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Clare Adamson MSP
Convener
Constitution, Europe, External Affairs and Culture Committee
Scottish Parliament
Edinburgh
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23rd April 2024

Dear Clare,

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

As you know, Scottish Government officials and their opposite numbers in the Scottish Parliament have been working through a range of matters linked to the impact of Brexit on the Parliament's ability to perform its vital scrutiny function. Many of these matters have of course been considered by your committee, not least in last year's excellent report on Brexit's impact on devolution.

While this officials' level work is progressing well, I thought it would be useful to set out where, in the Scottish Government's view, matters currently lie on a range of issues under consideration by our officials. This may contribute to a shared assessment of where things currently stand, and identify where we consider progress can be made in the short term, and where wider change may be a necessary precondition for substantive progress.

IMA Exclusions Process

As the Committee is aware, amendments were made late in the parliamentary passage of the Internal Market Act (IMA) to allow for policy divergence agreed through a Common Framework to be excluded from the Act's effect. An agreed process for achieving this was published a year later.

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To date, we have seen a successful exclusion from the Act, in respect of Scottish single use plastics regulations, although the process took longer to complete than was necessary. More recently, despite the Scottish Government following the agreed process to the letter in respect of Scotland's Deposit Return Scheme, the UK Government, after significant and unnecessary delay, would only allow for a temporary and limited exclusion which rendered the scheme effectively unviable in its intended form.

A proposed exclusion for a provision lying outside a Common Framework policy area – a ban on the sale of Glue Traps in the recently passed Wildlife Management and Muirburn (Scotland) Act 2024 – was blocked by the UK Government in late March, the decision coming after the Scottish Parliament had unanimously passed the relevant measures, and despite a Scottish sales ban entailing a negligible impact on the operation of the UK's internal market.

In both the DRS and glue traps cases the UK Government failed to provide an adequate and detailed explanation of the rationale for its decision, undermining further effective Parliamentary scrutiny.

Timing: the Committee has raised the question about the timing of the exclusions process, specifically whether the process is intended to be completed before regulations are adopted. The answer, in the Scottish Government's view, is yes.

Again, the Glue Traps episode is instructive. As noted, this matter lies outside a frameworks policy area, but a parallel process of timely notification and provision of evidence was followed. After a period of some six months without any detail on the steps the UK Government was taking to consider the matter, a decision was finally communicated but only after the Scottish Parliament had unanimously backed the relevant provisions in early March.

Assessment criteria for exclusions, and how will this balance the priority within devolution for regulatory autonomy with open trade: for as long as the Internal Market Act remains in force, the best starting point for balancing regulatory autonomy with open trade remains the Common Frameworks Statement of Principles agreed at JMC (EN) in October 2017. These are, after all, the principles that the exclusions process is supposed to uphold. Properly adhered to, these would provide a degree of proportionality and balance.

As the Scottish Government noted in its response to the Committee report in December 2023, a wholesale change in the approach of the UK Government, and a commitment to recognise and abide by agreed processes and rules, is a necessary precondition to mitigating some of the IMA's more egregious defects, for as long as the Act remains in force.

Disputes: the Committee asks if an exclusion cannot be agreed, can the matter then be resolved through the IGR dispute resolution process. There is a dispute resolution mechanism in common frameworks with scope for escalation into wider IGR structures.

Certainty and clarity for businesses and consumers: these considerations are bound up in the points made above. Timely, transparent, proportionate and evidence-based outcomes allow citizens, consumers and business to be clear on the effect of proposed laws. Just as importantly, it ensures the Scottish Parliament can have confidence as to the legal effect of draft laws it is tasked with scrutinising.

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Consultation and scrutiny: the Committee has also noted that there is no requirement for public consultation or parliamentary scrutiny of the process for seeking an exclusion, nor a requirement for proposed exclusions to be made public. It contrasts this with the approach at EU level, where there is a public consultation on notifications by a Member State of draft proposals for regulatory divergence during a standstill period (usually 3 months).

It is hard to overstate how far we currently are from the type of structured, transparent and predictable mechanisms in place at EU level. The IMA is fundamentally incompatible with such an approach. 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.

Annual Reporting on Common Frameworks and the DLUHC Evaluation

Several Common Frameworks (Hazardous Substances Planning; Animal Health and Welfare; Nutrition, Labelling and Compositional Standards, Food and Feed Safety and Health) have formal reporting requirements outlined in their Framework Outline Agreement. At their time of publication, it was not expected that provisional frameworks would include details of reporting beyond acknowledging any statutory requirements, whilst discussions remained on-going between the four governments on the approach for annual reporting on the operations of frameworks at the programme level.

As Common Framework move towards finalisation, following scrutiny in all four UK legislatures my officials will ensure that any annual reporting arrangements at the programme level are aligned with, and do not duplicate, any of the specific reporting requirements currently detailed within the frameworks.

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 year³. The formal frameworks reporting process will be established on full implementation of the frameworks, noting that this will be a retrospective review of activities over the reporting period, and therefore SP committees will have already been made aware of any significant policy developments within frameworks through proactive notification by the Scottish Government.

The Hazardous Substances Planning (HSP) Framework requires the policy team to provide a report after the first 12 months following its full implementation. Although this was drafted at official level in 2022, it had not proceeded beyond this point. The policy team are in the process of rectifying this and will also provide a further update for the intervening period, in line with the reporting methodology presented to the IMSC last year, although with this being an area of expected low divergence, we expect these will be concise reports.

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DLUHC commissioned a UKG-only evaluation of common frameworks in late 2022. Since then, DLUHC analysts have undertaken a programme-wide exercise to gather core data from policy teams, followed by a number of more in-depth case studies on individual frameworks through interviews with the relevant policy leads in each government. The data gathering is expected to conclude shortly, with a final report expected to be published later in the year. Clearly, while Scottish Government officials have contributed to the data gathering exercise, the evaluation will set out the views of the UKG.

Statutory Instrument Protocol Review

This protocol sets out the process for obtaining the approval of the Scottish Parliament to the Scottish Ministers consenting to the exercise, by UK Ministers, of certain powers to make provision by way of statutory instruments that is within devolved competence. The first iteration related to specific regulation-making powers under the European Union (Withdrawal) Act 2018. The second iteration, known as SIP2, applies to a slightly broader set of powers connected to the UK's withdrawal from the EU.

The Protocol provides that its operation will be kept under review. Scottish Government officials and Scottish Parliament officials have exchanged views relating to the Protocol, beginning with Parliament officials' paper of September 2022. Government officials most recently set out positions in relation to the Protocol in a paper of March 2024.

Both the CEEAC Committee and the DPLR Committee have considered the Protocol, and there are issues of practice and of constitutional significance. Practical issues include timing, as the Protocol provides for a 28 day period within which the Scottish Parliament should be able to consider and respond to the Scottish Government's request for approval. However, notifications have on occasion been made with less notice, often because UK Government seek the consent of the Scottish Government at shorter notice than this.

Similarly, issues were raised by the Parliament about the accuracy of forthcoming notifications, and the Scottish Government has confirmed that forward look information is drawn from UK Government officials, and that the Scottish Government has no control over the fluctuation in their forecast. Issues within the Scottish Government's gift are being worked on: for example, letters submitted at the end of a notification process were outstanding. The Scottish Government has reduced that backlog from 80 letters to less than half that amount, with progress continuing. Officials will continue to consider best practice.

The CEEAC Committee's report "How devolution is changing post-EU" includes recommendations relating to constitutional policy. The Scottish Government recognises the issue of UK ministerial powers beyond the scope of this Protocol. The report sets out the range of models that the UK Government has put in place in different pieces of legislation since 2016. The Scottish Government is aware of the complexities that these developments have introduced in relation to the provision of information to the Scottish Parliament, and for ensuring proper scrutiny of matters within devolved competence. However, the cooperation of the UK Government would be required to extend this Protocol to any broader range of powers.

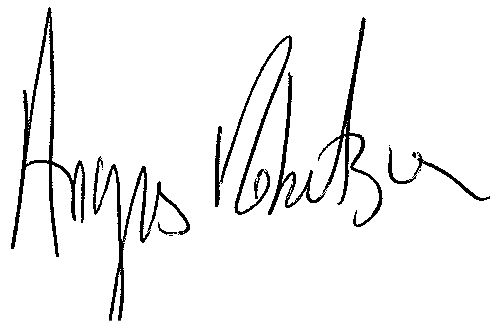
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Written Agreement on Intergovernmental Relations

I welcome that the CEEAC Committee has commissioned an academic review of the scope and implementation of the Written Agreement by Professor Nicola McEwen and Dr Coree Brown-Swan. My officials are engaging with the review , and I look forward to its conclusions and recommendations expected later this year,

Given the shared interest in some of these matters, particularly in respect of the Statutory Instrument Protocol, I am sharing this letter with Stuart McMillan, Convener of the Delegated Powers and Law Reform Committee. I am also copying to the Deputy First Minister and the Minister for Parliamentary Business.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Angus Robertson', written in a cursive style.

Angus Robertson

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