Finance and Constitution Committee

Committee Conveners, The Scottish Parliament
(by e-mail) EDINBURGH
Direct Tel: (0131) 348 5215
finance.constitution@parliament.scot

Dear Convener,

Impact of Brexit on Devolution

1. A key consideration for the Finance and Constitution Committee during this parliamentary session has been the impact of Brexit on devolution. While this continues to be uncertain a number of 'Brexit Bills' have been introduced both by the Scottish Government and the UK Government. The Committee has recently considered three such Bills which potentially have significant implications for the role of the Scottish Parliament and its committees—

- UK Withdrawal from the European Union (Continuity) (Scotland) Bill;
- UK Internal Market Bill (UK legislation);
- Trade Bill (UK legislation).

Background

2. Until now the Scottish Parliament has been unable to legislate in a manner incompatible with EU law. This statutory constraint will cease to exist following the end of the implementation period on 31 December 2020. This raises a number of fundamental questions for the Scottish Parliament—

- What, if anything, replaces the existing legislative constraints arising from the UK’s membership of the EU;
- How will any future constraints both statutory and non-statutory be decided and what is the role of the Scottish Parliament in the decision-making process;
- How will such constraints operate and what is the role of Scottish Parliament in monitoring and scrutinising how they operate.

3. The Committee recognises, therefore, that as we near the end of the implementation period there is a need for the Parliament and its committees to
consider how it needs to evolve in response to these fundamental questions. In particular, the role of the Parliament and its committees in relation to the following—

- The keeping pace power;
- Common frameworks;
- The UK internal market;
- Trade deals;
- Governance.

The Keeping Pace Power

4. One of the purposes of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill is to allow Scots law to be able to 'keep pace' with EU law in devolved areas, where appropriate. Within this context the Committee recognises that until now the Parliament has had a very limited role in the relation to the EU policy development process. However, the Committee believes that there is a need to ensure that there is an appropriate and proportionate level of parliamentary, stakeholder and public engagement in the domestic policy-making process in areas which were previously subject to EU law.

5. This is primarily because there will be no future formal democratic engagement in the EU policy making process by the UK and devolved governments. But it is also because there is a risk that the EU policy-making process is replaced by an executive-driven process which allows for significant levels of ministerial discretion including an inter-governmental process with limited opportunity for parliamentary and stakeholder engagement.

6. In our Stage 1 report on the Bill the Committee welcomed the commitment from the Cabinet Secretary for the Constitution, Europe and External Affairs to work with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. The Committee believes it is essential that the Parliament gives serious consideration to the level of scrutiny of the keeping pace power which would be both appropriate and proportionate.

7. This consideration needs to include the extent to which the Parliament should be dependent on the Scottish Government in identifying what might or might not be suitable for the keeping pace power. As the Committee highlights in our stage 1 report, consideration needs to be given to who will do the monitoring of the EU policy-making process in order to work out what is significant and what might trigger the discretion to keep pace. In other words, there is a first order issue of whether the Scottish Parliament should simply react to exercises of the power or itself do some monitoring or horizon scanning to see what’s coming down the line to then inform its judgement about when and why ministers use their discretion.

8. **We would, therefore, welcome your views on what role your Committee should have in relation to—**
   - the decision on whether or not to keep pace;
   - monitoring or horizon-scanning the EU policy-making process in areas within your remit;
- early engagement in the policy development process especially where there are opportunities for ministerial discretion in how to keep pace;
- the interaction of the keeping pace power with common frameworks, trade deals and the UK internal market.

Common Frameworks

9. The Committee recognises that, while common frameworks may not alter devolution, they may nevertheless constrain, albeit voluntarily and subject to continued agreement, the Scottish Government’s options for policy divergence in certain policy areas. The Committee’s view is that it is essential that this is done transparently and with an opportunity for parliamentary and stakeholder engagement. There is also a need for clarity in relation to how common frameworks interact with the keeping pace power, the proposed UK internal market legislation and trade deals.

10. The Committee has recommended that, when draft common frameworks are published for consultation, they set out how they will interact with the keeping pace power and, in particular, whether they will constrain in any way the use of this power as discussed above.

11. The Committee recognises the frustration felt by some of our witnesses regarding a lack of consultation with the Parliament, stakeholders and wider public. The Committee reported in January 2018 that the “process for agreeing common frameworks and the actual content must be arrived at through agreement and not imposed” and that “this process is not solely a matter for governments but must be transparent and inclusive”. Nearly three years later there has been little if any public consultation.

12. The Committee remains very supportive of the Scottish Government’s view that common frameworks should not be imposed by the UK Government and is supportive of a system of common frameworks for trade in the Internal Market, with the common frameworks to be agreed between the devolved Governments and the UK Government. However, it is equally important that common frameworks are not effectively imposed on the Parliament and stakeholders without meaningful consultation and an opportunity to propose amendments.

13. The Scottish Government has advised that seven common frameworks will be fully developed, agreed and implemented by the end of December 2020. Six of these will cover Scotland as follows—

- Hazardous Substances (Planning)
- Nutrition Health Claims, Composition and Labelling
- Emissions Trading System (ETS)
- Radioactive Substances
- Recognition of Insolvency Proceedings
- Food and Feed Safety and Hygiene (FFSH)
14. The Scottish Government has indicated that, by the end of the implementation period, the aim is that these frameworks will have completed their formal parliamentary scrutiny process.

15. A further 26 provisional frameworks will be established in a number of other policy areas before being finalised for agreement as full frameworks during 2021. The Scottish Parliament and other legislatures will receive a summary of each provisional framework and an update on its progress before the end of 2020, with the expectation that these frameworks will be ready for scrutiny into 2021.

16. There are also 115 framework policy areas where all four governments have indicated that no further action is required.

17. The Committee has also recommended that there should be a requirement for the Scottish Government to report on the operation of each common framework on an annual basis. This should include an update on the interaction of each common framework with the keeping pace power; for example, if the keeping pace power has not been used as a consequence of a common framework.

18. **The Committee would welcome an update on your Committee’s approach to the scrutiny of common frameworks including—**

- What, if any, work you have carried out in relation to common frameworks;
- What, if any, plans you have to carry our future scrutiny of common frameworks;
- Whether in relation to the six fully completed frameworks you will have sufficient time to carry out scrutiny of any within your remit prior to the end of this calendar year;
- Whether you have given any consideration to those framework policy areas where the Governments have agreed that no further action is required including what this decision means in practice;
- Views on the role of your committee in scrutinising the operation of common frameworks once agreed including in relation to the keeping pace power.

**UK Internal Market Bill**¹

19. The Bill introduces two market access principles: mutual recognition and non-discrimination. Both principles can be applied to relevant requirements in respect of the sale of goods or the provision of services.

20. These principles serve to disapply relevant requirements in one part of the UK when goods or services are lawfully provided in another part of the UK. The requirements remain applicable to the sale of goods and the provision of services originating in a jurisdiction, but they cannot be applied to goods or services

---

¹ Murdo Fraser MSP, Alexander Burnett MSP and Dean Lockhart MSP did not support the Committee’s findings and recommendations on the UK Internal Market Bill
originating in another part of the UK and which comply with the rules applicable there.

21. The Committee recognises that the use of devolved powers has been constrained by the need to comply with EU law. The evidence considered by the Committee suggests that the Bill will result in less regulatory autonomy for the devolved nations than currently exists. The main reason for this is that the market access principles in the Bill and especially the mutual recognition principle are more far reaching than the equivalent principles within the EU.

22. This means that regulatory standards agreed by the UK Parliament could effectively be imposed on the devolved nations. The Committee’s view is that it is unacceptable that the UK Government should seek to effectively impose new reservations on the devolved competences through this Bill. This is not myth-making but a clear consequence of the proposed market access principles within the context of the relative size of England’s population and economy.

23. The Committee’s view is that the Internal Market Bill and the market access principles in particular undermines the whole basis of devolution. The Committee therefore recommended that the Parliament does not agree consent to the UK Internal Market Bill.

24. The UK Government has argued that the agreement of common frameworks means that the market access principles will only apply in a limited number of policy areas and is an “insurance policy”. But this argument is problematic given that whatever policy divergence is agreed within common frameworks will still be subject to the market access principles under the provisions of the Internal Market Bill as currently drafted.

25. The Committee recognises that the agreement of common frameworks to the extent that they deliver harmonisation through common standards could potentially limit the application of the market access principles. However, it is not clear how common frameworks can address the threat to policy divergence highlighted by many of our witnesses. This is because in areas where the devolved governments may wish to have higher standards than the minimum standards agreed in common frameworks these will be potentially rendered ineffective by the market access principles contained in the Bill.

26. Consequently, there needs to be far greater clarity about how both statutory and non-statutory common frameworks would interact with the market access principles. For example, whether rules that implement or comply with common frameworks will be outside the scope of the market access principles and whether this can be achieved through non-statutory as well as statutory frameworks?

27. Part of the difficulty which the Committee has raised on numerous occasions is that there has been a real failure to engage stakeholders and the wider public in the process for developing frameworks. The Committee recognises that this is a structural problem relating to how the inter-governmental process operates, in particular, the emphasis on confidentiality. But given the increased
interdependence of the policy-making process across the four governments of the UK this is not sustainable.

28. We would, therefore, welcome your views on—

- How can we ensure that there is a sufficient level of parliamentary and public engagement in the policy-making process in areas subject to EU internal market rules and which may now fall within the scope of a future UK Internal Market Act?
- What role your Committee should have in scrutinising the impact of the operation of the UK internal market in policy areas within your remit including the interaction with the keeping pace power and common frameworks?

Trade Agreements

29. In our recent report on the Trade Bill LCM we welcomed the commitment of the Minister of State to work closely with the devolved Administrations in relation to the negotiation and implementation of trade agreements. However we recognise that this commitment is voluntary and therefore both temporary and entirely unenforceable. The Committee recommended that the Bill should be amended to make a process of negotiation a statutory requirement.2

30. The Committee’s view is that it is essential that the devolved institutions are involved at all stages of the trade negotiation process. It is also important that the new Ministerial Forum for Trade provides for meaningful engagement between the UK Government and the devolved administrations and allows for the four nations of the UK to develop a consensual position before the beginning of trade negotiations. It is also essential that the Ministerial Forum for Trade is accountable to the devolved legislatures enabling scrutiny of its decisions.

31. We would, therefore, welcome your views on—

- What role your Committee should have in scrutinising the trade negotiation process in relation to policy areas within your remit?
- What role your Committee should have in scrutinising the participation of Scottish Ministers in the Ministerial Forum for Trade;
- What role your Committee should have in scrutinising the impact of trade deals on policy areas within your remit including the interaction with the keeping pace power and common frameworks?

Governance

32. The Committee has previously heard concerns from some of our witnesses about a likely governance gap following Brexit. EU institutions such as the European Commission and the ECJ have a role in implementing, monitoring and enforcing EU law at a domestic level. That role has been supported by EU-level agencies in

---

2 Murdo Fraser MSP, Alexander Burnett MSP and Dean Lockhart MSP did not support this recommendation
areas like food safety and chemicals regulation but with significant interaction
with domestic-level agencies and bodies.

33. A number of new governance bodies are in the process of being established both
at a UK and devolved level. These include –

- Environmental Standards Scotland;
- Office of the Internal Market (within the Competitions and Market Authority);
- Trade Remedies Authority.

**Environmental Standards Scotland (ESS).**

34. The UK Withdrawal from the European Union (Continuity) (Scotland) Bill
establishes an environmental governance body, ESS, to continue the role and
functions of the European institutions in ensuring the complete and effective
implementation of environmental law.

**Office of the Internal Market (OIM)**

35. The UK Internal Market Bill confers new functions on the Competition and
Markets Authority (CMA) to allow for the creation of an OIM within it. This body
would be responsible for monitoring and advising on the health and evolution of
the internal market and for capturing business and consumer insights on its
development.

**Trade Remedies Authority (TRA)**

36. The Trade Bill establishes the TRA as a non-departmental public body. The UK
Government explained that a legally independent trade remedies investigatory
body is an important element in ensuring that trade remedies investigations are
conducted objectively, based on available data and evidence, and reduce the risk
of political interference. The TRA will be responsible for conducting trade
remedies investigations under a statutory framework provided by the Taxation
(Cross-border Trade) Act 2018, and for making impartial recommendations to the
Secretary of State.

37. When questioned on the role of the Scottish Parliament in scrutinising the work of
the TRA, the Minister of State suggested that its annual report could perhaps be
deposited with the Scottish Government and the other devolved Administrations,
which would give the Scottish Parliament the opportunity to scrutinise the TRA’s
work.

38. As noted by our Internal Market Committee Advisor, the creation of the TRA
alongside the new powers for the CMA/OIM “raises important questions about
how these UK-wide institutions – albeit acting at arm’s length from government –
interact with executive and parliamentary structures at both UK and devolved
levels.”

39. As such the Scottish Parliament has an important role in scrutinising how these
new and pre-existing bodies and agencies discharge their responsibilities in a
manner consistent with the devolution settlement. We therefore welcome that the CMA will be required to lay its reports in the Scottish Parliament and further welcome the UK Minister’s acknowledgement that the Scottish Parliament has a legitimate role in scrutinising the activities of the TRA. We have therefore recommended that the Trade Bill be amended to also require TRA reports to be formally laid in the Scottish Parliament.

40. **We would, therefore, welcome your views on—**

- What role your Committee should have in scrutinising the new and evolving governance structures at both a UK and a Scottish level following Brexit in relation to the impact on policy issues within your remit?

**Resource Implications**

41. The Committee notes in our Stage 1 report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill that the keeping pace power has potentially significant resource implications for the Parliament. Likewise, the scrutiny of trade negotiations and agreements, the development and operation of common frameworks and the operation of the UK internal market also have potentially significant resource implications.

42. But this will depend on what scrutiny role the Parliament agrees to adopt following the end of the implementation period. As noted above it is, therefore, essential that the Parliament gives serious consideration to the level of scrutiny of the keeping pace power which would be both appropriate and proportionate.

43. **We would, therefore, welcome your views on—**

- The potential resource implications for your Committee of the additional scrutiny arising from the impact of Brexit on devolution.

**Conclusion**

44. The Committee would welcome your response to the questions above and any general comments you may have in relation to the impact of Brexit on devolution by 29 November. The Committee has also bid for time in the Chamber in December to debate the issues raised above including the responses to this letter. We would encourage all Committee Conveners or a representative from each Committee to speak in the debate.

Yours sincerely,

Bruce Crawford MSP
Convener