

What this Note is for:

A group of experts, convened by the Bingham Centre for the Rule of Law and The Constitution Unit, and chaired by The Rt Hon Dominic Grieve QC MP, is meeting regularly to consider how the EU (Withdrawal) Bill can be improved to make it more compatible with the UK's constitutional commitment to the Rule of Law (for full list of members see back page). This briefing for parliamentarians outlines the most significant Rule of Law issues considered by the Expert Working Group to be raised by Clauses 10 and 11 of the Bill (the devolution clauses). Clause 11 will be debated on Monday 4th December and Clause 10 on Wednesday 6th December. **This Briefing Note seeks to:**

- **Inform Members of Parliament** about the most significant Rule of Law issues raised by the devolution clauses in the Bill
- **Identify a number of questions** that should be asked of the Government in relation to the devolution clauses during the course of debate in Parliament to seek clarification.

1. Introduction – Brexit, Devolution and the Rule of Law

Clarity and accessibility of the law and legal certainty are all fundamental components of the Rule of Law. As Lord Bingham explained, “the law must be accessible and so far as possible intelligible, clear and predictable.”¹ The reasons for this requirement include the fact that “the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.” The law must therefore be formulated with sufficient clarity and precision to enable legal subjects, including businesses, to regulate their conduct in conformity with it.

Where the law in question is constitutional in nature, because it defines who has the power to make laws on different subjects, it is particularly important that it leaves no room for uncertainty about who has the power to change the law. In a constitution where legislative power is divided between the national parliament and devolved parliaments, uncertainty about the division of legislative power undermines foreseeability and predictability about the overall legal framework and is therefore inimical to the Rule of Law.

Clause 11 of the Bill is such a law: it re-defines the scope of devolved legislative competence after Brexit. Under the existing devolution settlement, the devolution statutes require the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly to legislate in a way that is compatible with EU law.² Clause 11 replaces this with a new restriction on the legislative competence of the devolved parliaments: after Brexit, they will not have power to modify “retained EU law” in a way which would not have been compatible with EU law immediately before exit. This restriction on legislative competence can be relaxed in relation to

particular areas by Order in Council. The new test for devolved legislative competence is accompanied by a corresponding restriction on executive competence (Schedule 3, Part 1).

The effect of Clause 11 is that it gives Westminster the power to legislate on EU matters post-exit and envisions a process where powers are released to the devolved nations where it is agreed that a common approach established by EU law does not need to be maintained and can therefore be changed. In short, it means that areas of legislative competence which are returning from the EU go to Westminster, not the devolved parliaments, unless the UK Government agrees that legislative competence in particular areas can be released.

Matters that are currently devolved include several important policy areas, such as justice and home affairs, agriculture, fisheries and the environment. **The Scottish Government has published a list of 111 powers returning that will intersect with devolved areas.³ The list published by the Welsh Government contains 64 points of intersection.⁴** Therefore, it is very important that clause 11 is drafted in such a way as to provide clarity and certainty about where legislative competence lies after Brexit.

The full array of issues discussed by the Expert Working Group can be found in a Discussion Paper online at: <https://www.biicl.org/euwithdrawalgroupmeetings>. This Briefing Note focuses on the following issues:

- Legislative competence: Clause 11
- Repatriation of powers: Clause 11 and Schedule 3
- Devolved authorities' delegated powers: Clause 10 and Schedule 2

2. Legislative competence: Clause 11

Clause 11 addresses the competence of the devolved authorities to legislate on EU law matters after exit day. Currently, the devolved legislatures cannot legislate in a way that is incompatible with UK obligations under EU law. Clause 11 prevents devolved legislatures from modifying retained EU law unless the subject matter of the modification was already fully within their competence immediately before exit day (see also **Sch 2, paras 2, 14, 22**).

The scope of the devolved parliaments' power to make law after Brexit therefore depends on the meaning of 'retained EU law', which as indicated in our [first briefing for parliamentarians](#), is very unclear. There is a very real concern that the meaning of 'retained EU law' will lead to legal disputes between Westminster and the devolved authorities.⁵

Because of the lack of clarity around the content of retained EU law, this constraint has been described by the **House of Lords Delegated Powers and Regulatory Reform Committee** as a "moving target".⁶ This gives rise to problems of **legal uncertainty**, most notably in relation to the distinction between EU-derived domestic legislation which may be amended, and other kinds of retained EU law which may not.

In addition, this uncertainty has an impact on the definition of 'devolved competence' in **Schedule 2, paragraphs 9-12**.

Questions for the Government

- Q1: Can the Minister explain why Clause 11 of the Bill restricts the devolved authorities' legislative powers?
- Q2: Does Clause 11 provide sufficient legal certainty about the future division of powers to legislate between the Westminster Parliament and the devolved parliaments?

3. Repatriation of powers: Clause 11 and Schedule 3

Because the Bill does not allow devolved authorities to modify retained EU law, this means in practice that after Brexit, EU powers relating to devolved areas will return to Westminster and will not be devolved until there has been an agreement between Westminster and the devolved authorities on the transfer of power. Professor Michael Keating, Director of the Centre on Constitutional Change, has called this **“the first significant rolling back of devolution since the process started twenty years ago”**.⁷ The extent to which UK-wide common frameworks will be required is not clear and will depend very heavily on the withdrawal agreement. Where it is agreed that a common approach is necessary, **Clause 11** of the Bill provides that an Order in Council by the UK Government may release matters back to devolved authorities.

The use of Orders in Council (i.e. a form of delegated legislation) to make such significant constitutional changes has also attracted criticism. For example, the **House of Lords Delegated Powers and Regulatory Reform Committee has said it is “unacceptable” that such a procedure apply to “an issue as important as this”**.⁸ The Committee concluded that a Bill, subject to full parliamentary scrutiny, should instead be required for revisions to constitutional settlements.⁹

In addition, the fact that a UK authority has been given the power to make the determination of which powers should be repatriated has been criticised. For example, Professor Richard Rawlings, devolution and EU law expert at University College London, has referred to this as a “formal recentralisation of power and exercise of constitutional hierarchy in spades.”¹⁰ At a practical level, because the pre-exit trend has been toward a ‘reserved powers’ model of devolution (where the devolved bodies have powers by default in areas not explicitly ‘reserved’ by law to the UK government), exit could create a confusing situation where some powers are reserved but others revert to being ‘conferred’ by UK ministers.¹¹ The **House of Commons Public Administration and Constitutional Affairs Committee** has referred to these arrangements as “constitutionally insensitive”.¹²

Finally, the Explanatory Notes indicate that the arrangements under Clause 11 are intended to be “transitional...while decisions are taken on where common policy approaches are or are not needed.”¹³ But this appears nowhere on the face of the Bill, **an omission which the Delegated Powers and Regulatory Reform Committee has cited as problematic**.¹⁴

Questions for the Government

- Q3: Can the Minister explain why the Bill reverses the recent trend towards a reserved powers model of devolution, whereby all powers not expressly reserved to Westminster are devolved?
- Q4: Could the Bill be amended to include a presumption that returning legislative competences will be devolved, subject to exceptions where it is agreed that a common UK framework is required?
- Q5: Can the Minister confirm that the release procedure via Order in Council under Clause 11 represents the introduction of a conferred powers approach, and what that means for clarity and consistency of the law in light of pre-existing reserved powers arrangements?
- Q6: Can the Minister explain why the release procedure in Clause 11 is conducted via delegated powers and not primary legislation, as the House of Lords Delegated Powers and Regulatory Reform Committee has suggested?
- Q7: Can the Minister explain whether the arrangements in Clause 11 are intended to be transitional and, if so, why this is not set out on the face of the Bill?

4. Devolved authorities' delegated powers: Clause 10 and Schedule 2

Clause 10 and Schedule 2 of the Bill provide the devolved authorities with delegated powers to deal with deficiencies arising from withdrawal, to comply with international obligations and to implement the withdrawal agreement. These are described as powers “corresponding” to those given to UK ministers by Clauses 7 to 9 of the Bill (which will be scrutinised in Committee at a later stage).

However, there are more constraints on the delegated powers given to the devolved authorities than there are on the corresponding powers given to UK ministers. For example, the devolved authorities do not have the power to modify retained direct EU law or anything retained under Clause 4 (**Sch 2, paras 3, 15, 23**). Powers are limited to altering ‘EU-derived domestic legislation’ (see Clause 2) that is within the legislative competence of the relevant devolved legislature. This means that, regardless of the extent to which the UK Government uses Clause 11 to release legislative competence to alter retained EU law to devolved legislatures, devolved legislatures will continue to be restricted to altering EU-derived domestic legislation within the current scope of their devolved competence.

In addition, the powers are not all to be exercised by devolved authorities acting alone. Several provisions in the Bill require either consent, consultation or joint action with a UK Minister. For example, the devolved authorities must obtain the consent of the Crown where the proposed regulations relate to the WTO Agreement (**Sch 2, paras 5, 6, 16**).

Questions for the Government:

- Q8: Can the Minister explain why the delegated powers given to devolved authorities have been restricted in ways that do not apply to the delegated powers of UK Ministers?

¹ Tom Bingham, *The Rule of Law* (Penguin Books, 2011), p. 37. See also Council of Europe, European Commission on Democracy through Law, ‘The Rule of Law Checklist’ (March 2016), pp. 25-28, available at:

http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

² Scotland Act 1998, s.29; Government of Wales Act 2006, s. 108A; Northern Ireland Act 1998, s. 6.

³ The list is available at: <https://beta.gov.scot/publications/eu-withdrawal-bill-letter-to-finance-and-constitution-committee/>. It has been provided to members of the Expert Working Group alongside this Paper.

⁴ A statement to this effect was made by First Secretary of State Damian Green, as report by the [BBC](#) and the [Institute for Government](#). A ‘leaked’ list formed the basis of the IfG article, and is on file with the Bingham Centre. It has been provided to members of the Expert Working Group alongside this Paper.

⁵ Stephen Tierney, ‘The European Union (Withdrawal) Bill: legal implications for devolution’, The Constitution Unit (7 September 2017), available at: <https://constitution-unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution/>.

⁶ DPRRC, Third Report of Session 2017-19 HL Paper 22: European Union (Withdrawal) Bill (28 September 2017), para 31, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/22.pdf>.

⁷ Michael Keating, ‘To devolve or not to devolve? The European Union (Withdrawal) Bill and devolution’, The Constitution Unit blog (25 July 2017), available at: <https://constitution->

[unit.com/2017/07/25/to-devolve-or-not-to-devolve-the-european-union-withdrawal-bill-and-devolution/](https://www.parliament.uk/unit.com/2017/07/25/to-devolve-or-not-to-devolve-the-european-union-withdrawal-bill-and-devolution/).

⁸ House of Lords Delegated Powers and Regulatory Reform Committee, 3rd Report of Session 2017-19, 'European Union (Withdrawal) Bill', HL Paper 22 (28 September 2017), para 59.

⁹ *ibid*, para 58.

¹⁰ 'Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations' (The Constitution Society, 2017), p. 26, available at: <https://consoc.org.uk/wp-content/uploads/2017/10/Brexit-and-devolution-final.pdf>. See also Mark Elliot, 'A "blatant power grab"? The Scottish Government on the EU (Withdrawal) Bill', Public Law for Everyone (10 August 2017), available at: <https://publiclawforeveryone.com/2017/08/10/a-blatant-power-grab-the-scottish-government-on-the-eu-withdrawal-bill/>.

¹¹ Rawlings, *ibid*, pp. 26-27.

¹² 'Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration', First Report of Session 2017-19 (29 November 2017), HC 484, para 41, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/484/484.pdf>.

¹³ European Union (Withdrawal) Bill Explanatory Notes (Bill 5-EN), para 34.

¹⁴ House of Lords, *above* (n 8), p. 103; National Assembly for Wales, 'What does the EU (Withdrawal) Bill mean for Wales and devolution?', In Brief (17 July 2017), available at: <https://seneddresearch.blog/2017/07/17/what-does-the-eu-withdrawal-bill-mean-for-wales-and-devolution/>.

Expert Working Group on the EU (Withdrawal) Bill and the Rule of Law

The Expert Working Group exists to identify the most pressing rule of law problems with the Bill and inform debate on the Bill from that perspective. The Group is coordinated by the [Bingham Centre for the Rule of Law](#), with additional support from the [UCL Constitution Unit](#).

Chair: The Rt Hon Dominic Grieve QC MP (former Conservative Attorney General)

Members:

- [David Anderson QC](#) (Visiting Professor in EU Law at King's College, London; former Independent Reviewer of Terrorism Legislation)
- [Professor Catherine Barnard](#) (Professor of EU Law, University of Cambridge)
- Joel Blackwell ([Hansard Society](#))
- [Andrea Coomber](#) (Director of [JUSTICE](#))
- [Professor Paul Craig](#) (Professor in English Law, University of Oxford)
- [Professor Sionaidh Douglas-Scott](#) (Co-Director, Centre for Law and Society in a Global Context, Queen Mary University of London)
- Ruth Fox (Director, [Hansard Society](#))
- [Caoilfhionn Gallagher QC](#) (Doughty Street Chambers)
- [Professor Graham Gee](#) (Professor of Public Law, Sheffield University)
- [Paul Hardy](#) (DLA Piper; former Legal Adviser to the House of Commons European Scrutiny Committee and the House of Lords EU Committee)
- [Swee Leng Harris](#) (Co-ordinator, [APPG on the Rule of Law](#))
- Jo Hickman (Director, [Public Law Project](#))
- [Murray Hunt](#) (Director, [Bingham Centre for the Rule of Law](#); former Legal Adviser to the Joint Committee on Human Rights)
- [Sir Paul Jenkins KCB QC \(Hon\)](#) (former Head of the Government Legal Service)
- [The Rt Hon Lord Judge](#) (former Lord Chief Justice)
- [Sir Stephen Laws KCB QC](#) (former First Parliamentary Counsel)
- [Lord Lisvane KCB DL](#) (former Clerk of the House of Commons)
- [Amy Mount](#) (Head of [Greener UK Unit at Green Alliance](#))
- [Professor John McEldowney](#) (Professor of Law, University of Warwick)
- [Lord Norton of Louth](#) (Professor of Government, Hull University; former Chair of House of Lords Constitution Committee)
- [Professor Dawn Oliver](#) (Professor of Constitutional Law, UCL)
- [Professor Rick Rawlings](#) (Professor of Public Law, UCL; former Legal Adviser to the House of Lords Constitution Committee)
- [Alexandra Runswick](#) (Director, [Unlock Democracy](#))
- [Professor Meg Russell](#) (Director, [Constitution Unit](#), UCL)
- [Sir Paul Silk KCB](#) (Former Clerk to the National Assembly for Wales)
- [Corey Stoughton](#) (Advocacy Director, [Liberty](#))
- [Hannah White](#) ([Institute for Government](#))

Throughout the passage of the Bill we will be publishing briefings and other papers on our website:
<https://binghamcentre.biicl.org/withdrawalbillworkinggroup>.

If you would like to be added to the mailing list to receive such briefings directly, please contact Justine Stefanelli at j.stefanelli@binghamcentre.biicl.org.