



The Scottish Parliament
Pàrlamaid na h-Alba

Finance and Constitution Committee

The Scottish Parliament
Edinburgh
EH99 1SP

TEL: (0131) 348 5451

Finance.Constitution@parliament.scot

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Dear Convener,

The Finance and Constitution Committee noted in our report on the Trade Bill LCM that there is an urgent need for a transparent and consultative debate about whether or not the devolution settlement is robust enough to deal with Brexit. The Committee agreed at our meeting on 20 March 2019 to explore a more co-ordinated approach with other Scottish parliamentary committees to developing the Scottish Parliament's scrutiny role in relation to the new powers arising from the UK's withdrawal from the EU. This covers three main areas—

- Legislation in devolved areas which previously would have been within the competence of the EU;
- International Treaties including trade deals which cover devolved areas and which would previously have been negotiated by the EU;
- Common UK frameworks which the UK Government and the Scottish and Welsh Governments agree will be needed post-Brexit.

The Committee is also seeking the views of the respective constitution committees in the House of Commons, House of Lords and the Welsh Assembly.

Background

One of the consequences of the UK leaving the EU is the need to reflect on the existing devolution settlement. The EU (Withdrawal) Act 2018 alters the legislative competence of the Scottish Parliament by removing the requirement for the Parliament to legislate compatibly with EU law. The 2018 Act also alters the competence of the Parliament by introducing a new legislative constraint. This constraint is defined with reference to EU law that is retained in domestic law by the provisions of the 2018 Act and that is specified in UK regulations under the Scotland Act 1998.

Legislation

The UK Government has introduced a number of “Brexit Bills” which have or are likely to be subject to the legislative consent process. To date Scottish Parliament’s committees have considered legislative consent memoranda (LCMs) in relation to the following Brexit Bills:

- European Union (Withdrawal) Bill;
- Trade Bill;
- Fisheries Bill;
- Agriculture Bill;
- Healthcare (international Arrangements) Bill.

An LCM is also expected to be lodged shortly in relation to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.

A key theme which has emerged from parliamentary scrutiny of these LCMs is concern about the provision of delegated powers for the UK Government to legislate in devolved areas (previously within the competence of the EU) without the consent of the Scottish Parliament. There have also been circumstances, such as clause 18(1) of the Fisheries Bill, where the Secretary of State is required to consult with Scottish Ministers but does not require consent.

The Finance and Constitution Committee stated it was “deeply concerned” about specific powers relating to retained EU law in both the EU (Withdrawal) Bill and the Trade Bill which allow UK Ministers to make statutory instruments in non-reserved areas currently governed by EU law without any statutory requirement to seek the consent of Scottish Ministers or the Scottish Parliament. The Committee considers that this cuts across the devolution settlement.

The Delegated Powers and Law Reform (DPLR) Committee has also raised similar concerns in each of its reports on Brexit Bill LCMs. For example, in relation to the delegated powers conferred on UK Ministers in the Fisheries Bill in relation to devolved matters previously within EU competence, it stated the following –

“The Committee notes that the exercise of the power is subject to the consent of the Scottish Ministers but that there is no role on the face of the Bill for the Scottish Parliament in considering the consent provided. The Committee is concerned that the Scottish Parliament does not have any scrutiny function in relation to the Scottish Ministers providing consent to the Secretary of State to make provision in this area.”

The DPLR Committee recommended that the “lead committee considers what role is envisaged for the Scottish Parliament in scrutinising the decision of the Scottish Ministers to consent to any regulations being made by the Secretary of State.”

In its report on the Fisheries Bill LCM the Rural Economy and Connectivity (REC) Committee called on the Scottish Government –

“to provide its response to the issues raised by the DPLR Committee in its report, in relation to the role that is envisaged for the Scottish Parliament in scrutinising the decision of the Scottish Ministers to consent to any regulations being made under the Bill by the Secretary of State which relate to devolved powers.”

The Scottish Government has not yet responded to the REC Committee. However, in response to the Finance and Constitution Committee and the DPLR Committee regarding the need for consent provisions within the EU (Withdrawal) Bill, the Scottish Government stated that it recognises—

“the importance of ensuring that the Scottish Parliament is given the opportunity to scrutinise that consent, and of ensuring that scrutiny is proportionate and can be conducted within timescales which will enable instruments to proceed at a UK level or an alternative approach to be taken if necessary.”

A protocol was subsequently agreed between the Scottish Parliament and the Scottish Government. 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 Scottish Ministers’ consent to the exercise by UK Ministers of regulation-making powers under the EU (Withdrawal) Act in relation to proposals within the legislative competence of

the Scottish Parliament. The protocol was developed to enable powers in the EU (Withdrawal) Act to be exercised from July 2018 when it came into force. Since then, it has become clear that this question about the exercise of powers is a consistent, recurring theme applicable to other Brexit-related UK legislation.

The Committee would welcome the views of your committee on the scrutiny of Scottish Ministers' consent to the exercise by UK Ministers of powers to make subordinate legislation in areas within the legislative competence of the Scottish Parliament which previously were within the competence of the EU. In particular, whether—

- **There are any lessons which can be learned from the Scottish Parliament's current scrutiny of EU legislation which impacts on devolved areas;**
- **Further consideration needs to be given to the role of the Scottish Parliament in relation to future UK legislation which may confer powers on UK Ministers to legislate in non-reserved matters currently subject to EU law;**
- **As a matter of principle, the Scottish Parliament, as a minimum, must be consulted prior to consent being given by Scottish Ministers to exercise of the powers;**
- **Beyond this issue of principle, what process should be in place to enable the Scottish Parliament to scrutinise all UK legislation which confers powers on UK Ministers to make subordinate legislation in devolved areas that were previously within the competence of the EU. The protocol which applies to the EU (Withdrawal) Act may be a starting point in that consideration.**

International Treaties

Responsibility for foreign affairs, including international relations and the regulation of international trade, is a reserved competence under Schedule 5 of the Scotland Act 1998. The Scottish Government, however, highlights "important exceptions to this general reservation of foreign affairs" in its discussion paper on Scotland's Role in the Development of Future UK Trade Arrangements. These are as follows—

- The Scottish Parliament and Scottish Ministers are responsible for implementing international, ECHR and EU obligations relating to devolved matters;

- The Scotland Act 1998 enables the Scottish Government to assist the UK Government in relation to international relations (including the regulation of international trade), so far as relating to devolved matters;
- The Scottish Government could, therefore, assist the UK Government in the formulation, negotiation and implementation of policy relating to regulation of international trade issues regarding devolved matters;
- The Scottish Government could, therefore, participate in relevant international obligations.

While the UK remains a Member State, the EU retains exclusive competence to negotiate and agree trade agreements on the UK's behalf; the UK cannot negotiate or conclude any trade deals with a third country. In total the EU is party to 36 regional or bilateral Free Trade Agreements, covering more than 60 countries. The European Parliament has a formal locus in the EU process for signing up to these agreements including a formal veto power.

The Finance and Constitution Committee has previously recommended that “it is imperative that robust processes and new institutional mechanisms are urgently developed to allow for the four nations of the UK to develop a consensual position before the beginning of trade negotiations.”¹

The Scottish Government has published a discussion paper on Scotland's role in the development of future UK trade arrangements.² The paper proposes a statutory requirement that new trade agreements with otherwise devolved content, or which touch on devolved issues, must be agreed by the Scottish Government and Scottish Parliament and that, in practice, this would almost certainly mean all such agreements.

The UK Government has recently committed to establishing a new intergovernmental Ministerial Forum to provide a formal mechanism for UK and Devolved Government Ministers to discuss and provide input to future trade negotiations. In correspondence with the Committee the UK Minister of State for Trade Policy states that it “will be a matter for the Scottish Parliament to determine how it will scrutinise the role of the Scottish Government in those arrangements.”³

The Committee would welcome the views of your Committee on the role of the Scottish Parliament in scrutinising the impact of future

¹ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/FCC/2018/10/31/Report-on-Trade-Bill-LCM/FCC-S5-18-11.pdf> paragraph 78

² <https://www.gov.scot/publications/scotlands-role-development-future-uk-trade-arrangments/>

³ https://www.parliament.scot/S5_Finance/General%20Documents/2019.2.18_-_George_Hollingberry_to_Convener_re_trade_bill.pdf

international treaties on devolved areas. For example, what role would each committee wish to have in influencing the formulation, negotiation and agreement of trade deals which relate to their respective remits.

Common Frameworks

The UK Government has identified 153 areas of EU law that intersect with devolved competence; 150 in Northern Ireland; 107 in Scotland and 64 in Wales. Of these areas the UK Government has identified 82 where a UK common approach on a non-legislative basis is potentially needed. A further 24 areas have been identified where frameworks are likely to require legislative elements either in part or wholly.

The UK Government is required by the EU (Withdrawal) Act 2018 to publish a quarterly report on progress in developing common frameworks. The most recent report published in February 2019 states that significant joint progress continues to be made on future common frameworks.

The Committee recommended in its interim report on the EU (Withdrawal) Bill LCM that there needs to be parliamentary oversight of non-legislative as well as legislative common frameworks. The Scottish Government responded that it believes that the Parliament should have the opportunity to scrutinise and agree such non-statutory arrangements for common frameworks, as well as legislative arrangements, in line with the provisions set out in the Inter-Governmental Relations Written Agreement between the Scottish Parliament and Scottish Government.

In our report on common frameworks, published on 25 March 2019, the Committee welcomed this commitment. The Committee also recommended that common frameworks should include the following –

- their scope and the reasons for the framework approach (legislative or non-legislative) and the extent of policy divergence provided for;
- decision making processes and the potential use of third parties;
- mechanisms for monitoring, reviewing and amending frameworks including an opportunity for Parliamentary scrutiny and agreement;
- the roles and responsibilities for each administration; and
- the detail of future governance structures, including arrangements for resolving disputes and information sharing.

The Committee would welcome the views of your committee on the role of the Parliament in scrutinising common frameworks. In particular, whether there is a need for—

- **Parliamentary consent prior to the Scottish Government agreeing both legislative and non-legislative common frameworks;**
- **A protocol between the Scottish Government and the Scottish Parliament on the process for scrutiny of legislative and non-legislative common frameworks.**

The Committee would also welcome the views of your committee on the commitment of the Scottish Government “not to create divergent policy” in ways that would cut across future common frameworks. In particular, whether this could imply an inappropriate limit on Parliament.

Conclusion

It would be helpful if your Committee could respond by Friday 17 May. The Committee will then consider the responses and provide a summary to the Cabinet Secretary for Government Business and Constitutional Relations before taking evidence from him prior to Summer recess and a copy of this letter has been provided to the Cabinet Secretary.

I look forward to your response.

Yours sincerely,

**Bruce Crawford MSP,
Convener**