

David Rees AM
Chair, External Affairs and Additional Legislation Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

13 March 2018

Dear Mr Rees,

AMENDMENT TO CLAUSE 11 OF THE EU WITHDRAWAL BILL AND COMMON FRAMEWORKS ANALYSIS

I am writing to update you on the further steps the UK Government has taken in relation to clause 11 of the EU (Withdrawal) Bill ("the Bill"), which deals with the devolution of powers returning from the EU, and our work on common frameworks to protect, amongst other things, the common market of the United Kingdom.

CLAUSE 11

The Government yesterday tabled a substantial amendment to clause 11 for Lords Committee stage of the Bill to show how we now propose to deliver the twin objectives of increasing devolution and protecting the UK common market. Under the change, of those powers returning from the EU that intersect with the devolution settlements, all would go directly to the DAs, unless subject to the new, more targeted, clause 11.

The powers passing to the devolved administrations as a result of the amendment to clause 11 have never previously been held or exercised by the Welsh or Scottish Governments, since the devolution settlements were created in the context of our membership of the EU. This means that after we leave the EU, power will sit closer to the people of Wales, Scotland and Northern Ireland than ever before.

Our proposal builds on the constructive discussions between our governments over recent months. You have recognised that this is a significant offer, but we have not yet reached agreement. Our discussions will continue, and I am keen to maintain our engagement, and while this takes place we are keen to ensure MPs and Peers have the chance to consider our proposed amendment - as the Government committed to doing at Commons Report Stage - and that Parliamentarians, businesses, organisations and people in general can see what our approach will mean for them. I

have included an annex that sets out further detail on the proposed amendment to clause 11.

FRAMEWORKS

We have also published the UK Government's working analysis of the powers that will be returning from Brussels and where we envisage that common frameworks across the UK may and may not be required, as well as what form they might take. The analysis has involved considerable joint work with the Welsh and Scottish governments to identify where the 150+ policy areas returning from the EU intersect with devolved competence. I am grateful to the devolved administrations and their officials for their support in this regard.

This analysis remains provisional and without prejudice to the ongoing negotiations with the EU, but it demonstrates that the vast majority of policy areas require no legislative framework at all. It identifies that many areas require no further action, that some only require non-legislative arrangements, such as Memoranda of Understanding between governments, and that in only a minority of areas, where consistency is essential to protect the common market and our ability to fulfil the United Kingdom's international treaty obligations in the future, do we envisage a legislative approach being required in whole or in part. In practice, this approach is designed to ensure that businesses do not face the risk of new barriers to trade with other parts of the UK by, for example, ensuring that a producer trading in Scotland and Northern Ireland would not have to comply with different labelling requirements, or different regulations on pesticides in Wales compared to England which could prevent or limit opportunities for farmers to sell their products in different places in the UK. Further detail on the analysis is also included in the annex.

Our change to clause 11 therefore puts forward a temporary mechanism to safeguard the UK common market and avoid the risk of potentially damaging divergence in different areas of the UK while we are developing and implementing new bespoke arrangements for the long term in the UK. Importantly, under this approach, anything the devolved administrations can do now, they will still be able to do after exit, even with the narrower form of the new clause 11.

To limit problematic divergence, the Bill provides a power to maintain existing EU law frameworks through an SI that has to be approved by the UK Parliament in specific, targeted areas. This will ensure that everything the devolved administrations could do before in these areas, they will still be able to do after exit, but it will pause new changes so we can discuss and implement new common arrangements that should replace the EU frameworks.

These arrangements are only intended to be temporary, and to ensure consistency on the day we leave the EU before new arrangements have been put in place. They are not designed to be long-term solutions. The basis for future frameworks, legislative and non-legislative, is subject to ongoing discussions with the DAs and is therefore not set out in this Bill.

NORTHERN IRELAND

In the absence of a Northern Ireland Executive, the frameworks analysis is without prejudice to the views of incoming Ministers. We remain committed to restoring the power-sharing executive in Northern Ireland. In the meantime, we continue to keep the Northern Ireland Civil Service updated.

NEXT STEPS

This is a sensible and pragmatic step to provide businesses and families with the legal certainty they have asked for, while also demonstrating our commitment to strengthen devolution. It would ensure people across the UK know which laws apply from day one in areas where consistency is most important, while the right longer-term approaches can be developed.

Our proposal balances our commitment not just to respect the devolution settlements, but to strengthen them, and the imperative of providing reassurance to businesses and families that the UK common market will not be weakened. It is right that while we continue to discuss our approach with the devolved governments, Peers are able to debate it at Committee Stage in the House of Lords and MPs are able to study the changes we have put forward.

I hope you find this material helpful. I would be happy to appear before your Committee to discuss our proposals in more detail.

I am writing in similar terms to all Assembly Members.



Rt Hon Alun Cairns MP
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru

Detail on Proposed Clause 11 Amendment

There are four main elements to the revised clause 11:

1. Powers returning to the DAs directly from Brussels

The new clause 11 will see the vast majority of powers automatically flow from Brussels to Edinburgh, Cardiff and Belfast whilst creating a mechanism to ensure the protection of our internal market, our common resources, and our reputation as a credible international trading partner.

The mechanism introduced in the new clause 11 would provide UK ministers with delegated powers to temporarily preserve existing EU frameworks in specific, targeted policy areas. This would be implemented through secondary legislation, subject to the affirmative scrutiny procedure.

If Parliament approves an SI, it will prevent problematic divergence across the UK after EU exit by maintaining the EU law framework in the immediate term; providing time to work with the devolved administrations on new more appropriate common arrangements for the UK and implementing them. Staggering implementation in this way is a sensible step to minimise the number of policy changes for businesses.

The amendment would ensure that anything that was within the competence of the devolved institutions before exit day, will continue to be in competence after exit day, even where UK Ministers have exercised the proposed clause 11 powers. That applies across areas such as agriculture, environment and fisheries.

2. UK Government Obligations

The UK Government would have to follow usual processes in making the regulations, but the proposed amendment recognises the interest in, and complexity of, what happens to EU law when it returns to the UK. We have therefore incorporated a number of additional obligations on the UK Government.

The following procedural safeguards will apply when exercising the new mechanism under clause 11:

- Before laying the regulation, a UK minister must consult the relevant devolved administration. For example, under proposed new subsection 11(3)(a) a UK Minister must consult Welsh Ministers before laying regulations that concern the ability of the National Assembly for Wales to modify retained EU law in a specific area. The amendments provide that consultation prior to Royal Assent counts towards fulfilling this obligation to enable us to continue working with the devolved administrations on which areas we think will need us to act as soon as possible after Royal Assent in order to prevent problematic divergence across the UK.
- There is also a duty on the UK Government to provide enhanced explanatory material to the UK Parliament before the draft regulations are laid before Parliament. In addition to the usual material, the explanatory statement must also explain what the regulations do and the response of the relevant devolved administration to the consultation on those regulations, enabling further scrutiny of the regulations.

The exercise of the powers will be subject to the affirmative procedure, meaning that before the instrument can be made it must be approved in draft by resolution of both the House of Commons and the House of Lords.

3. The temporary nature of the powers under clause 11

We are clear that maintaining existing EU law frameworks is not a long-term solution. It instead ensures that any potential divergence that could impede our economy is minimised whilst we develop and implement new arrangements for the UK in these areas.

To demonstrate this, the proposed amendment to clause 11 also includes additional provisions that demonstrate the temporary nature of the powers whilst new arrangements are being discussed and implemented in specific areas. The amendments:

- Provide a power for UK ministers to repeal (by regulations) temporary limits on the devolved institutions, as well as the powers to create restrictions (new subsection (4B) of clause 11). This power too is subject to the affirmative procedure in Parliament to enable fuller scrutiny.
- Place a legal obligation on UK Ministers to have regard to the intended temporary nature of the restrictions when considering whether to exercise the repeal power (new subsection (4D) of clause 11).
- Place a further legal obligation on UK Ministers to consider periodically whether it is appropriate to repeal all of the restrictions (see new subsection (4C) of clause 11).
- Include an explicit legislative reference to the intended temporary nature of the provisions in the provision that introduces the reporting duty placed on UK Government (see below) (see new subsection (4A) of clause 11).

4. Increasing transparency - reporting obligations

To date, much of the work and discussion on frameworks has been a discussion between the UK Government and the devolved administrations. Now that we have initial analysis, it is increasingly important that those affected by future changes are able to view and comment on the work.

In order to provide that greater transparency on the progress of future framework discussions, the amendments place a legal obligation on the UK Government to report to Parliament on a number of detailed areas. Every three months, starting three months after Royal Assent, the Government would be required to:

- Report on steps taken to implement frameworks in areas where Ministers have exercised the new clause 11 powers to maintain existing EU frameworks;
- Explain how the framework principles agreed between the UK Government and devolved administrations have been taken into account in the development of new arrangements;
- Specify the regulations that have been made to add or remove policy areas where EU law frameworks are temporarily being maintained across the UK and progress required in order to move outstanding policy areas from the existing EU law frameworks to new UK arrangements;

- Specify regulations that have been made to remove the UK Government's powers to maintain EU law frameworks in targeted areas and progress required in order to repeal any such powers that are still in place; and
- any other relevant information.

Detail on Frameworks Analysis

At the moment, EU law creates consistent practices across the UK in a range of policy areas that are otherwise devolved. The frameworks analysis sets out the UK Government's provisional assessment of where we think we will need to maintain those common approaches after we leave the EU and where we will not.

The UK, Scottish and Welsh Governments have previously agreed a set of principles which set out that future common frameworks will be established where they are necessary in order to do the following things:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can 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.

A framework may take different forms and be implemented in different ways including by legislation, by executive action, by MoUs, or by other means depending on the context in which the framework is intended to operate.

The provisional analysis covers 153 individual policy areas^[1] where EU law intersects with devolved competence and breaks these down into the following categories:

- no further action is required in 49 areas;
- non-legislative common frameworks, like memoranda of understanding, could be required in 82 areas; and
- legislative common framework arrangements could be required for some or all elements of 24 areas.¹

The analysis also references 12 separate policy areas that the UK Government believes are reserved in all three settlements, but are subject to ongoing discussion with the devolved administrations.

Because the devolution settlements are asymmetrical, different powers are relevant to Scotland, Wales and Northern Ireland.

The analysis is provisional and will continue to develop over time as the UK Government and devolved administrations continue to discuss these policy areas. The positions set out are without prejudice to the outcome of our negotiations with the EU. They are also subject to the need to find practical solutions that recognise the unique economic, social and political context of the land border between Northern Ireland and Ireland.

¹ In total, 153 policy areas sit within these categories. Two policy areas appear in the analysis twice, in different categories, depending on the devolution intersect in question. These are 'High Efficiency Cogeneration/Combined Heat and Power (CHP)' and 'Rail Franchising Rules'.