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Dear Bruce,

Thank you for your letter of 10 August inviting me to set out the Scottish Government's views on the European Union (Withdrawal) Bill and connected matters. The Bill is a significant constitutional event, every bit as much as the Bill that introduced EU law into the UK's legal systems in 1972 and those that established the devolution settlements in 1999. The work that the Scottish Parliament will have to do because of the Bill, and its effect on the Scottish Parliament's competence, will be significant and profound. I therefore welcome the Parliament's pro-active and in-depth engagement with these issues, including the evidence already taken by the Finance and Constitution Committee. I look forward to giving evidence to your Committee on 20 September, where I will be able to expand on the points in this letter. These issues will also be covered in the legislative consent memorandum on the Bill that the Government will be lodging shortly.

The European Union (Withdrawal) Bill

You have asked for a more detailed statement of the Scottish Government's views on the appropriate mechanisms for making UK secondary legislation with an impact on devolved responsibilities. As you are aware, the Bill contains a suite of powers designed to address the considerable range of deficiencies in legislation, reserved and devolved, that will arise as a result of EU withdrawal. The Bill gives powers to Ministers in the UK Government and to Scottish Ministers to address these deficiencies. However the powers given to Scottish Ministers are unacceptably limited compared with the broad powers given to the UK Government. A whole category of EU law – directly-applicable instruments – is put beyond the power of Scottish Ministers to amend, even when the subject matter of the law is an entirely devolved matter (such as agriculture or the environment) and where the devolved institutions, structures and circumstances in Scotland are entirely different to those in the

rest of the UK (such as justice, where Scotland's separate legal system could require a different change to be made). Policy decisions to correct deficiencies in these devolved areas are properly a matter for the Scottish Government and Parliament, but the effect of the Bill will be to give only UK Ministers powers to make statutory instruments implementing these changes, which will not be subject to any formal requirement for agreement by devolved institutions.

As you note, the Bill also contains, in clauses 7, 8 and 9, wide powers allowing the UK Government to make changes to laws to address deficiencies caused by EU withdrawal, to implement international obligations on withdrawal and to give effect to the terms of the withdrawal agreement, including in areas of devolved competence. If UK Ministers use these powers to make changes to matters within the responsibility of the Scottish Parliament, the Bill again provides no formal involvement of any devolved institution: neither the Scottish Parliament nor the Scottish Ministers.

You have also asked for our views on the Bill's approach to the repatriation of powers currently exercised by the European Union.

Clause 11 of the Bill provides that where a rule or policy area is covered by EU law on the date of withdrawal, then it will, after withdrawal, become part of retained EU law and will be put beyond the competence of the Scottish Parliament. This scheme will apply regardless of whether the policy area is one of those that were devolved to the Scottish Parliament when it was established in 1999 or since. This is contrary to the approach of the devolution settlement, in which matters not explicitly reserved are devolved to the Parliament.

The way the Bill is drafted means that the UK Government accepts that the natural legal consequence of leaving the EU is that the requirement to act compatibly with EU law is lifted from the Scottish Parliament and Government, with new decision-making powers allocated according to the devolution settlement. If that weren't the case, no new restriction would be required.

On the Bill's introduction, the First Minister set out in a joint statement with the First Minister of Wales that we consider this is a power grab by the UK Government. The Bill frees the UK Parliament and Government from the requirement to comply with EU law, but then applies a new restriction on the Scottish Parliament and Government requiring compliance with a new category of law, "retained EU law", even as that body of law changes after withdrawal. This will make a stable system of devolution difficult to operate. This new restriction will make it difficult to work out what is and is not within the powers of the Scottish Parliament, and even more difficult as time passes after withdrawal. Even where we use the powers in the Bill to fix a problem caused by withdrawal (perhaps by giving EU functions to a Scottish authority), the new restriction means that we will not be able to further modify that law after withdrawal.

The Bill would therefore make the UK Government and UK Parliament the sole successors to the EU, with an increase in the involvement of UK institutions in currently devolved areas.

The Scottish Government considers that no new limitation on devolved power is required as part of EU withdrawal, and that the powers currently exercised at the EU level should, on withdrawal, fall to be exercised by the Scottish and UK Parliaments in accordance with the well-understood and established scheme of devolution set out in the Scotland Act 1998. We share our position on this with the Welsh Government and we have been consistent. In *Scotland's Place in Europe* (December 2016), we said:

Matters no longer subject to EU law are the responsibility of the Scottish Parliament where they concern devolved areas such as agriculture, fisheries, education, health, justice and environmental protection. In these areas decisions on the replacement of the rights and protections provided by EU law to Scottish citizens will be for the Scottish Parliament. There must be no attempt to reserve these matters... (Paragraph 176)

The Scottish Government is now working with the Welsh Government on amendments to address these and other concerns both governments have with the Bill.

UK-wide frameworks

The Scottish Government has always accepted that the case may be made for a common approach across the UK on withdrawal from the European Union, in some areas. In *Scotland's Place in Europe* we noted that:

Where there may be a need to devise a cross-border framework within the UK to replace that provided by EU law, for example in relation to animal health, that should be a matter for negotiation and agreement between the governments concerned, not for imposition from Westminster. (Paragraph 179)

The European Union (Withdrawal) Bill, as currently drafted, makes the reaching of such agreement difficult, perhaps impossible since, as set out above, it reserves to the UK Government alone the power to impose a UK-wide framework, even in a devolved area such as agriculture or fisheries.

It is not necessary for the UK Government to reserve these matters in order to ensure that there can be, where it is agreed that it is necessary, a common UK-wide approach on withdrawal from the EU. There is nothing that would prevent – and a lot that supports – agreement on a framework using well-established and successful forms of co-operation: namely legislation (in multiple parliaments or with legislative consent), by executive action, or by memorandum of understanding. However, frameworks must respect the devolved settlements, meaning that they must not constrain the legislative competence of the Scottish Parliament nor interfere with the democratic accountability of the Government to the Parliament.

The Scottish Government and the Welsh Government have made clear our willingness to take forward consideration of areas for such co-operation. Discussions are currently underway to seek to agree the principles required to underpin that consideration.

Inter-governmental relations and the JMC

As you noted in your letter, both the Scottish Government and the Welsh Government have written to the UK Government on several occasions requesting that meetings of the JMC Plenary and JMC (EN) be convened. We have received no written response to these requests, and no meetings have yet been arranged. We believe that the UK Government are attempting to identify potential slots for a meeting of the JMC (EN) in the week beginning 16 October, but we have heard nothing further. In the interim, the UK Government have published numerous position papers and are participating in negotiations with the EU without any meaningful involvement of the devolved administrations in the development of negotiating positions for the whole of the UK. This is clearly unacceptable.

You will also be aware that our experience to date of the JMC (EN) has been deeply unsatisfactory, both in process terms, and in the quality of the discussion which has taken place. It is obvious that the current inter-governmental mechanisms are not operating in the way that was envisaged. We have made it clear to the UK Government that the JMC (EN) requires to be reset. In a joint letter, Mr Drakeford and I set out various practical suggestions to this end. However, the fundamental change required remains a shift in attitude from the UK Government without which little improvement will be possible.



MICHAEL RUSSELL