



The Scottish Parliament  
Pàrlamaid na h-Alba

### Finance and Constitution Committee

Lord Boswell of Aynho  
Chairman  
European Union Committee  
House of Lords  
London  
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By email

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Dear Lord Boswell of Aynho,

Thank you for your letter of 19 July regarding your Committee's report on *Brexit: devolution* and proposal for a meeting in October for representatives involved in scrutinising Brexit to meet at Westminster to discuss issues of common interest. The Deputy Convener of the Committee and myself look forward to attending the meeting.

As you will be aware, the Finance and Constitution Committee of the Scottish Parliament is the lead committee with regard to the consideration of legislative consent and the European Union (Withdrawal) Bill within the Scottish Parliament. The report of your Committee on the impact of Brexit upon the devolution settlements of the constituent parts of the United Kingdom considers many of the issues which we are considering. To date, the Committee has focussed its scrutiny on the following issues:

- The appropriateness of the powers proposed in the European Union (Withdrawal) Bill for UK Ministers and Scottish Ministers including the proposed power for UK Ministers to make changes to law in devolved areas without any formal mechanism for accountability to the Scottish Parliament;
- The impact of the approach proposed in the Bill for repatriating powers which are currently competences of the European Union upon the legislative competence of the Scottish Parliament with particular regard to the impact of Section 11 of the Bill upon the devolution settlement;
- Whether there is a need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment; the appropriateness of the arrangements proposed for reaching agreement on common frameworks proposed by the UK Government; and alternative

models for discussing, agreeing and operating any common frameworks that may be required;

- The suitability of current inter-governmental relations structures for a post-Brexit environment, and alternative processes and structures that may improve the effectiveness of intergovernmental relations, in light of the process of EU withdrawal and the development of common frameworks;
- Mechanisms that could be put in place to ensure that the Scottish Parliament has sufficient oversight over the process of negotiating, legislating for and implementing Brexit, and of the exercise of powers conferred on Scottish and UK Ministers by the European Union (Withdrawal) Bill; and
- Mechanisms, such as Schedule 7 of the Scotland Act 1998, which could provide a means of ensuring that the Scottish Parliament's consent is required for the making of UK secondary legislation which impacts upon devolved legislation.

I have attached, as an annexe to this letter, the Committee's most recent correspondence with the Scottish Government on these issues which provides an overview of the current position with regard to these issues. I trust that this letter is helpful in providing you with an overview of the priorities of the Finance and Constitution Committee with regard to scrutiny of the European Union (Withdrawal) Bill.

I look forward to meeting you in October.

Yours sincerely,

**Bruce Crawford MSP**  
**Convener**

**Letter from Convener to Minister for UK Negotiations on Scotland's Place in Europe dated 10 August 2017**

Dear Michael,

Thank you for your recent evidence to the Committee on 28 June. As you are aware, the Committee has taken evidence recently on the issue of legislative consent in relation to the European Union (Notification of Withdrawal) Bill and the concepts of a UK internal market and UK common frameworks, and the potential implications of these concepts for the devolution settlement.

Separately, the European Union (Withdrawal) Bill received its First Reading in the House of Commons on Thursday 13 July 2017. The Committee will shortly publish a call for evidence on the Bill and on the expected legislative consent memorandum.

There are a number of areas where the Committee would welcome additional information from the Scottish Government following your evidence on 28 June. This information will assist the Committee in its scrutiny of the European Union (Withdrawal) Bill and in deciding what further evidence it would wish to have from the Scottish and UK Governments about the impact of the UK's withdrawal from the EU on the devolution settlement.

Firstly, much of the Brexit-related legislation is expected to be secondary legislation. The Committee heard evidence that the Sewel Convention has not been treated as being formally engaged by the making of secondary legislation. However, the Committee heard views that there are alternative mechanisms which could be used to ensure that any secondary legislation made by the UK Government in relation to Brexit that has implications for the devolution settlement would require the consent of the Scottish Parliament. Professor Tierney highlighted the powers in Schedule 7 of the Scotland Act 1998 as a possible mechanism. In addition, you noted in evidence to the Committee a procedure created by the Public Bodies Act 2011.

The Committee would welcome a more detailed statement of the Scottish Government's views on the mechanisms which could provide a means of ensuring that the Scottish Parliament's consent is required for the making of UK secondary legislation which impacts upon devolved responsibilities. In addition, the Committee would welcome information on the Scottish Government's views on the appropriateness of these mechanisms.

Secondly, the Committee would welcome further information from the Scottish Government on the approach proposed in the Bill for repatriating powers which are currently competences of the European Union and the implications of this approach for the devolution settlement in Scotland. It would also be useful to receive further information in relation to whether common frameworks may be required and, if so, how these should be governed, and effective ways to manage the broader intergovernmental relationships after Brexit. We would also welcome an update on the formal and informal discussions the Scottish Government has had on these issues with the UK Government.

Thirdly, the Committee would also appreciate further information on the position of the Scottish Government with regard to the intergovernmental structures which in its view should underpin the Brexit process, with respect to the process of withdrawal, as well as deliberation, agreement and governance of UK 'common frameworks'.

We note the letter sent jointly by you and the Welsh Cabinet Secretary for Finance, Mark Drakeford, on 15 June on the practical steps that could be taken to improve intergovernmental coordination, including the resumption of the JMC (EN), with a forward programme of regular meetings.

We also note the joint letter of the Scottish and Welsh First Ministers requesting a meeting of the JMC Plenary. We would welcome an update on any response received to these requests, and of plans for intergovernmental discussion going forward. We also note that the Explanatory Notes accompanying the European Union (Withdrawal) Bill included a commitment by the UK Government to begin intergovernmental discussion, led by the First Secretary of State, Damian Green, on UK common frameworks immediately after the Bill's introduction. We would welcome an update on the Scottish Government's position on, and participation in, such discussions.

Finally, the Committee has noted the contribution of the Welsh Government in its paper on Brexit and Devolution. This included some consideration of where there may be a need for 'shared governance frameworks', and how these and other intergovernmental interdependencies can be overseen by the governments working cooperatively. The Committee has also heard evidence from witnesses on intergovernmental structures that operate in other European countries notably Belgium, Germany and Spain.

Yours sincerely,

Bruce Crawford MSP  
Convener

## **ANNEXE C:**

### **Letter from Minister for UK Negotiations on Scotland's Place in Europe to Convener dated 1 September 2017**

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