Brexit, devolution and scrutiny

Thank you for your letter of 26 March inviting the Constitution Committee to comment on issues relating to devolution arrangements and Brexit. Please find our views to your various questions below.

Legislation in devolved areas which previously would have been within the competence of the EU

We believe it is essential that the UK Government seeks the consent of the devolved legislatures for bills that engage devolved policy areas and that the two-way processes and relationships required to achieve consent are supported and strengthened. The principles of the Sewel Convention and its formulation in the respective devolution Acts should be observed. It is a matter of regret that intergovernmental discussions on the European Union (Withdrawal) Bill, whilst securing the consent of the National Assembly for Wales, did not reach an agreement that could secure the consent of the Scottish Parliament.

As part of our legislative scrutiny work we have raised concerns about bills that provide powers to UK ministers to legislate in areas of devolved competence, including by amending laws passed by the devolved legislature, without any requirement to consult devolved institutions.1 The UK Government’s position on this issue, illustrated in their response to our scrutiny of the Telecommunications Infrastructure (Relief from Non-Domestic Rates) Bill, has been that such powers reflect “well-established reciprocal arrangements” and that in practice consultation will take place.2 We do not consider that the such arrangements are

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2 Lord Bourne of Aberystwyth to the Chairman, Telecommunications Infrastructure (Relief from Non-Domestic Rates) Bill, 6 November 2017
wholly reciprocal, as devolved legislation can authorise a devolved minister to amend UK legislation only within devolved competence, whereas UK legislation can enable UK ministers to amend enactments of the devolved legislatures in ways that would trespass upon devolved competence. Further, we believe that a duty to consult the devolved executive regarding the use of such a power is appropriate, especially as such consultation is expected in practice.³

In expectation that such consultation does take place, whether or not it is required by legislation, it is for individual legislatures to determine whether and how they wish to scrutinise the decisions taken by their ministers in such matters.

We welcome the commitment of the UK Government to go beyond the scope of the Sewel Convention by seeking the consent of the devolved administrations for some of the secondary legislation under the European Union (Withdrawal) Act 2018 and reporting to the UK Parliament if statutory instruments are laid for which consent has not been given.⁴

International treaties including trade deals which cover devolved areas and which would previously have been negotiated by the EU

The Committee was grateful to receive the written evidence that you submitted on behalf of the Finance and Constitution Committee as part of our inquiry on Parliamentary Scrutiny of Treaties, in which you touched on similar issues to those raised in your recent letter. In our report, published on 30 April,⁵ we made the following conclusions and recommendations in respect of devolution:

- As part of its treaty-making after the UK leaves the European Union, the UK Government must engage effectively with the devolved institutions on treaties that involve areas of devolved competence.

- The UK Government will need to consult the devolved governments about their interests when opening negotiations, not just to respect the competences of those governments but also in acknowledgement of the important role devolved administrations may play in the implementation of new international obligations. It is also likely that other countries participating in negotiations will seek to ensure that any new treaty will be implemented fully throughout the UK. The same logic applies to representatives from the devolved governments forming part of the UK Government’s team in relevant negotiations.

- Inter-governmental relations have been under stress in recent years. This reflects in part the different political composition of the governments in Westminster, Edinburgh and Cardiff, and the significant additional strain of Brexit. As we have observed in our legislative scrutiny, this has manifested itself in a number of ways including disputes over legislative consent.

³ Chairman to Lord Bourne of Aberystwyth, Telecommunications Infrastructure (Relief from Non-Domestic Rates) Bill, 27 November 2017
⁴ Cabinet Office, The European Union (Withdrawal) Act and Common Frameworks, November 2018
⁵ Constitution Committee, Parliamentary Scrutiny of Treaties (20th Report, Session 2017-19, HL Paper 345)
It is disappointing that the recommendations of our previous reports to address the shortcomings of inter-governmental relations have not been acted on. While some tension is inevitable where competences overlap, particularly in the politically-charged context of Brexit, if problems with the inter-governmental machinery had been addressed at an earlier stage, some of them might have been ameliorated.

We welcome the review of the Memorandum of Understanding on intergovernmental relations and the operation of Joint Ministerial Committee structures. It is essential that agreement can be reached on its future operation, including its dispute resolution mechanism, in order to strengthen working relationships and provide a basis for cross-government working, including the negotiation and implementation of treaties. To this end, we also welcome the announcement of a new Ministerial Forum for international trade.

It is essential that the devolved governments are effectively involved in treaty negotiations. This should ensure that devolved competences are respected and that the devolved legislatures are able to undertake meaningful scrutiny of the treaty actions that will affect them, as the impact in some policy areas could be significant.

Your committee may also be interested in the following exchange during an oral evidence session we held with David Lidington MP, Chancellor of the Duchy of Lancaster, as part of that inquiry:

**Lord Dunlop:** You are open to the idea both in the next phase of EU negotiations and for free trade agreements that the devolveds could be part of the negotiating team. Is that what you are saying?

**David Lidington MP:** Yes. Exactly how they would fit into the negotiating team is a question to be determined. Ultimately, all three devolution Acts make it clear that the negotiation of international agreements is a reserved matter for the Government of the United Kingdom, and for the Parliament of the United Kingdom when it comes to ratification, so structures have to reflect the fact that, ultimately, it is a reserved matter. It is also true that those international agreements will touch on things whose implementation may be a devolved competence, fisheries being a classic example; the environment may be another. It is right that the UK lead negotiator should be fully cognisant of the specific interests and concerns of the devolved Governments. To take the obvious example, there is the fact that to reflect an international agreement in Scots law will require something different from reflecting it in English law. It is right that the UK lead Minister should give devolved Ministers an opportunity to seek to influence the UK negotiating position.°

It will be for individual legislatures to determine how best to scrutinise the actions of their executives in relation to international agreements. As we noted in our report, for parliamentary scrutiny of treaties to be effective, the UK Government must provide information on the opening and progress of negotiations and sufficient time for scrutiny at the conclusion of agreements. We concluded that a new structure, in the form of a treaty scrutiny committee, was required at Westminster and that existing processes – if operated consensually with the UK Government – should form the basis for scrutiny of treaties. A

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° Constitution Committee, Parliamentary Scrutiny of Treaties, Uncorrected oral evidence, 30 January 2019, Q 94
starting point for scrutiny might therefore be the seeking of commitments from Scottish ministers to report on treaty negotiations and texts to the Scottish Parliament, and developing structures and processes for the Parliament to scrutinise them.

**Common UK frameworks which the UK Government and the Scottish and Welsh Governments agree will be needed post-Brexit**

In our report on the European Union (Withdrawal) Bill (now the 2018 Act), we concluded that:

- The agreement of common frameworks is essential to ensure that those areas that are currently governed by EU law return to the UK in a way that both maintains a common UK approach where needed and respects the principles of the territorial constitution. Securing such agreement will also help assuage concerns over the possible ramifications of clause 11 and may help secure legislative consent to the Bill by the devolved legislatures. It is important that all parties to the negotiations have similar incentives and work constructively to reach an agreement on the approach to common frameworks. We urge the UK Government and the devolved administrations to seek swift and tangible progress towards such frameworks in their negotiations.

- Effective inter-governmental relations are essential to achieve a smooth transfer of competences from the EU level to the devolved administrations and to agree new common UK frameworks. We urge the Government and the devolved administrations as a matter of urgency to work cooperatively to improve the operation of the Joint Ministerial Committee as the primary forum for these discussions.

We believe that, in line with the principles agreed between the UK Government and the devolved administrations, the consent of the UK Parliament and the devolved legislatures should be sought for establishment of a common framework in a particular policy area and for the content of that framework. The legislatures will be able to scrutinise the legislation to implement common frameworks and the non-legislative actions taken by respective ministers using their existing scrutiny processes. In practice, common frameworks will only function and be perceived as legitimate if they are approved in all parts of the UK and we therefore expect the respective governments to agree frameworks and bring them to the legislatures with the recommendation that they consent. In order to influence the development of such frameworks, parliamentarians and committees may wish to seek regular reports from their ministers on the negotiations of the frameworks and to scrutinise ministers’ actions and decisions.

Thank you again for your letter and we look forward to the findings of your inquiry.

Yours sincerely,

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Chairman of the Constitution Committee