



The Scottish Parliament
Pàrlamaid na h-Alba

Finance and Constitution Committee

Cabinet Secretary for
Government Business and
Constitutional Relations
and Secretary of State for
Exiting the European Union
(by e-mail)

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Dear Cabinet Secretary and Secretary of State,

European Union (Withdrawal Agreement) Bill LCM

As lead Committee we are required under Rule 9B.3.5 of the Standing Orders to report on the European Union (Withdrawal Agreement) LCM¹ and this letter fulfils that requirement. The Committee welcomes the evidence from the Cabinet Secretary at our meeting this morning but is disappointed that a UK Minister was unavailable. We seek assurance from the UK Government that the default position in relation to all future LCMs is that a UK Minister will ordinarily be available to appear before the relevant Scottish Parliament committee.

Provisions altering the legislative competence of the Parliament and the executive competence of the Scottish Ministers

The LCM states that many “provisions of the Bill modify the application of EU law during the implementation period, and so alter the limits of executive and legislative competence through the current EU law restriction.”² It also states that other “provisions modify the executive competence of the Scottish Ministers, either because they expressly confer powers on Ministers, or because they alter existing powers.”

The Scottish Government is concerned about the “lack of commitment by the UK Government to seek the consent of the Scottish Ministers before making

¹ https://www.parliament.scot/S5_Bills/SPLCM-S05-29.pdf

² https://www.parliament.scot/S5_Bills/SPLCM-S05-29.pdf paragraph 29

secondary legislation in devolved areas.”³ This would cover the powers in the WAB that can be exercised in one of three ways: either by UK Ministers alone, Scottish Ministers alone or jointly (i.e. the concurrent powers). Those are:

- **Clause 1** (insofar as it saves the effect of the power in s.2(2) of the European Communities Act to implement EU law, which now applies during the implementation period)
- **Clause 3** (for UK Ministers – the equivalent is clause 4 for Scottish Ministers) – supplementary power in connection with the implementation period
- **Clauses 12, 13 and 14** (power to make provision implementing recognition of professional qualifications, coordination of social security systems and equal treatment etc rights of workers)
- **Clause 18** (for UK Ministers – the equivalent is clause 19 for Scottish Ministers) – power in connection with other separation issues
- **Clause 21** (for UK Ministers – the equivalent is clause 22 for Scottish Ministers) – power in connection with Ireland / Northern Ireland Protocol)
- **Clause 27** (insofar as it amends the deficiencies correcting power conferred on UK Ministers in section 8 of EUWA and part 1 of schedule 2 of EUWA for SMs)
- **Clause 28** (insofar as it provides ancillary fee-charging powers to those contained in part 1 of schedule 4 of EUWA)
- **Paragraph 1(3) of schedule 5** (insofar as it allows exceptions to be made to the rules that provide that references in subordinate legislation made under EUWA to exit day become references to IP completion day (i.e. the end of the implementation period)).

The Committee stated in our report on the Withdrawal Bill supplementary LCM that we remained “deeply concerned about the lack of any statutory provision within the Bill for UK Ministers to seek the consent of Scottish Ministers or the Scottish Parliament to legislate in devolved areas, especially given that the Sewel Convention does not apply to subordinate legislation.”⁴ We stated that this “cuts across the devolution settlement” and we reaffirmed this view in our report on the Trade Bill LCM.

The Committee remains of the view that providing UK Ministers with powers to make secondary legislation in devolved areas without any statutory requirement to seek the consent of the Scottish Government and the Scottish Parliament cuts across the devolution settlement.

Implementation of International Agreements in Devolved Areas

The LCM states that the “principal purpose of the Bill is to implement the Withdrawal Agreement, an international treaty” and while “international relations is reserved, the implementation of international obligations is not.” On

³ https://www.parliament.scot/S5_Bills/SPLCM-S05-29.pdf paragraph 44

⁴ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/FCC/2018/5/10/Report-on-European-Union-Withdrawal-Bill-Supplementary-LCM-1/FCCS052018R6Rev.pdf> paragraph 83

this basis the view of the Scottish Government is that “provisions implementing the Withdrawal Agreement in devolved areas would therefore be within the legislative competence of the Scottish Parliament.”⁵ The Secretary of State recognises in his letter to the Cabinet Secretary dated 18 December 2019 that the implementation of international agreements, where it would otherwise fall within devolved competence is devolved. On this basis he explains that consent “is not sought for the obligations in the Withdrawal Agreement, but for the manner in which provisions in this Bill implement those obligations in domestic law.”

Protected Enactment Status

Certain provisions of the Bill, once enacted, will be made protected enactments under the Scotland Act 1998 by virtue of their inclusion in the EUWA. The Scottish Government does not agree with the protection of EUWA as it constrains the competence of the Scottish Parliament, and the Parliament withheld its consent to this provision. The Scottish Government similarly disagrees with the limitation of legislative competence that will follow once certain provisions in the WAB are included in this protected enactment status.

The Scottish Government’s view is that the conferring of protected enactment status is unnecessary and unsuitable as the relevant provisions in the Bill are implementing an international agreement. As discussed above the Scottish Government and Scottish Parliament have an obligation to implement international agreements in devolved areas. The LCM states that there “is no reason to think either the Scottish Government or Parliament will not take seriously their responsibilities to implement all international obligations in devolved areas.”

The Secretary of State’s view is that the UK Government is only protecting a very limited number of clauses which are constitutional in nature and that this is essential for legal certainty and is consistent with precedent - for example, parts of the European Communities Act 1972 (which also implements an international agreement) were protected in a similar way. In his view it is “a focussed protection, which is entirely in keeping with the protection afforded to other constitutional statutes under the devolution settlements.”

Requirement for Legislative Consent

The Explanatory Notes to the Bill specify the particular provisions which require legislative consent. The Scottish Government agrees consent is required for these provisions and considers that further clauses also require the Scottish Parliament’s consent, specifically clauses 25, 26 and 36.

⁵ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/FCC/2018/10/31/Report-on-Trade-Bill-LCM/FCC-S5-18-11.pdf> paragraph 33

Clause 25

Clause 25 is designed to ensure that the conversion of EU law into 'retained EU law' will now take place at the end of the implementation period rather than on exit day as originally stated in EUWA. The Scottish Government's view is that clause 25 alters the executive competence of the Scottish Ministers in relation to existing powers which they have to deal with legislative deficiencies. The view of the Committee's adviser on constitutional issues is that this provision alters the executive competence of the Scottish Ministers in relation to existing powers which they have to fix legislative deficiencies.

Clause 26

Clause 26 makes further amendments to the European Union Withdrawal Act (EUWA). It amends section 6 of EUWA by substituting references to 'IP completion day' for the references to 'exit day' that currently appear in that statute. This clause also enables UK Ministers to make regulations to provide that certain courts or tribunals (to be specified) are not to be bound by retained EU case law in certain circumstances. It also inserts a new section 7C into EUWA. It defines the term 'relevant separation agreement law' and sets out rules of interpretation so that, so far as applicable, that body of law is interpreted in accordance with the Withdrawal Agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement.

To the extent that these rules of interpretation apply to the law implementing the withdrawal agreement and applying retained EU law in devolved areas, our Adviser's view is that they make provision within the legislative competence of the Scottish Parliament.

Clause 36

Clause 36 repeals Part 2 of Schedule 2 of EUWA which enables devolved authorities to make regulations for the purposes of implementing the Withdrawal Agreement if the authority considers it appropriate for such regulations to be in force on or before exit day. The Scottish Government's view is that clause 36 is due to be commenced as soon as the Bill is passed (clause 42(6)(c)), which is expected to be before exit day and therefore this clause alters the executive competence of Scottish Ministers.

The Committee welcomes the recognition by the UK Government that the implementation of international agreements "where it would otherwise fall within devolved competence, is devolved." The Committee, therefore, invites the UK Government to explain why clauses 25, 26 and 36 have not been included in the list of provisions in the Bill requiring legislative consent.

Independent Monitoring Authority (IMA)

Part 3 and schedule 2 of the Bill establish an IMA to monitor the implementation and application of the EU-UK citizens' rights agreements. The IMA will consist of a chair (a non-executive member), between two and six other non-executive members, the chief executive (an executive member) and between one and three other executive members.

The Secretary of State is to appoint the non-executive members and the non-executive members are to appoint the executive members. In making appointments, the Secretary of State must, so far as possible, ensure that the non-executive members of the IMA include members who know about conditions in Scotland, Wales and Northern Ireland relating to relevant matters.

The Bill proposes that before making the appointment of the member of the IMA who is intended to know about relevant conditions in Scotland, UK Ministers must tell the Scottish Ministers who they propose to appoint and why. If Scottish Ministers approve, the appointment is made but if Scottish Ministers do not approve, then UK Ministers may proceed with the appointment regardless. However, if an appointment is made without Scottish Ministers' approval, UK Ministers must publish a statement explaining why.

The Scottish Government's view is that the IMA "should have accountability, credibility and authority in Scotland, in its exercise of devolved functions and in its relations with devolved authorities" and to achieve this "the consent of the Scottish Ministers should be required for the appointment of the member of the IMA who is intended to know about relevant conditions in Scotland." The Scottish Government also consider that UK Ministers should be required to consult the Scottish Ministers before removing the appointee from the IMA and that the UK Government should consult devolved authorities when appointing the chair of the IMA.

The Secretary of State recognises these concerns in his letter to the Cabinet Secretary dated 18 December and states that "UK Ministers will work in good faith throughout the appointments process to ensure that the final candidate put forward by the Secretary of State has the approval of the relevant Scottish Government minister." However, he also states that it is necessary to include a contingency on the face of the Bill "in the unlikely event that agreement on a candidate cannot be reached between our governments."

The Committee previously considered a similar disagreement between the UK Government and the Scottish Government in relation to the membership of the Trade Remedies Authority (TRA) as part of our consideration of the Trade Bill LCM. The Scottish Government proposed an amendment to the Trade Bill which would require UK Ministers to secure the consent of Scottish Ministers to one nonexecutive member of the TRA. The Secretary of State for International Trade responded that "members of the TRA will be appointed on merit, following a fair and open competition" and "while they may come from a particular nation or region, that should not be the reason why they are chosen."

The Committee recommended that the need for diverse representation on the TRA, including knowledge of the Scottish, Welsh and Northern Ireland economies, should be reflected in the appointment process.

The Committee recommends that the UK Government and the devolved governments should work together to develop and agree a set of principles and criteria which should ensure that devolved interests are reflected in the establishment of bodies such as the IMA and the TRA following Brexit

Sewel Convention

The LCM states that the “UK Government has demonstrated that it is prepared to proceed with legislation relating to the UK’s withdrawal from the EU without the consent of the Scottish Parliament, even where that consent is required and sought.” It also states that given “the breach of the Sewel convention on EUWA, the Scottish Government does not expect the views of the Parliament to be respected on this occasion either, demonstrating once again the democratic deficit which exists in Scotland.”

The Committee has previously considered the operation of the Sewel Convention. We noted the view of the Public Administration and Constitutional Affairs Committee (PACAC) that “there is a considerable level of ambiguity surrounding the Sewel Convention.” PACAC recommended that the UK Government “sets out a clear statement of circumstances under which legislative consent is not required by the Sewel Convention.”

The UK Government responded to PACAC that it “is fully committed to the Sewel Convention and the related practices and procedures for seeking legislative consent” but “it has never been the case that devolution means that the Scottish Parliament, or any devolved legislature, has a veto over...the UK Parliament’s ability to make laws for each of the devolved nations.”

The Committee has previously stated that the impasse between the Scottish Government and the UK Government in relation to the Sewel Convention needs to be addressed as a matter of urgency. The Committee reiterates that view and invites both the UK Government and the Scottish Government to set out their views in response to this letter as to how this impasse can be resolved.

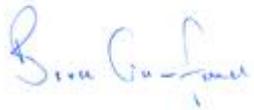
Recommendation

The Committee notes the view of the Scottish Government as stated in the LCM that “the Scottish Parliament should not agree legislative consent to the Bill, but should take a firm stance against withdrawal, against the Withdrawal Agreement, and against the Bill.”⁶

⁶ https://www.parliament.scot/S5_Bills/SPLCM-S05-29.pdf paragraph 41

As we set out above, the Withdrawal Agreement Bill (as with the EUWA and the Trade Bill) provides UK Ministers with the powers to make secondary legislation in devolved areas without any statutory requirement to seek the consent of the Scottish Government and the Scottish Parliament. This cuts across the devolution settlement and when combined with our other concerns means that the Committee recommends that the Scottish Parliament does not consent to the European Union (Withdrawal Agreement) Bill⁷.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Bruce Crawford".

Bruce Crawford MSP
Convener

⁷ Adam Tomkins MSP, Murdo Fraser MSP and Alexander Burnett MSP dissented from this paragraph.