



The Scottish Parliament
Pàrlamaid na h-Alba

Rt Hon Chloe Smith MP
Minister of State for the Constitution
and Devolution
Cabinet Office

c/o Clerk to the Committee
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Dear Minister,

EU EXIT LEGISLATION - European Union (Withdrawal) Act 2018

As you will be aware, the UK leaving the EU has required revision to a substantial body of legislation to enable the repatriation of powers to the UK Parliament and to the devolved administrations. A very large number of statutory instruments have been made, containing changes to reserved and devolved law, and more are anticipated.

To ensure effective parliamentary scrutiny of Scottish Government decisions to consent to the UK Government using its powers to make regulations on matters that are within the legislative competence of the Scottish Parliament, the Scottish Government collaborated with the Scottish Parliament to develop a [protocol](#) under which the Scottish Ministers notify the Scottish Parliament of any proposal to consent. The Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, [told the parliamentary committees](#) that the Scottish Government was “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”.

At its meeting on 9 March 2021, the ECCLR Committee considered a proposal for a statutory instrument made under the European Union (Withdrawal) Act 2018 that had been referred to it by the Scottish Government - the Air Quality (Legislative Functions) (Amendment) Regulations 2021. In considering this notification, the Committee wished to record its concern that incorrect information was provided to the Scottish Parliament on an earlier related SI notification concerning to whom a devolved legislative function would be transferred. The Committee noted – with significant concern - that this was not the first or only occasion when such an error had occurred.

Again, at its meeting on 16 March 2021, the ECCLR Committee considered five proposals to consent and was frustrated to note that the same issue arose again in one instrument. The extract of the Official Report of each meeting, expressing Members' concerns, is annexed for reference.

The Scottish Government advised the Committee, in relation to the instrument considered on 9 March, that the reason incorrect information was provided to the Scottish Parliament was because at the time of the original notification, "changes to draft SIs were happening at pace". We have received numerous notifications from the Scottish Government requesting abbreviated or urgent parliamentary scrutiny in order to meet the UK Government's legislative timetable. Problems have also arisen due to inaccurate, incomplete or unclear information being provided in the notifications as to what the UK SIs will do.

The Committee has drawn these issues to the attention of the Scottish Government on several occasions.

The Committee appreciates that events have been moving at pace and there is a great deal of goodwill from Members to ensure that legislation is in place timeously. However, the role of the Parliament in scrutinising legislation and its ability to undertake effective scrutiny is being constrained by the timing of information provided to it and this is compounded by the quality of that information. Parliamentary scrutiny is being compromised.

For the Scottish Parliament to be able to carry out its role properly, it is essential that the Scottish and UK Governments work together effectively to ensure that the timetable allows sufficient time for Scottish Parliament consideration.

The Committee agreed to write to the UK Government to express its considerable frustration and concern. The Committee feels strongly that it is being hampered in undertaking scrutiny of these important notifications. The Committee seeks assurances that the UK Government is aware of the issues and is prioritising improvements to ensure that the system is working, and a coherent and transparent timetable is in place that enables proper consideration by devolved parliaments. The Committee is writing also to the Scottish Government in this regard and has agreed to copy the letters to the Presiding Officer of the Scottish Parliament and to the Finance and Constitution Committee.

I look forward to your detailed response.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Gillian Martin'.

Gillian Martin MSP
Convener
Environment, Climate Change and Land Reform Committee

Annexes:

- A – Notifications where further explanation has been required by the Committee
- B – The Scottish Parliament, Extract from the Official Report, 9 March 2021
- C – The Scottish Parliament, Extract from the Official Report, 16 March 2021

Notifications where further explanation has been required by the Committee

2020

- The Ozone Depleting Substances and Fluorinated Greenhouse Gases (Amendment etc) (EU Exit) Regulations 2020

The Committee wrote to the Scottish Government for further information (and then took evidence from officials): meeting on 28 October

- The Waste and Environmental Permitting etc. (Legislative Functions and Amendment etc.) (EU Exit) Regulations 2020
- The Detergents (Amendment) (EU Exit) Regulations 2020
- The REACH etc. (Amendment etc.) (EU Exit) Regulations 2020
- The Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc.) (EU Exit) Regulations 2020

The Committee wrote to the Scottish Government on the Waste and Environmental Permitting etc. (Legislative Functions and Amendment etc.) (EU Exit) Regulations 2020 (and then took evidence from officials): meeting on 3 November

- The Animals, Aquatic Animal Health and Seeds (Amendment) (EU Exit) Regulations 2020
- The Marketing of Seeds and Plant Propagating Material (Qualifying Northern Ireland Goods) (EU Exit) Regulations 2020
- The Alien Species in Aquaculture, Animals, Aquatic Animal Health, Seeds and Planting Material (Legislative Functions and Miscellaneous Provisions) (Amendment) (EU Exit) Regulations 2020
- **The Committee wrote to the Scottish Government (and then took evidence from officials): meeting on 10 November**
- The Control of Mercury (Amendment) (EU Exit) Regulations 2020

The Committee wrote to the Scottish Government for further information for consideration at meeting on 17 November.

2021

- The International Waste Shipments (Amendment) (EU Exit) Regulations 2020

The Committee wrote to the Scottish Government for further information for consideration at the meeting on 19 January

- The Greenhouse Gas Emissions (Kyoto Protocol Registry) (Amendment) (EU Exit) Regulations 2021
- Air Quality (Legislative Functions) (Amendment) Regulations 2021

The Committee wrote to the Scottish Government for further information for consideration at the meeting on 9 February

- The Exemptions from the Official Controls at Border Control Posts (Amendment) Regulations 2021

The Committee wrote to the Scottish Government (and then took evidence from officials): meeting on 23 March

- The REACH etc. (Amendment) Regulations 2021 (CHM/09)
- The Storage of Carbon Dioxide (Amendment) (EU Exit) Regulations 2021
- The Fluorinated Greenhouse Gases (Amendment) (EU Exit) Regulations 2021

The Committee wrote to the Scottish Government for further information for consideration at the meeting on 9 February

The Scottish Parliament, Extract from the Official Report, 9 March 2021

European Union (Withdrawal) Act 2018

Air Quality (Legislative Functions) (Amendment) Regulations 2021

The Convener: Our third item is consideration of a notification from the Scottish Government in relation to consent to a UK statutory instrument, the Air Quality (Legislative Functions) (Amendment) Regulations 2021.

Members will be aware that a revised statutory instrument protocol has been agreed between the Scottish Government and the Parliament. The aim of the revised protocol is to enable committees to scrutinise proposals for UK SIs on all devolved matters that were formerly governed by EU law. The original SI protocol applied only to scrutiny of consent to SIs that fix deficiencies under the European Union (Withdrawal) Act 2018. The new SI protocol will continue to apply to such technical changes and ensure continuity of law, but also extends to proposals for SIs that introduce new regulatory or governance regimes, or that implement policy choices.

The committee raised some queries with the Scottish Government in advance of today's meeting and we have received a response. I know that members have some concerns and issues with the general process that they would like to raise.

Stewart Stevenson: I preface my remarks and suggestions with the observation that I do not imagine that anyone is setting out to deliberately create difficulties between the UK Government and the Scottish Government. The issues with which we are engaging when we look at the regulations that are before us lie more in the shortness of time at UK Government level and, more fundamentally for us, perhaps a failure to lock in the different processes and timetables in the Scottish Parliament with what has to happen at Westminster.

I know that this is not a new subject for us, and that our minister and the Presiding Officer are well aware of some of the difficulties. I propose that, on this occasion, we write to the relevant minister with responsibility for the constitution at Westminster, to make them aware of the difficulty, because I assume that they are not fully aware of it. I also assume that they will not reject any observations, because if the process works well in devolved Administrations—I do not imagine that Scotland is the only one that is affected—it improves the governance and government at all levels. Therefore, it is appropriate for us to write to say that we must get our act together and have a coherent timetable that allows proper consideration not only by the politicians, but by the officials who support our consideration of such UK statutory instruments.

The Convener: As I outlined, the revised protocols are supposed to facilitate that scrutiny, but they are not really adequate. Members have been bringing up the issue for some time. Stewart Stevenson is right in what he said, and other committee conveners have also raised the issue with the Presiding Officer and the Scottish Government. Those are good suggestions, Stewart.

Mark Ruskell: I agree with those points. It is disappointing to see consistent errors in timings and in the accuracy of the information that is presented to the committee about what the instruments do.

I agree that writing to all those concerned—including the Presiding Officer—would make sense. If the issue persists, the committee conveners in the next session of Parliament will have to consider it in more detail. It is also important to try to understand where the blockage is and how those errors keep on creeping in.

I would like clarity on how the policy could impact on the Scottish Government's desire to stay in alignment with the European Union. Although I see the logic in having a UK minister administering the instrument, if the European Union were to decide to take air quality standards in a slightly different direction, that might cut across the Scottish Government's desire to stay aligned with Europe. I am not raising an objection now, but I would like the Scottish Government to be clear as to how likely that might be.

Liz Smith: I agree with Stewart Stevenson and Mark Ruskell. Ours is not the only committee to have had these difficulties; it is a wider issue for the Parliament. The main problem is around consistency, or the lack of consistency in some cases. We must address that in the next Parliament. We should not wait for the problem to arise again; we have had sufficient evidence that there is a difficulty. As Stewart Stevenson rightly said, it is probably not intentional, but it could cause us a lot of headaches. The committee should quickly put that on the record and I am very much in favour of copying in the Presiding Officer.

The Convener: We are agreed that we will write to the UK Government minister with responsibility for this area.

We have been talking bilaterally to other devolved Parliaments about the issues and some of the work that we have been doing. It might be a good idea to copy them in to our letter to the UK Government. We know that they are facing the same issues, and that would make our point stronger. We want to get this right. An awful lot of statutory instruments will be laid and we cannot keep running into the same problems time and again.

I see that everyone seems to be content with that approach. Are members content to write to the Scottish Government to confirm the committee's consent to the UK statutory instrument referred to in the notification, caveated with Mark Ruskell's request to have clarity on some issues?

I see that we are content to write to the Government in those terms.

The Scottish Parliament, Extract from the Official Report, 16 March 2021

Exemptions from the Official Controls at Border Control Posts (Amendment) Regulations 2021

The Convener: Agenda item 2 is an evidence session on a United Kingdom statutory instrument. Members will be aware that a revised SI protocol has been agreed between the Scottish Government and the Scottish Parliament. The aim of the revised protocol is to enable committees to scrutinise Scottish Government proposals to consent to UK SIs on all devolved matters formerly governed by European Union law. The original SI protocol applied only to scrutiny of the Scottish Government's proposals to consent to SIs that fixed deficiencies under the European Union (Withdrawal) Act 2018. Our new SI protocol continues to apply to those technical changes and ensure continuity of law, but also extends to proposals to consent to SIs that introduce new regulatory or governance regimes, or implement policy choices.

The committee received notification of this SI only last week, and members have some questions. To help us with those we have with us Jesus Gallego, deputy director of agriculture and rural economy in the EU exit unit and deputy chief veterinary officer. Good morning, Mr Gallego.

We will move straight to questions. Could you outline why there is a need for urgency and what is behind the late notice of the SI?

Jesus Gallego (Scottish Government): It is purely to follow the UK Parliament's timetable. We received the instrument late, and we made it available to the committee as soon as we had it. Unfortunately, that was only 10 days before the laying date.

The Convener: The issue is process, rather than anything that might have a practical consequence if it was not done. It is because dissolution is imminent.

Jesus Gallego: That is absolutely right. It is purely a process matter.

The Convener: Other members may have questions.

Mark Ruskell (Mid Scotland and Fife) (Green): From your perspective, is the protocol working?

Jesus Gallego: We have had repeated problems with adhering to the timetable for notifications, because of the lateness of notifications from the Department for Environment, Food and Rural Affairs, which is responsible for the majority of the SIs that we in the agriculture and rural environment part of my unit are involved in. As you will be well aware, this is not an isolated incident. The situation is frustrating for everyone, and I know that it is frustrating for the committee. We have done our best to give the committee as much notice as we can, but the timing of these instruments depends on the UK Government.

Mark Ruskell: It is concerning and it is frustrating.

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The Convener: I see that no other members have comments to make. We hear loud and clear that the lack of notice is causing frustration at the Scottish Government level, but we understand that you are largely content with the impact of the SI. Thank you for your time, Mr Gallego.

Agenda item 3 is consideration of a number of notifications from the Scottish Government in relation to consent to UK statutory instruments, including the one that we have just discussed.

We have a number of comments to make about the process. The notifications coming in today relate to amending instruments that make technical fixes to flaws in SIs that we have already looked at. We are again frustrated about the lack of information on frameworks surrounding the SI notifications, which is a common theme of the past couple of years, not just for this committee but other Scottish Parliament committees. The frameworks that underpin the issues raised by SIs are not developing at the pace that we would like and we are certainly not getting information on them.

We have received a letter from the cabinet secretary about the Scottish Government's frustration that EU REACH was not adopted when it could have been. The cabinet secretary has flagged up to us that the chemicals industry is now heavily involved in trying to ensure that the REACH regulations do not have an adverse financial effect on the industry.

Do members have any comments to make in relation to the SIs? The Scottish Government does not object to their content, but I know that members have comments to make on the process.

Mark Ruskell: There seems to be a consistent theme and I am pretty fed up with it. At times, it feels as though we are being treated as a community council, and the only thing that we can do is to write an occasional letter to the UK Government or to the Scottish ministers.

An example of that is the F-gas statutory instrument. The notification was not clear about where the powers would be transferred to and that is simply not good enough.

The REACH regulations are not available, so we have the policy intent but not the SI itself.

At times, the process is meaningless. The committee is struggling to understand the impacts of the regulations and whether they have been properly drafted, as many of them have not been over the past year.

The point that I would make about the REACH regulations is that there is a strong industry lobby and we are trying to make sense of the ways in which the industry wants to reduce costs. It is important that the Scottish Government has a view on that. I was disappointed to learn from the cabinet secretary that the Government does not have a view and will not take a view until after the election. It is important that the Government engages with the issue and with the Parliament, particularly as there are strong industry lobby groups that are calling for changes that may or may not be in the interests of the environment.

We are in a bit of a mess and we are not left with much alternative but to keep writing the letters.

The Convener: You raise a good point about the fact that some of the SIs that have come to us in the past have turned out to be flawed. The role of parliamentary scrutiny is to identify flaws, so if we do not have the information to do that, mistakes will go through. We have a responsibility to scrutinise things properly, and if we cannot do that, mistakes will go through and yet more SIs will have to come in, for which we do not get relevant and comprehensive information.

Claudia Beamish (South Scotland) (Lab): I echo and reinforce the points that you and Mark Ruskell have made. It is disheartening to spend time as a committee member who has committed to trying to get to grips with these often important SIs—particularly those in relation to withdrawal from Europe—when they come late, which puts Scottish Government officials in a difficult position and puts pressure on the committee. Our role of scrutiny is fundamental and it is hard to carry it out in the situation in which we are put.

It is important that we highlight our concerns about the delays, both in our legacy report and in writing to the UK Government—I know that these conversations become somewhat tedious, given that we were talking about writing such a letter last week. I understand that last week's letter might not have been sent, so perhaps when we write we could be even more robust on the matter, because I would not want a new committee to be put in the same position.

The Convener: I clarify that we have started to draft the letter to which you are referring, which is for the minister for devolution, Chloe Smith. We express our general concern about the amount of notice of and information on SIs that is being given to the committee. The letter has not gone yet, so we have a chance to include today's comments about SIs.

As Mark Ruskell said, we write letters and nothing seems different. That has been the case, not just for weeks or months but for the past couple of years, and the situation has not changed. As members rightly pointed out, statutory instruments that provide for technical fixes as a result of our leaving the EU will not stop being made in the next couple of months or so, and nor will the common frameworks stop being developed. We are looking at a timeframe of well into the next parliamentary session.

We have flagged up the issue in our legacy report. The committee that takes over from us will have to keep a close eye on the situation. We hope that our concerns, which are shared by the other devolved Parliaments—the Welsh Parliament has the same issue—lead to solutions and some fixes to the procedures. Members have made their points and we will discuss the letter that we want to send to the UK Government.

Are members content that we write to the Scottish Government to confirm that we agree that consent be given in relation to the UK SIs that are referred to in the notifications and the SI that the Scottish Government representative joined us to talk about?

I see that members are content.