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Bruce Crawford MSP  
Convener  
Finance and Constitution Committee  
Scottish Parliament  
Edinburgh  
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Dear Bruce

## **EU EXIT: SCRUTINY OF UK SECONDARY LEGISLATION AFFECTING DEVOLVED MATTERS**

The Scottish Government has been and remains strongly opposed to the UK leaving the EU. However, as a responsible Government we recognise the need to plan for and manage the consequences of EU exit, including acting to ensure that domestic law in Scotland will work effectively after the end of the Transition Period on 31 December 2020.

That includes, where appropriate, agreeing to proposals by the UK Government to include in statutory instruments provisions affecting devolved matters. As you will recall, in 2018 the Scottish Government and the Scottish Parliament agreed a Protocol setting out a process for seeking the Parliament's approval to the giving of consent by Scottish Ministers to the exercise by UK Ministers of powers under the European Union (Withdrawal) Act in relation to proposals within the legislative competence of the Parliament. That Protocol has in the main worked well, with over 180 proposals for legislation having been dealt with so far. I and my colleagues very much appreciate the work done by the Parliament's subject committees in considering those proposals.

In correspondence last year we agreed that Scottish Government and Parliament officials should work together to develop a new protocol covering the exercise by UK Ministers of all powers to legislate in devolved areas that were within the competence of the EU, to enable effective parliamentary scrutiny in the event of Brexit taking place. That joint work has produced the text of a new Protocol, which accompanies this letter and which I understand was endorsed by the Conveners Group subgroup last month. I am grateful to Parliament officials for their help in developing the new Protocol, and to you and your fellow Conveners for your positive and constructive approach to considering the proposals.

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As proposed in that correspondence, the new Protocol is based on, and retains many of the elements of, the current one. The main differences are the new Protocol's wider scope, so that it will apply to all proposals by Scottish Ministers to consent to UK SIs on matters that were within EU competence immediately before exit day i.e. 31 January 2020 not just to SIs proposed to be made under sections 8 or 9 of the EUWA; and its provision for "scrutiny of Ministerial consent after it has been signified to the UK Government for purely technical provisions. The latter should provide a proportionate but effective process for scrutiny of minor consent cases, while enabling the Parliament to prioritise significant proposals for more detailed consideration.

I am keen to ensure that so far as possible there is a smooth transition from the existing arrangements to those set out in the new Protocol. Scottish Government and Parliament officials have been discussing this, and I understand that it has been proposed that the new Protocol should take effect from the start of next year. That seems sensible, and we will aim to ensure that so far as possible committees are not expected to operate under both Protocols at the same time. We will in the meantime continue to apply the existing Protocol to a wider range of proposed SIs than that covered by its original terms until the new Protocol is in place.

As described in previous correspondence, we have been engaging with the UK Government to ensure that appropriate administrative arrangements are in place to support the Scottish Parliament scrutiny process; and that we are sufficiently informed of, and involved in, the UK Government's secondary legislation plans so that the Parliament can scrutinise proposals under the Protocol arrangements. That engagement has on the whole been constructive, with the UK Government having agreed that it will so far as possible respect the Protocol arrangements when seeking Scottish Ministers' consent to proposed secondary legislation. Even though this has not always happened in practice, in most cases the close working between Scottish Government and UK Government officials has enabled the Parliament to have the time provided for in the Protocol to consider legislative proposals. For example, we recently secured the UK Government's agreement that where draft SIs are laid under the draft affirmative procedure, those SIs will wherever possible not be debated, and so not come into force, until the Scottish Parliament has had an opportunity to consider them in accordance with the Protocol.

We will continue to work with the UK Government to enable the Parliament to consider proposals to consent to UK SIs. To that end we have made the UK Government aware of the proposed new Protocol arrangements, so that it can take those arrangements into account when taking forward proposed instruments.

There is however one issue of difficulty that I should draw to your attention. Our position has been, and remains, that the UK Government should seek the consent of Scottish Ministers before making any SI arising from or relating to EU exit that would affect devolved matters. However, the UK Government recently adopted the position that it would only seek consent where there is a statutory requirement, or it has given an explicit political commitment, to do so. In particular it has said that it will not seek our consent before making SIs under section 41 of the European Union (Withdrawal Agreement) Act 2020. This gives UK Ministers power to make consequential, transitional, transitory or saving provision in connection with the Act, such as changing references to "exit day" in SIs to refer instead to the end of the Transition Period.

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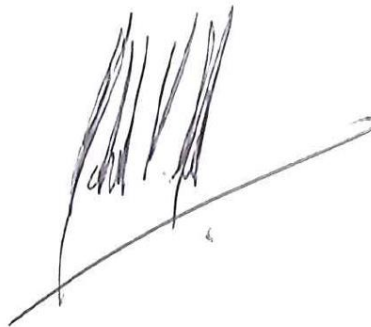


I have, with the support of the other devolved administrations, written to the UK Government reiterating our view that consent should be sought in all such cases. In response the UK Government has maintained its position, but has said that the vast majority of SIs legislating on devolved matters during the Transition Period will be made under powers where it is required, or has given a commitment to, seek Scottish Ministers' consent. It has also said that in all cases, UK Government officials will continue to engage with the Devolved Administrations to develop future secondary legislation on devolved matters and to work constructively with us to help facilitate our engagement with the Scottish Parliament.

Our analysis supports the view that only a very small number of instruments should not be covered by a statutory requirement or political commitment to seek Scottish Ministers' consent. Six such cases have arisen so far, all of which have been of a technical nature such as changing references to "exit day". My officials will be in touch to provide details of those instruments.

While my view remains that the UK Government position does not reflect the spirit of the devolution settlement, we have at least secured its agreement to continued practical co-operation and in particular to have regard to the scrutiny arrangements we have agreed with the Parliament. This should mean that even where our formal consent is not sought to proposed secondary legislation, we will still be suitably involved in, and able to influence, its preparation. We will continue to operate on the basis that the Protocol arrangements should always apply, and we will give the Parliament details of any cases where the UK Government does not see our formal consent.

I hope this is helpful, and look forward to receiving your confirmation that you and your colleagues are content with the terms of the new Protocol. I am sending a copy of this letter to the Convener of the Delegated Powers and Law Reform Committee.



**MICHAEL RUSSELL**

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