent decision” mechanism created by the UK Government’s amendments to Clause 11 which would allow the UK Government to proceed with regulations without the consent of the Scottish Parliament. ^{iv}

ⁱⁱⁱ Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this paragraph.

^{iv} Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this sentence.

52. The Committee welcomes the commitment from the Scottish Government in response to our interim report that the Scottish Parliament should have the opportunity to scrutinise and agree non-statutory arrangements for common frameworks as well as legislative arrangements, and its statement that it will consider with the Parliament appropriate procedures. The Committee recommends that Scottish Parliament and Scottish Government officials work together to develop appropriate procedures for consideration by Ministers and the Parliament.

53. As stated in our interim report the Committee also strongly believes that this process is not solely a matter for governments and must be transparent and inclusive. The Committee is concerned that there remains a fundamental lack of information in the public domain in relation to the process for developing and agreeing common frameworks. The relevant part of the Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks consists of five paragraphs containing information mostly already in the public domain. In particular, the following issues remain unresolved-

- What processes will be used for the development of common frameworks and what role will there be for the devolved legislatures, civic society and the public more generally;**
- Whether a clear commitment will be given by the UK Government that the content of common frameworks and especially non-legislative frameworks will not be imposed;**
- What dispute resolution mechanisms will be used where needed in relation to the development and operation of common frameworks;**
- What governance structures are envisioned in relation to the implementation, monitoring and enforcement of frameworks;**
- The process for agreeing the funding arrangements for common frameworks;**
- The application of the general principles of EU law to common frameworks.**

Clause 7

54. Clause 7 of the Bill 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. The Committee expressed concern in our interim report about the breadth of the powers conferred by clause 7 and in particular by the apparent transfer to government (from the legislature) of such extensive law making powers. The Committee supported the recommendation of the DPLR Committee that the powers in clause 7 should only be available when Ministers can show that it is necessary to make a change to the statute book, even if they cannot demonstrate that the particular alternative chosen is itself necessary.
55. The UK Government tabled a number of amendments at Report Stage in the House of Commons in relation to clause 7 which were subsequently agreed. The Secretary of State for Scotland explained in his letter to the Presiding Officer, dated 16 January 2018, that the purpose of these amendments was to "to make absolutely clear the scope of the power in this clause." The amendments included restricting the scope of the power to correct deficiencies in retained EU law by making the list of deficiencies given in clause 7(2) exhaustive rather than illustrative. Further amendments include a 'sweeper' provision allowing the powers to be used for deficiencies which are not on the list but which are of a similar kind to those listed and a provision for UK Ministers to add to the list through an affirmative SI requiring the approval of both Houses of Parliament.
56. These amendments made in the Commons included amendments affecting the corresponding powers in the Bill conferred on Scottish Ministers to remedy deficiencies. The exhaustive list of deficiencies in respect of which remedial powers can be used applies across the UK, as does the sweeper provision. Scottish Ministers have not, however, been given a corresponding power to add to the list of deficiencies. The amendments made in the Lords altering the test for the use of the remedial powers from "appropriate" to "necessary" have not been carried over to the corresponding powers of the Scottish Ministers.
57. In his response to the Secretary of State for Scotland, the Minister for UK Negotiations on Scotland's Place in Europe stated that "the Scottish Government is concerned at the proposal that only UK Ministers have the power to make regulations to provide for the list of deficiencies."
58. The Committee took evidence on the Bill as amended in the House of Commons at its meeting on 31 January 2018. Professor McHarg explained in written evidence that the practical effect of the above clause 7 amendments "seems marginal" and that "there is still no requirement that the regulation-making power must only be used where 'necessary'." Professor Page pointed out in written evidence that the "fact that the list is no longer illustrative does not mean of course that the power being taken is any less far-reaching."
59. **The House of Lords agreed an amendment at Report Stage which replaces the "appropriateness" test in Clause 7 of the Bill with a test based on "necessity." This amendment does not affect the powers of the Scottish**

Ministers under the Bill. The Committee welcomes the agreement of the amendment to introduce a “necessity” test in relation to Clause 7 of the Bill and recommends that this test should also apply to the use by Scottish Ministers of the parallel powers under the Bill.

Scrutiny Procedures

60. The Bill was also amended at Committee Stage in the House of Commons to strengthen the scrutiny procedures for regulations under clauses 7, 8 and 9. The Bill as amended imposes requirements on the UK Ministers to make explanatory statements in relation to regulations or draft regulations under clauses 7, 8^v and 9. The Bill as amended also now 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.
61. These amendments do not place requirements on Scottish Ministers and do not apply to the Scottish Parliament. The Secretary of State for Scotland, therefore, wrote to the Minister for Parliamentary Business and the Presiding Officer on 16 January 2018 seeking the views of both the Scottish Government and the Scottish Parliament regarding whether the Bill should be amended to include such provision. Specifically, he asked –
- Would you like devolved authorities to be statutorily bound to produce explanatory material alongside secondary legislation made under the relevant powers in Schedule 2 of the Bill?;
 - Would you like devolved authorities to be required to submit regulations made under the negative procedure for a committee of the relevant legislature to consider the appropriateness of that negative procedure?

Explanatory material

62. The DPLR Committee recommended in its interim report on the LCM that instruments should be accompanied by explanatory material. In a letter dated 23 January 2018 to the Presiding Officer, the DPLR Committee stated that the House of Commons amendment on explanatory memoranda “meets some of the requirements set out in the Committee’s report.” While therefore supporting in principle an amendment to the Bill to require Scottish Ministers to provide such information, the DPLR Committee also stated that it had not yet “come to a definitive view on what that accompanying information should be.”
63. The Scottish Government requested that the requirement for UK Ministers to provide explanatory statements when exercising powers under the Bill should also apply to the exercise of powers by the Scottish Ministers. The UK Government subsequently tabled an amendment to make such a provision at Report Stage in the House of Lords which was agreed.

^v Clause 8 was removed from the Bill by amendment at Report Stage in the House of Lords

64. The Committee welcomes the agreement of this amendment.

Sifting Committee

65. Professor McHarg stated in written evidence that while the effect of the sifting committee will be to enable the House of Commons to police more effectively the choice of procedure for making regulations under the Bill “there are still likely to be major practical constraints” and “the range of procedural options provided is still relatively weak compared to other statutes which contain similar Henry VIII powers.” Professor Page’s view is that there is no guarantee that a recommendation of the sifting committee “will be acted on, and the procedure itself can be avoided in cases of urgency.”
66. The DPLR Committee concluded in its interim report on the LCM that the Parliament’s procedures are robust and sufficiently flexible to enable effective scrutiny of instruments irrespective of the procedure attached to them. In its letter to the Presiding Officer dated 23 January 2018, the DPLR Committee stated that accordingly, they do “not think it is necessary to pursue an amendment to establish a sifting committee for the Scottish Parliament.”
67. The Minister for UK Negotiations on Scotland’s Place in Europe responded to the Secretary of State for Scotland stating that some “of the matters dealt with in the amendments to Schedule 7 are matters for the Scottish Parliament to decide and implement, for example a sifting committee.” The Minister subsequently wrote to the Committee stating that Scottish Parliament and Scottish Government officials are working on proposals for what a sifting procedure may entail.

68. The Committee will consider these proposals in due course.

Restrictions on the Powers of Scottish Ministers

69. Schedule 2 to the Bill makes provision for powers to be conferred on Scottish Ministers which are similar but not identical to the powers conferred on UK Ministers by clauses 7 to 9 of the Bill. As noted in the Committee's interim report on the LCM, a number of restrictions apply to the devolved Ministers' use of powers in the Bill which do not apply to UK Ministers. The Committee stated in our interim report that we support the principle that Scottish Ministers should have the same powers as UK Ministers in the Bill in relation to devolved competences. But we were also strongly of the view that the powers in the Bill as introduced were too broad and must be subject to robust parliamentary scrutiny.
70. In response to the concerns of the Scottish Government and the Welsh Government the UK Government tabled two amendments at Report Stage in the House of Commons which were subsequently agreed. The first replaces the requirement for the devolved administrations to seek the consent of the UK Government to make secondary legislation to remedy deficiencies in retained EU law with a requirement to consult the UK Government. The second allows the devolved administrations to use the powers in the Bill to modify directly-applicable retained EU law where it has been agreed that a common UK framework is not required.
71. In his letter dated 14 February 2018 to the Secretary of State for Scotland, the Minister for UK Negotiations on Scotland's Place in Europe stated that he welcomes the first of these amendments but "remains of the view that the same amendment should be made in relation to the powers in clauses 8 and 9." In relation to the second amendment he stated that the "Scottish Government welcomes the recognition of the principle that Scottish Ministers should be able to modify directly applicable EU law in areas of devolved competence." However, he also pointed out that these amendments assume clause 11 continues in its current form and that the Scottish Government would be looking for further amendments to "ensure that Scottish Ministers have the same powers in devolved areas with regard to directly applicable EU law as UK Ministers."
72. The amendments to Clause 11 at Report Stage in the House of Lords lift the blanket restriction on the devolved institutions generally amending retained EU law. As noted above, the restriction will now only apply where Clause 11 regulations have been approved by the UK Parliament. The supplementary LCM states that if "the making of Clause 11 regulations required the consent of the Scottish Parliament, this arrangement would be acceptable to Scottish Ministers."
- 73. The Committee welcomes the amendment to the Bill which replaces the requirement for the devolved administrations to seek the consent of the UK Government to make secondary legislation to remedy deficiencies in retained EU law under Clause 7 with a requirement to consult the UK Government.**

74. **The Committee also welcomes the removal of the blanket restriction on the devolved institutions generally amending retained EU law.**

75. **However, as noted above, the Committee does not believe that there is a need for Clause 11 to remain in the Bill.** ^{vi}

^{vi} Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this sentence.

UK Ministerial Powers in Devolved Areas

76. As the Committee noted in our interim report, 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. 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. Neither does the Sewel Convention apply to the making of secondary legislation.
77. The Scottish Government stated in its initial 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.”
78. Both the Scottish Government and the Welsh Government published proposed amendments to the Bill which would impose this procedural constraint. The Minister for UK Negotiations on Scotland’s Place in Europe also confirmed in a letter to the Secretary of State for Scotland dated 14 February 2018 that the Scottish Government “remains of the view that Clause 7 should have an express requirement for Scottish Ministers to consent to the exercise by UK Ministers of powers in devolved areas.”
79. The Committee stated in our interim report that we are “deeply concerned” that the Bill would allow UK Ministers to legislate in devolved areas without the consent of Scottish Ministers or the Scottish Parliament and that this cuts across the devolution settlement. The Committee also indicated its support for the relevant amendments of both the Scottish Government and the Welsh Government. The Scottish Government responded to our interim report stating that they welcome the Committee’s support for their proposals to amend the Bill to require that consent of Scottish Ministers is sought to the exercise by UK Ministers of powers in devolved areas.
80. The supplementary LCM notes that no amendment has been made to the Bill to require the consent of Scottish Ministers when making regulations to fix deficiencies in retained EU law in devolved areas. The Scottish Government states that while it is concerned by this “there is nevertheless a basis on which these powers could operate compatibly with the devolution settlement, in order to ensure that devolved law is prepared for EU withdrawal.” The supplementary LCM provides three reasons for this as follows –
- The UK Government’s political commitment not to use the powers in devolved areas without the agreement of devolved administrations;
 - A draft protocol between the Scottish Government and the Scottish Parliament for the scrutiny of decisions made by Scottish Ministers to agree to regulations made by UK Ministers in devolved areas;
 - The amendments to the Bill which have resulted in “the substantial equalisation of the powers of the Scottish Ministers and the UK Ministers.”

81. The supplementary LCM also refers to the powers within the Continuity Bill which provides for UK Ministers to legislate in devolved areas but only with the consent of Scottish Ministers.
82. Scottish Parliament and Scottish Government officials have produced a draft protocol which sets out the arrangements for the Scottish Parliament to scrutinise instances where Scottish Ministers wish to give consent to for the UK Government to correct a Brexit legislative deficiency via a UK statutory instrument.

83. As noted at paragraphs 73 and 74 above the Committee welcomes the progress which has been made in providing equivalent powers for Scottish Ministers to those of UK Ministers in the Bill. Nonetheless as we stated in our interim report the Committee remains deeply concerned about the lack of any statutory provision within the Bill for UK Ministers to seek the consent of Scottish Ministers or the Scottish Parliament to legislate in devolved areas, especially given that the Sewel Convention does not apply to subordinate legislation. The Committee considers, as we stated in our interim report, that this cuts across the devolution settlement.

84. The Committee will consider the draft protocol produced in due course.

Status of Devolution Acts

85. As discussed above, the Bill confers powers on Ministers in the UK Government and devolved administrations to address deficiencies in retained EU law. However, as the Committee noted in our interim report 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 that Act. No similar provision was initially provided in the Bill in relation to the Government of Wales Act 1998 and the Scotland Act 1998.
86. The Committee recommended in our interim report that all of the devolution Acts should have equal status in terms of the provisions of the European Union (Withdrawal) Bill. The Secretary of State for Scotland confirmed, in his letter dated 5 April 2018 to the Scottish Government, that the UK Government would table amendments to apply the same protection from modification to the Scotland Act 1998 and the Government of Wales Act that currently applies to the Northern Ireland Act. Those amendments were tabled and agreed at Report Stage in the House of Lords.
- 87. The Committee welcomes the amendment that has been agreed to provide protection to the Scotland Act 1998.**

Scope of Legislative Consent

88. The Committee noted, in its interim report, that there were a number of clauses and schedules within the Bill where there was a difference of view between the Scottish and UK Governments as to whether legislative consent was required. Specifically, there was a difference of views with regard to—

- Clause 5
- Clause 6
- Clause 7
- Clause 9
- Clause 13 and Schedule 5
- Clause 17 and Schedules 8 and 9

89. The Committee recommended, in its interim report that given the need for clarity and certainty, that “the Scottish and UK governments reach agreement on the areas of the Bill that require legislative consent as a matter of urgency”. To date, the Committee is unaware of any progress that has been made on ensuring that there is a shared understanding between the two governments as to the areas of the Bill that require consent. The supplementary LCM comments on the issue, specifically with regard to Clause 7 which deals with regulation making powers that deal with deficiencies arising from withdrawal, in the following terms—

” “The Parliament should note that the UK Government has not identified the main relevant provision, clause 7, as requiring legislative consent in its supporting documents to the Withdrawal Bill. It is not clear on what basis the UK Government has reached this view, and the Scottish Government is clear that these provisions do require legislative consent as they enable UK Ministers to exercise powers in relation to matters within the legislative competence of the Parliament”.

90. The Committee considers it unsatisfactory that there remains a difference of view between the two governments on the areas of the Bill that require legislative consent.

91. Moreover the Committee considers that areas of the Bill, such as Clause 7, are clearly within devolved competence. This is particularly regrettable given that the Parliament will be asked to consider consent to the Bill in a context where there is no certainty on the areas of the Bill where consent is being sought. ^{vii}

^{vii} Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this paragraph.

92. **Should agreement be reached between the two governments on consent for the Bill then it is imperative that agreement is also reached on the aspects of the Bill that fall within devolved competence.**

Charter of Fundamental Rights

93. Clause 5 of the Bill, as introduced, provided that “the Charter of Fundamental Rights is not part of domestic law on or after exit day”. The Committee, in its Interim report, noted a Motion agreed by the Scottish Parliament on 10 January 2017. The Motion, among a range of matters, recorded the Parliament’s opposition “to any loss in Scotland of the human rights, equality, social protection and other safeguards and standards enshrined in EU law and set out in the EU Charter of Fundamental Rights”. At Report Stage in the House of Lords an amendment to keep the Charter of Fundamental Rights as part of ‘retained EU law’ was agreed. The amendment agreed is intended to ensure that the majority of the EU Charter of Fundamental Rights is carried over to form part of domestic law with the exception of the preamble and a chapter on EU elections.

- 94. The Committee welcomes the amendment agreed by the House of Lords with regard to the Charter of Fundamental Rights.** ^{viii}

^{viii} Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this sentence.

Conclusion

95. **The Committee welcomes the progress which has been made in seeking to address the concerns of the devolved Governments, this Committee and other parliamentary committees across the UK in relation to the Bill. However, the Committee also recognises that fundamental differences remain between the UK Government and the Scottish Government regarding the impact of the Bill on the devolution settlement.**

96. **The Committee's view is that these differences could be resolved through an emphasis on mutual trust and respect amongst governments across the UK. The Committee recommends the inclusion of reciprocal political commitments in the proposed Intergovernmental Agreement as sufficient to allow the discussions on common frameworks to proceed and provide the clarity and certainty which is needed.^{ix}**

97. **On this basis and as we stated in our interim report, Clause 11 and Schedule 3 should be removed. Otherwise without another solution to the fundamental differences between the Scottish Government and UK Government the Committee recommends that the Parliament does not consent to Clause 11 and Schedule 3 of the Bill.^x**

^{ix} Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this paragraph.

^x Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this paragraph.

Annex A: Policy Areas Likely to be Subject to Clause 11 Regulations

(Source: Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks: Annex A^{xi})

1. Agricultural support
 2. Agriculture - fertiliser regulations
 3. Agriculture - GMO marketing and cultivation
 4. Agriculture - organic farming
 5. Agriculture - zootech
 6. Animal health and traceability
 7. Animal welfare
 8. Chemicals regulation (including pesticides)
 9. Elements of reciprocal healthcare
 10. Environmental quality - chemicals
 11. Environmental quality - ozone depleting substances and F-gases
 12. Environmental quality - pesticides
 13. Environmental quality - waste packaging and product regulations
 14. Fisheries management & support
 15. Food and feed safety and hygiene law (food and feed safety and hygiene law, and the controls that verify compliance with food and feed law (official controls))
 16. Food compositional standards
 17. Food labelling
 18. Hazardous substances planning
 19. Implementation of EU Emissions Trading System
 20. Mutual recognition of professional qualifications (MRPQ)
 21. Nutrition health claims, composition and labelling
 22. Plant health, seeds and propagating material
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^{xi} https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IJA_and_Memorandum.pdf

23. Public procurement

24. Services Directive

Annex B: Extract from the Minutes of the Finance and Constitution Committee

16th Meeting, 2018 (Session 5), Wednesday 9 May 2018

European Union (Withdrawal) Bill (UK Parliament legislation) (in private): The Committee considered and agreed a draft report.

Note of divisions in private:

Adam Tomkins proposed that a new paragraph be inserted after paragraph 30 of the report as follows—

“The Committee welcomes this compromise and the fact that the UK and Welsh governments have found agreement on its basis. The Committee urges the Scottish Government to join the agreement without further delay.”

The proposal was disagreed to by division: For 3 (Alexander Burnett, Murdo Fraser, Adam Tomkins), Against 7 (Neil Bibby, Willie Coffey, Bruce Crawford, Ash Denham, Emma Harper, Patrick Harvie, Ivan McKee), Abstentions 0.

Adam Tomkins proposed that in paragraph 94 of the report, the word “welcomes” should be deleted and replaced with “notes”.

The proposal was disagreed to by division: For 3 (Alexander Burnett, Murdo Fraser, Adam Tomkins), Against 8 (Neil Bibby, Willie Coffey, Bruce Crawford, Ash Denham, Emma Harper, Patrick Harvie, James Kelly, Ivan McKee), Abstentions 0.

Murdo Fraser proposed that in paragraph 95 of the report, the following wording be inserted after “However, the Committee also recognises that”—

“whilst the UK and Welsh governments have reached agreement on the Bill,”

The proposal was disagreed to by division: For 3 (Alexander Burnett, Murdo Fraser, Adam Tomkins), Against 8 (Neil Bibby, Willie Coffey, Bruce Crawford, Ash Denham, Emma Harper, Patrick Harvie, James Kelly, Ivan McKee), Abstentions 0.

Adam Tomkins proposed that a new paragraph be inserted after paragraph 95 of the report as follows—

“The Committee urges the Scottish Government to join the agreement between the UK and Welsh governments without delay; and recommends that the Parliament consents to the European Union (Withdrawal) Bill.”

The proposal was disagreed to by division: For 3 (Alexander Burnett, Murdo Fraser, Adam Tomkins), Against 8 (Neil Bibby, Willie Coffey, Bruce Crawford, Ash Denham, Emma Harper, Patrick Harvie, James Kelly, Ivan McKee), Abstentions 0.

