



The Scottish Parliament  
Pàrlamaid na h-Alba

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Dear Mr Robertson

**Work of the Scottish Parliament-Scottish Government Officials' Joint Working Group on Post-Brexit Scrutiny Issues**

Thank you for your letter of 23 April on the above matter. In the spirit of contributing to a shared assessment of where things currently stand, I have set out below the Committee's view on the issues you raised, including where we think progress can be made.

UK Internal Market Act 2020 Exclusions Process

As you will be aware, in our [report on our UK internal market inquiry](#), the Committee made the following recommendation:

“The Committee welcomes the inter-governmental agreement on a process for seeking exclusions from the market access principles. The Committee notes, however, that there is very little detail in the public domain in relation to how this will work. The Committee recommends the need for clarity in the following areas –

- Is the process intended as a means of managing policy divergence before regulations are adopted?
- What criteria will be used in assessing exclusions and how will this balance the priority within devolution for regulatory autonomy with open trade?
- If an exclusion cannot be agreed whether the matter may then be resolved through the IGR dispute resolution process?
- How the process will provide certainty and clarity for businesses and consumers?”

The Scottish Government responded that:

“Where an exclusion from the provisions of the UK Internal Market Act is necessary to ensure the policy effect of devolved legislation, that will be made clear by the Scottish Government to the Scottish Parliament, in order to allow for proper consideration of the exclusion by interested parties.”

Your letter of 23 April states:

“While the IMA remains in force however, my officials have been scrupulous in notifying the Scottish Parliament of matters where an IMA exclusion is being proposed, and in providing timely updates. I and my officials would be happy to consider any proposals for increasing the opportunity for Parliamentary scrutiny and to improve information flows – although as I have described, the Scottish Government has limited visibility of UK Minister’s consideration of the exclusions process.”

The Committee welcomes the information that the Scottish Government has been providing on UK Internal Market Act 2020 (UKIMA) exclusions to date. We also thank you for this offer to consider any proposals for increasing the opportunity for Parliamentary scrutiny. **Annexe A** sets out a proposal for a suggested process on which we would welcome your views.

The key differences between this proposal and the manner in which information has been provided to the Parliament to date are:

- The Parliament is not routinely being given advance notice of the intention of the Scottish Government to seek an exclusion which is sufficient to allow it to consider the position
- The Parliament is not routinely being given information on the scope of exclusions being sought
- The Parliament is not routinely given information on how any exclusion agreed differs to the exclusion sought, including on scope.

While the Committee appreciates the impact of intergovernmental dynamics on exclusion issues, it appears to us that providing the information above would be within the Scottish Government’s gift.

**The Committee would therefore welcome a response from the Cabinet Secretary setting out the Scottish Government’s position on the specific process for the provision of information on, and scrutiny of, proposed exclusions to the market access principles of UKIMA that is set out in Annexe A.**

#### Annual Reporting on Common Frameworks and the DLUHC Evaluation

The Committee welcomes the agreement that was reached, in response to our recommendation in our report on our Internal Market Inquiry, on the information the

Scottish Government will provide in supporting documents relating to any impact on common frameworks.

With this in mind, the Committee considers the outstanding issues in relation to common frameworks to be:

- fulfilment of reporting required under individual frameworks
- annual reporting on the operation of common frameworks.

The Committee appreciates the reasons for the delays in frameworks being agreed and implemented and welcomes the commitments that have been made to annual reporting.

**The Committee would be grateful if the Cabinet Secretary could confirm when a decision will be made by governments on the level of reporting which will be made to the Scottish Parliament and other legislatures on common frameworks on an annual basis. It would also be helpful to get an update on what such reporting is likely to include.** We note that your letter states:

“An outline of the anticipated data that would be collected on individual frameworks to inform an annual report on the operations of frameworks was provided to the Interministerial Steering Committee last year.”

**The Committee would also be grateful if the annual reports on the Hazardous Substances Planning common framework could be shared with the relevant subject committee in due course.** We note that these are likely to be ‘concise’.

#### Statutory Instrument Protocol Review

The matter officials have considered in relation to the review of Statutory Instrument Protocol 2 (“the protocol”) fall into two categories: the scope of the protocol and operational matters.

#### **Scope**

In relation to the scope of the protocol, the conclusions set out below are shared by the Constitution, Europe, External Affairs and Culture (CEEAC) Committee, and the Delegated Powers and Law Reform (DPLR) Committee (“the Committees”).

The Committees note that over the course of the review, agreement was reached that powers in three new Acts should be added to Annex A of the protocol:

- Ivory Act 2018
- Environment Act 2021
- Retained EU Law (Revocation and Reform) Act 2023.

New powers that could be added to Annex A are being created regularly, for example those in the Levelling-up and Regeneration Act 2023.

**The Committees have therefore delegated authority to officials to update Annex A quarterly with any new powers within the scope of the protocol that the Scottish Government agrees can be added. The Committees invite you to consider extending the same authority to your officials to ensure Annex A stays as up to date as possible.**

*Powers not within the scope of the protocol*

As you will be aware, in the CEEAC Committee report "[The Impact of Brexit on Devolution](#)"<sup>1</sup> we noted two principal limitations of the protocol:

- "first, it applies only to powers in policy areas that were formerly governed by the EU. This is because Protocol 2 was agreed at a time when the new powers that were being created were only in former EU areas. Increasingly, however, new powers for UK Government Ministers are now being conferred in devolved areas that were not formerly EU areas."<sup>2</sup>
- Second, the Protocol is only effective if the Scottish Government has a legal entitlement to withhold its consent for a UK SI to be made, that is, where a requirement for such consent is written into the power. Such a statutory consent requirement is not always provided."<sup>3</sup>

The CEEAC Committee and the DPLR Committee both take the general position that the Scottish Parliament should have the opportunity to scrutinise the exercise of all legislative powers that are within devolved competence.

In the report "[How Devolution is Changing post-EU](#)", the CEEAC Committee called for a supplementary agreement between the UK and Scottish governments on the use of delegated powers by UK Ministers in devolved areas, including:

- "A recognition of the constitutional principle that devolved Ministers are accountable to their respective legislatures for the use of powers within devolved competence; and [that]
- The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence".

The DPLR Committee's agreed general position in this regard is:

- "a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
- b) Where such powers are exercised by UK Ministers in devolved areas,

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<sup>1</sup> paragraph 167 onwards

<sup>2</sup> Paragraph 171

<sup>3</sup> paragraph 172

there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.

- c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

- d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the SI Protocol 2 where the power is within the scope of that protocol."<sup>4</sup>

This position has also received backing from lead committees on individual LCMs, for example, the Net Zero, Energy and Transport Committee in its recent [report on the Automated Vehicles Bill](#).

During the review, officials explored the possibility of extending the protocol to include all powers that could be exercised by UK Ministers in devolved areas, not only those in former EU areas. I understand from your 23 April letter that your position on this matter is that any extension to the scope of the protocol would require the cooperation of the UK Government.

**While recognising fully the Scottish Government's position that it cannot agree to extend the protocol in the absence of a commitment from the UK Government that it will facilitate this, the Committees would welcome clarification of the Scottish Government's own position in principle.**

**Would the Scottish Government agree:**

- (b) that as a matter of principle the protocol should be extended to non-former EU areas;**
- (c) that they would be willing to do so in the event that the present or a future UK Government administration agrees to facilitate this; and**
- (d) to take up this matter again with whichever UK Government administration is formed after the upcoming general election.**

In addition, whenever the Scottish Ministers are asked and decide to give consent (whether in pursuit of a statutory requirement or otherwise), the Committees consider that the Scottish Parliament should be able to hold them to account for that decision.

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<sup>4</sup> as reiterated most recently in the DPLRC report on the [Supplementary Legislative Consent Memorandum: delegated powers exercisable within devolved competence in the Data Protection and Digital Information Bill](#).

Accordingly, in instances where the UK Government seeks the consent of the Scottish Ministers for powers that are not covered by the protocol, the Committees consider that the Scottish Parliament should be informed. The Committees appreciate that, since it has not been possible to agree to extend the protocol to include these powers, a type 1 process may not be appropriate, but sees no reason why a notification in the style of type 2 could not be made. **We would therefore invite you to agree that the Scottish Government will notify the Parliament in these circumstances in the spirit of SIP2.**

More generally, as the CEEAC Committee's "How Devolution is Changing Post-EU" report highlighted, there is now a myriad of statutory and non-statutory requirements for UK Ministers to seek consent or consult with devolved Ministers or to do neither. The Committee recommended that there should be:

"a supplementary agreement on the use of delegated powers by UK Ministers in devolved areas including—

- A list of the delegated powers available (updated as appropriate) and reasoning for the level of consent/consultation being applied to each;
- The criteria for their use;
- The process for engagement between UK and devolved officials;
- The process for engagement at Ministerial level;
- How this works within the context of the Review of Intergovernmental Relations;

The Committee also recommends that the Scottish Government publishes guidance setting out the issues which officials consider when advising Ministers on consent/consultation in relation to the use of delegated powers by UK Ministers in devolved areas."<sup>5</sup>

As you are aware, the protocol applies regardless of whether there is a statutory requirement for Scottish Ministers' consent. It therefore applies to powers which do not have a formal consent/consultation requirement, but for which the UK Government has given a political commitment that it will seek the Scottish Government's consent. This is information which the Scottish Parliament cannot itself establish and which should appear on the list.

**The Committees repeat this call for the Scottish Government to produce a comprehensive list of the delegated powers which are available to the UK Government in devolved areas (and the related calls, set out above). We recognise that it would be a substantial piece of work to identify pre-exit-process powers, and therefore suggest in the first instance this list goes back to 2018.**

One final issue related to the scope of the protocol was featured in the review – the exercise of powers with a requirement to consult the Scottish Ministers. The Committees understand that the Scottish Government has provided information to the Parliament on the exercise of these powers, in a form similar to a notification under

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<sup>5</sup> paragraphs 196 and 197

the protocol. **The Committees welcome this information being provided and seeks a commitment from you to continue to provide this information in all cases. The format utilised [for notification of use of a power in the Professional Qualifications Act](#) that required consultation was useful and is what we would expect to see continued.**

**We understand that, given timing constraints, it may not be possible to notify the Parliament about a consultation in advance but the Parliament should, at a minimum, be notified when the policy position has been finalised and the SI is being made.**

The Committees are aware that the Scottish Government's [response to the DPLR Committee](#) to its report on the Economic Crime and Corporate Transparency Bill stated in relation to consultation requirements under that Bill:

“At a minimum I would hope that we would be able to share information concerning the consultation with the UK Government, including the questions asked and the Scottish Government's response”

**The DPLR Committee welcomes this intention and confirms that this is the minimum information that we would expect to see provided to the Parliament. The CEEAC Committee agrees with this position.**

## **Operational matters**

As your letter outlined, the review considered a number of operational matters including the content, quality and timing of notifications and the accuracy of forecasting. There are a number of outstanding issues in respect of operational matters which the Committee invites you to agree.

### *Content of notifications*

Firstly, on the content of notifications, the Committee recommends that the same information be provided in respect of EU alignment and other post-EU issues that the Scottish Government has committed to provide in respect of SSIs, Bills and LCMs.<sup>6</sup> Specifically, that the notification should, where relevant and appropriate, include:

- details of which EU legislation is relevant to the legislative proposals, and, where relevant, how the legislation will impact on the Scottish Government's commitment to align with EU law;
- details of whether and how proposals would result in divergence from EU law;
- the impact on access to EU markets for people, goods, and services;
- whether the market access principles in the UK Internal Market Act may impact on the policy objectives of the legislative proposal,<sup>7</sup> whether consideration has been given to seeking an exclusion and, if so, provide details;
- whether and how common framework agreements may impact on the policy objectives of the legislative proposal and, if so, provide details;

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<sup>6</sup> As set out in Guidance to Committees dated September 2023 [guidance--final.pdf \(parliament.scot\)](#)

<sup>7</sup> Given the market access provisions in UKIMA extend to many devolved policy areas this should include legislative proposals which may not impact on EU alignment.

- whether the Trade and Cooperation Agreement with the EU may impact on the policy objectives of the legislative proposal and if so provide details;
- whether other obligations (e. g. international law) act as constraints on alignment.

**Would the Scottish Government be willing to commit to providing the above information in SI notifications?**

*Annex H letters*

As your letter alludes to, at the start of the review, there was a significant backlog of “Annex H letters”<sup>8</sup>, and most were not provided within the required 28-day period.

**The Committee welcomes the progress that has been made towards clearing this backlog, and the steps your officials have taken to achieve this. We would encourage monitoring of this going forward to ensure the backlog does not build up again.**

*Consultation on significant SIs*

As you will be aware, one of the principles set out in the protocol is that the Scottish Government will, where possible, consult the Parliament on significant policy developments that are expected to make use of UK regulation-making powers on matters within devolved competence. The aim of such consultation (as set out in the protocol) is to allow the Parliament an opportunity to influence policy development, and to ensure that when an SI notification is made, the Parliament should normally already be aware of the purpose for which that SI is proposed to be made. The review identified that this is not generally being done.

**While the Committee appreciates the timing constraints that can make this difficult, the Committee nonetheless wishes to encourage the Scottish Government wherever possible to use this process, to give the relevant subject committee the maximum opportunity to scrutinise significant proposals.**

*Absence of consent*

The review also considered whether the protocol should state more clearly that the Scottish Government should send a notification to the Scottish Parliament in certain situations where the Scottish Government intends to refuse consent to devolved content being included in a proposed SI.

The Committee would draw a distinction here between “business-as-usual” inter-governmental relations where the UK Government seeks the Scottish Government’s consent, the Scottish Government refuses consent, and the UK Government does not proceed with making the devolved provision and cases where the UK Government

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<sup>8</sup> The letters the Scottish Government are required under paragraph 34 of the Protocol to produce within 28 days to advise whether the SI, as made, was consistent with the consent granted. These letters were known as “Annex H” letters under the original protocol.



seeks the Scottish Government's consent, the Scottish Government refuses consent, but the UK Government decides nonetheless to proceed. In the latter situation, legislation is being made in a devolved area and the Committee is of the view that the Scottish Parliament ought to be notified about this.

**The Committee would welcome a commitment from you to provide a notification to the Parliament in all such cases, and as soon as possible.**

#### *Dividing line between type 1 and type 2 notifications*

The review also considered whether the current line being drawn between type 1 and type 2 notifications was appropriate. In particular, it was considered whether proposals to revoke obsolete assimilated law, using the power in [section 14\(1\)](#) of the Retained EU Law (Revocation and Reform) Act 2023, and proposals to restate legislation, using the power in [section 12\(1\)](#) of the same Act would be more appropriately characterised as type 2 than type 1.

In relation to revoking obsolete instruments, the Committee considers that, although committees may not feel significant engagement with such a proposal is necessary, it would be difficult to conduct effective scrutiny if these were received after the fact. We also note that the volume of these instruments appears to be low so does not appear to raise particular workload concerns (though we recognise this could change). We therefore consider these cases remain appropriately considered as a type 1 notifications.

In relation to a proposed SI under section 12(1) that is a pure restatement involving no policy decisions, we would consider that this would already be categorised as type 2 without the need for any adjustments to the protocol.

**The Committee has therefore concluded that we do not wish to propose any changes to the dividing line at this time.** This can be reconsidered if volumes become problematic. We note that the Retained EU Law (Revocation and Reform) Act 2023 periodic reporting arrangements that have been agreed by the Scottish Government will identify if volumes are increasing so this provides one route by which we can monitor this.

Given our shared interest in respect of the Statutory Instrument Protocol, I am copying this letter with Stuart McMillan, Convener of the Delegated Powers and Law Reform Committee.

Yours sincerely



Clare Adamson MSP, Convener of the Constitution, Europe, External Affairs and Culture Committee

## **Annexe A: Process for provision of information to the Scottish Parliament on UKIMA exclusions**

- **Prior to seeking or discussing an exclusion from UKIMA Ministers should consult the relevant subject committee which should be provided with a minimum of 28 days (not including recess periods) to consult and report on the proposed exclusion; in order to facilitate this scrutiny the relevant subject Committee should be advised of the scope and rationale for the proposed exclusion;**
- **The relevant subject committee should subsequently be notified of the outcome of the discussions on the exclusion being sought or discussed within the relevant framework(s) as well as any discussions with the UK Government, the Welsh Government and the Northern Ireland Executive, including an explanation of any differences between the proposed and agreed exclusion, including differences on scope. Details should also be provided of the impact of any differences on Scottish Government policy and legislative programme.**
- **Where legislation (primary and secondary) has been introduced prior to the completion of the exclusions process this should be made clear in accompanying documents or policy note, including an assessment of the likely impact on the effectiveness of the legislation if an exclusion is not agreed wholly or in part.**
- **Parliament should not be asked to agree legislation until the exclusions process is complete and the Scottish Government has set out its assessment of the impact of the outcome on the legislation.**
- **Where legislation has been introduced after the completion of the exclusions process there should be full transparency of how this has affected the legislative proposals including whether it has impacted on the Scottish Government's policy aims and objectives.**