

T: 0300 244 4000  
E: [scottish.ministers@gov.scot](mailto:scottish.ministers@gov.scot)

Bruce Crawford MSP, Convener, Finance and  
Constitution Committee  
Graham Simpson MSP, Convener, Delegated  
Powers and Law Reform Committee  
Scottish Parliament  
EH99 1SP

11 September 2018

Dear Conveners.,

With 62% of people in Scotland voting to remain in the European Union, the Scottish Government opposes EU withdrawal. We have nevertheless set out our views on how withdrawal could take place in a way which allowed Scotland to mitigate the effects of the UK's decision to leave the EU. It is our view that remaining in the Single Market and Customs Union, along with a significant expansion of devolved competence for the Scottish Parliament, is the only way in which Scotland's interests could be protected in EU withdrawal. It follows that the UK Government should take the idea of leaving in March 2019 without a withdrawal agreement off the table. Contemplating a No-Deal scenario is irresponsible, and should be unthinkable. It would have significant negative economic and social consequences for Scotland and indeed for the whole of the UK.

However the UK Government continues to insist that a No-Deal scenario is possible, despite the inevitable widespread damage and disruption it would cause. We must respond to this uncertainty as best we can. It is therefore our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal in this event. As part of that, I would like to set out how the Scottish Government intends to go about the regrettable but necessary task of preparing devolved law for EU withdrawal.

This is not about the question of where devolved powers will be exercised after EU withdrawal. Instead it is about the technical task of ensuring that important schemes and regulations can continue to operate despite withdrawal. It has been the consistent position of the Scottish Government that cooperation and coordination between the governments of these islands would be required to prepare our laws for the shock of EU exit. We set this out in the legislative consent memorandum for the EU (Withdrawal) Bill, and during the passage of the Continuity

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Bill. That will remain our position as long as it is in Scotland's interests, as long as it can be done compatibly with the devolution settlement, and as long as the Scottish Parliament is afforded its proper role.

This necessary contingency planning will involve a substantial number of instruments to be made containing changes to reserved and devolved law. Where the policy outcome being sought is consistent across administrations, then it could be appropriate and in Scotland's interests to agree a UK-wide approach to statutory instruments (for example, to avoid duplication of effort, or where only technical or minor amendments are required). Where a different way of dealing with EU withdrawal, or a different policy outcome, is required in Scotland, we will pursue our own statutory instruments in the Scottish Parliament.

Because of the large number of instruments involved, this approach will protect, as best we can, the Scottish Government and Parliament's capacity for dealing with non-withdrawal-related legislation in the coming months and years.

The Scottish Government is determined to ensure that the Scottish Parliament will be given its necessary and vital role in scrutinising decisions by the Scottish Ministers to cooperate over legislative preparations and we will impress that matter on the UK Government in our discussions. Scottish Ministers will notify the Scottish Parliament of any proposal to consent to the UK Government using its powers in devolved areas. Annexed to this letter is a protocol, developed in collaboration between Scottish Government and Scottish Parliament officials, which will ensure that the Scottish Parliament is able to scrutinise Scottish Ministers' approach. We are working to ensure that the UK Government builds sufficient time into the timetable for this programme of legislation to ensure that the protocol can be followed in full. In addition it should be noted that in relation to correcting deficiencies, there is now substantial equalisation of Scottish and UK ministerial powers under the EU (Withdrawal) Act.

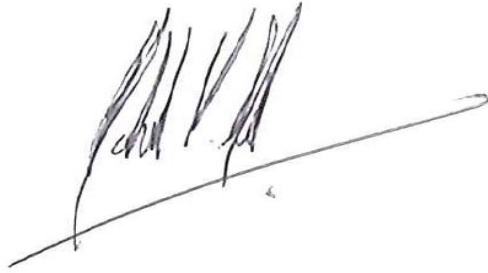
Of course, the Scottish Government deeply regrets the fact that substantial resources and time have to be devoted to preparing Scotland's laws for an an EU withdrawal that people in Scotland did not vote for, and that the situation that has been made worse and more urgent by the possibility of a No-Deal outcome.

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I am happy to commit to giving evidence on any of these matters to your committees, and I have asked my officials to continue their liaison with yours to ensure that information is exchanged about the likely content and scale of the programme of notifications required.

A handwritten signature in black ink, appearing to read 'Michael Russell', written over a horizontal line.

**MICHAEL RUSSELL**

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**Protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament**

**Introduction**

1. This protocol sets out a shared understanding between the Scottish Government and the Scottish Parliament on the process for obtaining the approval of the Scottish Parliament to the Scottish Ministers' consent to the exercise by UK Ministers of powers under the European Union (Withdrawal) Act 2018 ("the Act") in relation to proposals within the legislative competence of the Scottish Parliament.
2. The protocol also sets out how proposals for UK Statutory Instruments (SIs) will be categorised to help committees target their scrutiny in a proportionate manner.
3. The Scottish Government and the Scottish Parliament recognise that it may be necessary to re-visit the protocol to consider whether its provisions should apply to other legislation relating to the UK's withdrawal from the European Union.
4. The protocol applies to proposals which may result in statutory instruments containing provision under sections 8 or 9 of the Act where the provision could be made by the Scottish Ministers exercising their equivalent powers in Schedule 2 ("relevant provision"). Where there is agreement between the UK Government and the Scottish Government that the relevant provision should be subject to joint procedure (laid in both the UK Parliament and the Scottish Parliament) or be made in a Scottish Statutory Instrument (SSI) then the procedures set out in the protocol will not be required. In such instances, the Scottish Parliament will be able to scrutinise the instrument via either the joint procedure or the SSI procedure.
5. There is a separate protocol establishing the process for the consideration of SSIs under the Act and the categorisation of such instruments.

**Background**

6. The Act contains various delegated powers for:
  - UK Ministers to make regulations in all areas, including provisions within devolved competence;
  - Scottish Ministers to make regulations by SSI within devolved competence as defined in paragraphs 8 or 17 of Schedule 2;
  - UK Ministers and Scottish Ministers to make regulations in a UK SI under a joint procedure.
7. In that regard the Act is unusual in that it provides concurrent delegated powers to the UK Government and the Scottish Ministers to make provision within devolved competence as defined in paragraphs 8 and 17 of Schedule 2.
8. The UK Government indicated, in its Delegated Powers Memorandum that accompanied the Bill for the Act, that it will not normally use the powers in the Act to

amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority.

9. It is recognised that the Scottish Parliament has power to legislate for matters within devolved competence (as defined in paragraphs 8 and 17 of Schedule 2). However, where the Scottish Ministers consent to the power being exercised by UK Ministers alone in relation to devolved competence this will be done by SI. In such cases the Act makes no provision for scrutiny by the Scottish Parliament of the exercise of that power. Both the Scottish Parliament and the Scottish Government recognise that, as a matter of principle, the Scottish Parliament should have the opportunity to consider in advance of the exercise of such powers whether it is content for the matter to be taken forward by SI rather than SSI.
10. As noted earlier, the protocol applies in respect of all SIs containing provision under sections 8 or 9 of the Act where that provision could be made by the Scottish Ministers exercising their equivalent powers in Schedule 2 (“relevant provision”). However, the protocol recognises that not all relevant provisions will merit the same level of scrutiny. In prioritising scrutiny capacity the Scottish Parliament will wish to take a proportionate approach. The proportionality issue is addressed by suggesting a differentiated scrutiny approach depending on the significance of the provision proposed.

## **Process**

11. The Scottish Parliament should be notified about all proposals which may result in UK SIs containing relevant provision prior to consent being given by Scottish Ministers to the UK Government to proceed. Please note, there may be instances in which Scottish Ministers do not wish to consent UK Ministers taking forward proposals for UK SIs containing relevant provision. In any such instance, Scottish Minister will take forward their own SSIs that the Scottish Parliament will be able to scrutinise when they are laid. The Scottish Government is taking a prioritised approach to the legislative fixes that are necessary before the end of March 2019 and will aim to fix all deficiencies by the end of December 2020. What the Scottish Parliament then does by way of scrutiny may vary depending of the significance of the proposal. The following process provides a guide as to how committees might wish to consider proposals for relevant provision in UK SIs, but it is not prescriptive or mandated.

### *Phase 1 - identification*

12. Proposals for inclusion in SIs will emerge from deficiencies in legislation identified (by the Scottish Government or UK Government) that will need corrected as a consequence of the UK’s withdrawal from the European Union. Discussions will take place between the Scottish Government and UK Government counterpart departments on how to fix the deficiencies identified and the most appropriate legislative vehicle to use (UK SI, SSI or instrument subject to Joint Parliamentary procedure). If the legislative vehicle considered appropriate is a UK SI then the process moves to phase 2.

### *Phase 2 - notification*

13. At the earliest opportunity, the Scottish Government will notify the Scottish Parliament where the Scottish Ministers propose to give consent to proposals being included in UK SIs where the proposals would be within devolved competence. This is important

because if the Scottish Parliament recommends not to include provisions in a UK SI there needs to be sufficient time for the Scottish Government to prepare the necessary SSI, which may be challenging given the timescales necessary for developing SSIs. At this stage, the Scottish Government may or may not have seen the draft UK SI that the proposals are to be included in.

14. The notification will be by way of a Notification of Intention to Consent (Notification) accompanied by a letter from the relevant Scottish Minister to the relevant lead subject committee. The notification and letter should also be copied to the Convener of the Delegated Powers and Law Reform Committee.
15. A single notification to the Scottish Parliament may cover a number of proposals for correcting deficiencies or it may only cover a proposal to correct a single deficiency. This will be dependent on the nature of the legislation that is being corrected and the policy area. The precise timing of notifications may vary depending on the nature of what is being notified. However, the Scottish Government will share information with the Scottish Parliament about the expected timing and volume of notifications.
16. From the date of receipt of the notification from the Scottish Government, the Scottish Parliament will normally have a maximum of 28 days (subject to paragraph 18) in which to consider the notification.
17. The notification will detail—
  - The name of the instrument in question (if known) or a title describing the policy area
  - A brief explanation of law that the proposals amend
  - Summary of the proposals and how these correct deficiencies
  - An explanation of why the change is considered necessary
  - Scottish Government categorisation of significance of proposals
  - Impact on devolved areas
  - Summary of stakeholder engagement/consultation
  - A note of other impact assessments, (if available)
  - Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislating
  - Intended laying date (if known) of instruments likely to arise
  - If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?
  - Information about any time dependency associated with the proposal
  - Any significant financial implications

### *Phase 3 – parliamentary scrutiny*

As noted at paragraph 16, from the date of receipt of the notification from the Scottish Government, the Scottish Parliament will normally have a maximum of 28 days to consider the notification. For the purposes of this protocol, in calculating any period of days, no account shall be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than 14 days. The Scottish Parliament and the UK Parliament have different recess periods. The Scottish Government will seek to ensure that the United Kingdom Government is aware of Scottish Parliament recess periods

and take them in to account in its own legislative programming and that it respects the role of the Scottish Parliament under the terms of this protocol.

18. The Committee's consideration will be of the Scottish Minister's proposal to consent to proposals being included in a UK SI as contained in the notification.
19. To support committee consideration of notifications this protocol categorises proposals that may be included in a notification, so as to assist committees to prioritise scrutiny of more significant proposals. The categories also suggest that there are particular matters that the Scottish Government and Scottish Parliament agree should be subject to the joint procedure or made provision for in an SSI rather than a UK SI.
20. This protocol sets out different levels of scrutiny based on the significance of the proposal to be included in a notification.
21. A suggested approach to scrutiny is set out in relation to each of the categories. There is flexibility for a committee to do more or less in terms of scrutiny than what is set out below, within the timeframe set out in paragraph 16.
22. The categories make no provision for particular policy areas to fall into any one of the categories, but it may become apparent that there are policy areas where there is significant stakeholder interest and substantive proposals within this policy should necessarily normally fall into a higher category.

- **Category A**

These are proposals for UK SIs containing relevant provision which the Scottish Ministers must notify to the Scottish Parliament prior to granting consent in the way described above. This would be a residual category of all proposals for SIs subject to the protocol, where the relevant provision is not significant enough to fall within categories B or C. It is expected that matters falling into this category would not necessarily be so significant as to require a committee to take evidence from the relevant Scottish Minister or stakeholders. While proposals under category A may not be significant, committees would retain the right to take evidence on such proposals for SIs should they wish to do so and could come to the view that the Scottish Parliament should not give its approval to the Scottish Ministers giving their consent to UK Ministers. Set out below is an illustrative guide to the type of matters that may fall into category A.

### **Category A**

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Minor and technical in detail;
- Ensuring continuity of law;
- Clear there is no significant policy decision for Ministers to make;
- Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer;
- Proposals where Ministers have a policy choice but with limited implications, e.g. only one obvious policy option as to which body may provide an opinion or receive a report;
- Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK, where a choice as to whether that should be amended to be the Secretary of State for Scotland, Scottish Ministers or somebody else is consistent with the devolution settlement or replicates what happens in practice now;
- Updating references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states”

This is an illustrative list and not a comprehensive view of what falls into this category.



- **Category B**

Matters in category B are considered to be more significant than those contained in category A. Again these are proposals for UK SIs containing relevant provision which the Scottish Ministers must notify to the Scottish Parliament prior to granting consent in the way described above. It is expected, however, that these are matters where the lead committee may wish to take evidence on the notification from the Scottish Government (and potentially from external stakeholders where it is felt that the notification is particularly significant). A committee would not be obliged, however, to take evidence. Again, based on its consideration of the notification, a committee could come to the view that the Scottish Parliament should not give its approval to the Scottish Ministers giving their consent to UK Ministers.

### **Category B**

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Proposals where a more significant policy decision is being made by Scottish Ministers.
- Proposals predominantly concerned with technical detail but which include some more significant provisions that may warrant subject committee scrutiny;
- Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK where there is a policy choice with significant implications about which public authority it should be e.g. a regulatory function exercisable by either SEPA or Scottish Water where Parliament may have an interest in the policy choice made by Scottish Ministers
- Replacement, abolition, or modification of certain EU functions that have significant implications e.g reporting (both receiving and making reports), monitoring, compliance and enforcement;
- Sub-delegation - creating or amending a power to legislate, for example transferring EU legislative powers to a UK public authority;
- Provision which materially increases or otherwise relates to a fee in respect of a function exercisable by a UK public authority. This could include changes to the group of bodies or individuals required to pay such fees;
- Provision which creates, or widens the scope of, a criminal offence, or which increases the penalty which may be imposed in respect of a criminal offence;
- Provision which involves a significant financial impact on individuals, business, public sector or the economy (this could be automatically elevated to category C if it met a particular financial threshold);
- Provision which creates, widens the scope of, or increases the level of fine for a fixed penalty.

This is an illustrative list and not a comprehensive view of what falls into this category.

- **Category C**

Finally, there are matters that it is considered should be subject to joint procedure in the UK and Scottish Parliaments, in accordance with paragraph 2 of Schedule 7 to the Act. These are matters where it is considered that the Scottish Parliament will wish to consider the terms of the instrument not the proposal to legislate. This protocol does not identify matters falling into the category, but on the basis of experience the Scottish Government may come to the view that there are matters that should automatically fall into this category. In these instances, this protocol is not engaged as the Scottish Parliament will be able to scrutinise the instrument under the joint procedure. However, this category is included in this protocol for reference, to enable the Scottish Parliament to recommend to the Scottish Government that a proposal which may result in a UK SI is taken forward as an instrument under joint procedure.

### *Reporting*

23. The lead Committee is under no obligation to use the full 28 day period outlined above, and may instead wish to write to the Scottish Government at an early stage to confirm that it is content with the Scottish Ministers' proposal to consent to the proposals being included in a UK SI.
24. However, the Committee may wish to undertake consideration of the proposal to consent to the matters being included in a UK SI and make a report to the Parliament.
25. That report may make one of three recommendations—
  1. That the Scottish Ministers should proceed to notify the UK Government of their decision to consent to the proposals being included in a UK SI to be made by UK Ministers.
  2. That the Scottish Ministers should not consent to the proposal being included in a UK SI to be laid solely in the UK Parliament and instead request that the proposals be included in a UK SI to be made under the joint procedure.
  3. That the Scottish Ministers should not consent to the proposals being included in a UK SI and instead should include the proposals in an SSI.
26. If a committee makes a recommendation as mentioned at sub-paragraph 2 or 3 of paragraph 26 then the lead Committee should notify the Scottish Government in writing. The Scottish Government should normally be given 7 days to respond. If the Scottish Government does not agree to the recommendation made then the Parliamentary Bureau should---
  - by motion propose that the Scottish Parliament agrees to the Committee's recommendation, and
  - schedule time in the chamber for debate on the motion.
27. That debate may take place after the period of 28 days has expired, but should take place within 14 days following the expiry of the 28 day period.
28. If the Scottish Parliament agrees to the motion the Scottish Government would normally not consent to the proposal being included in a UK SI and would either

request that the proposal be included in a UK SI to be made under the joint procedure or include the proposal in an SSI, depending on what the committee recommended.

#### *Phase 4 – finalisation of the SI*

29. Where the Scottish Ministers have consented to proposals being included in a UK SI to be made by UK Ministers the UK Government will proceed with drafting, or finalising the SI in question. The Scottish Government will track which UK SI or SIs the proposals are included in. When in receipt of a draft SI, the Scottish Government will take a view as to whether the SI reflects the proposals that were consented to. The Scottish Government will either—

- Advise the Scottish Parliament when the SI is laid in the UK Parliament and that it is content that the SI is drafted in a manner that is consistent with the consent granted.
- Advise the Scottish Parliament in writing to the lead Committee and the Delegated Powers and Law Reform Committee that there has been a variation in the approach taken to the proposals included in the SI, but that the variation is not so significant as to engage the need for a further process of obtaining the Parliament's approval. The letter will explain the Scottish Government's reasons.
- Advise the Scottish Parliament that there has been a more substantive variation to the approach taken to the proposals included in the SI and that as such it no longer reflects what the Scottish Parliament approved and that an SSI will be laid or alternatively the instrument will be subject to the joint procedure.

#### **Revisions to this protocol**

30. This protocol will be kept under review. The Scottish Government or the Scottish Parliament may propose revisions to the protocol and both will need to agree to any revisions made.