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## **Constitution, Europe, External Affairs and Culture Committee**

# **The Impact of Brexit on Devolution**



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# Constitution, Europe, External Affairs and Culture Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) the Scottish Government's EU and external affairs policy;
- (b) policy in relation to the UK's exit from the EU;
- (c) the international activities of the Scottish Administration, including international development; and
- (d) any other matter falling within the responsibility of the Cabinet Secretary for the Constitution, External Affairs and Culture and any matter relating to inter-governmental relations within the responsibility of the Deputy First Minister.



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# Introduction

1. In our report on the UK internal market we identified a number of interrelated tensions arising from and/or exacerbated by the UK leaving the European Union (EU). This included increased tension within the devolution settlement. The Committee has sought to explore the impact of Brexit on devolution in more detail through holding a series of roundtable evidence sessions covering the following areas—
  - Legislative Consent after Brexit;
  - Implementation of the UK-EU Trade and Co-operation Agreement;
  - Implementation of the Protocol on Ireland/Northern Ireland;
  - Retained EU law;
  - Intergovernmental relations.
2. The Committee thanks our Advisers and all those who participated in the roundtable discussions and who provided written submissions.
3. As noted by our Adviser, Dr Chris McCorkindale, Brexit “has posed a number of significant challenges to the effective functioning of the UK constitution.” In his view, “territorial tension has been exposed and exacerbated by the relatively weak constitutional safeguards for devolved autonomy and the relatively weak mechanisms that have existed for shared governance as between the UK and the devolved institutions.”<sup>1</sup>
4. The Institute for Government (IfG) point out that Brexit has “opened up new space for disagreement in the many important policy areas previously subject to EU law.”<sup>2</sup>
5. In our report on the UK internal market we highlighted the tension which can exist between open trade and regulatory divergence within the constituent parts of an internal market.<sup>3</sup> In this report we explore this *divergence dynamic* in more detail.
6. The Committee firstly examine the extent to which regulatory divergence is limited both within the UK internal market and between the UK internal market and the EU single market. In the next section of the report we then examine the extent to which devolution needs to evolve to accommodate the possibility of different policy and legislative priorities within the four parts of the UK. This is challenging given the complex interplay of devolved regulatory powers with UK regulatory powers and international agreements and trade deals with the EU and other countries.

## Regulatory Divergence

7. While the UK was a member state of the EU the options for significant regulatory divergence within the four parts of the UK in devolved policy areas within EU competence such as animal health, food safety and the environment was minimal due to the statutory obligation on the UK to comply with EU law. Outside of the EU this obligation no longer applies. This means that it is now possible for a much higher level of regulatory divergence both *within* the four parts of the UK and *between* the UK and the EU.
8. The starting point for this discussion is the future relationship between the UK and the EU which is primarily based on the [EU-UK Withdrawal Agreement](#) (including the [Protocol on Ireland and Northern Ireland](#)) and the [EU-UK Trade and Co-operation Agreement](#) (TCA). While the Committee recognises there is an on-going dispute between the EU and the UK on the implementation of these agreements the focus of this report is on the impact of the agreed text on devolution rather than to speculate on the outcome of the dispute.

## Trade and Co-operation Agreement

9. Professor Paul Craig points out that during the TCA negotiations there was considerable disagreement “as to the extent to which the UK should be bound by EU standards post-Brexit.” In his view the outcome was “something betwixt” the hard-line EU position that the UK should have to follow EU rules and the hard-line UK position that it should be free to adopt whatsoever rules it wished.<sup>4</sup> The key principle is non-regression.
10. As the Committee noted in our report on the UK internal market, the TCA includes commitments to non-regression in environmental standards, labour rights and social responsibility in a way which impacts on trade and investment. In this way the TCA seeks to establish a level playing field between the EU and the UK. However, it is important to note that divergence is allowed under the TCA.
11. Some of our witnesses highlighted that divergence may occur in various ways. Dr Fabian Zuleegtold us that “first of all, there is inherent divergence” arising from when “the UK and EU markets separated, and divergence in that respect implies the sort of friction that we have already seen at the borders.” He also highlights the level of divergence arising as a consequences of developments at an EU level which is “changing very rapidly, and some of those changes are affecting certain areas that are relevant to the TCA.” While the TCA contains a mechanism for dealing with divergence, his view is that “the process can be very lengthy and cumbersome.”<sup>5</sup>
12. Professor Catherine Barnard points out that there “are active and passive divergences” with the former occurring when “the UK, for example, deliberately decides to do something that is different from EU policy choices—gene editing is a good example of that.” Passive divergence occurs on an on-going basis when, for example, “the UK does not keep up with EU rules because, of course, we are no longer obliged to do so.”<sup>5</sup>

13. Professor Craig points out that while formally binding strict dynamic equivalence provisions were not acceptable to the UK, this “should not detract from the substantive and remedial TCA obligations.” In his view the TCA “embodies substantive obligations that limit the UK’s control over these areas in a post-Brexit world.”<sup>4</sup>
14. Professor Ian Forrester points out that the TCA “does not prescribe how technical disagreements will be addressed.” He can see “hundreds of areas where there will be potential conflicts about matters that seem obscure but which are driven by experts and, ultimately, touch the environment, animal welfare and many other topics.”<sup>5</sup>
15. Some of our witnesses also highlighted the impact on the UK economy of divergence from EU regulatory standards. Dr Zuleeg told us that “as long as there is an economic relationship, what is decided in Brussels matters hugely to the UK economy and UK businesses.”<sup>5</sup> Professor Barnard remarked, while “from the UK Government’s point of view, it is free to do what it likes and does not need to co-operate with the EU”, tensions arise as “supply chains are still closely interconnected with those of the EU”.<sup>5</sup>
16. Professor Barnard points out that UK manufacturers “have to comply with provisions of EU law” because if they did not, they would not be able to sell through a supply chain into the EU. In her view if divergence engages the level playing field provisions “it might have the effect of stopping our goods and services getting on to the EU market.”<sup>5</sup>
17. Professor Barnard also emphasises the difficulty in tracking down exactly what is happening at EU and UK levels to see where divergence is occurring. She asks, “what is the mechanism for checking whether there is divergence” and “are we properly checking the hundreds of statutory instruments that come from the Government?” In her view this “is a particular issue, because if there is a lack of awareness that a particular regulation may trigger the level playing field mechanism, we might accidentally trigger the mechanism.”<sup>5</sup>
18. **The Committee notes that there is a real lack of clarity regarding the extent to which the TCA non-regression principle and level playing field provisions may limit the level of regulatory divergence between the EU and the UK. It is also unclear whether access to the EU single market for businesses in Scotland and the rest of the UK may be impacted if divergence engages the terms of the level playing field provisions.**
19. **The Committee has also previously noted the risk of a lack of transparency and Ministerial accountability in the operation of the TCA. In our report on the UK internal market we recommended that “a formal parliamentary process needs to be developed in relation to the communication to the relevant subject committee of binding decisions of the Partnership Council and the Specialised Committees which relate to matters within devolved competence.”<sup>3</sup>**

## Protocol on Ireland/Northern Ireland

20. The Protocol on Ireland/Northern Ireland (“the Protocol”) is part of the EU-UK Withdrawal Agreement. It sets out special arrangements for Northern Ireland to protect the Belfast/Good Friday Agreement, to avoid a hard border on the island of Ireland and to protect the integrity of the EU’s single market. It came into effect on 1 January 2021 but is yet to be fully implemented.
21. Northern Ireland remains part of the UK customs territory but is subject to the EU customs code, EU VAT rules, EU Single Market regulations for goods, EU state aid rules and EU regulations relating to electricity supply and energy markets.<sup>6</sup>
22. Under Article 13(3) of the Protocol, instruments of EU law listed in Annexes to the Protocol apply ‘as amended or replaced’ to the UK in respect of Northern Ireland. 338 EU acts were initially listed in the Protocol and its Annexes. Dr Lisa Claire Whitten points out that since then a number of changes have been made to the list and “the number of EU acts that apply in post-Brexit Northern Ireland has decreased since the Protocol entered into force.”<sup>7</sup> As indicated in Table 1 below, “as of 1 January 2022, 312 EU regulations, directives and decisions applied; 26 less than when the Protocol was first agreed in October 2019.”<sup>7</sup>

**Table 1: Changes in EU acts listed in the Protocol**

Annex	Area	Regulations, Directives, Decisions*		
		October 2019	July 2021	January 2022
1	Individual Rights	6	6	6
2	Trade in Goods	287	262	261
3	VAT and Excise	19	19	19
4	Single Electricity Market	7	7	7
5	State Aid	19	19	19
<b>Total</b>		<b>338</b>	<b>313</b>	<b>312</b>

*EU acts listed in the Annexes to the Protocol on Ireland/Northern Ireland* Change during first year of Protocol’s implementation (2021) compared to when Protocol was agreed in October 2019

\* Not included are the small number of EU treaty articles referenced in the Articles of the Protocol, ‘soft law’ texts (e.g., commission communications) included in Annex 5, and two unspecific provisions noted in Annex 3 of the Protocol.

Source: Dr Lisa Claire Whitten<sup>7</sup>

23. As these EU legal instruments are updated/amended, these changes automatically apply in Northern Ireland. As Dr Whitten points out, “the UK must keep Northern Ireland aligned with any changes made to the EU legal instruments included within the scope of the Protocol.”<sup>6</sup> She explains that the “dynamic alignment of Northern Ireland to roughly 300 EU law instruments under the Protocol means that UK-EU divergence over time will, by default, result in GB-NI divergence.”<sup>7</sup> This brings consequences in terms of the rules that apply in NI, for production and for sale. As standards in the rest of the UK diverge from the EU (or even as they diverge in England alone), this will affect the GB market for NI products (e.g. in terms of market access and price).
24. Dynamic alignment includes legislation that implements the regulations, directives and decisions listed in the Annexes to the Protocol. Each year over 1000 pieces of implementing legislation are adopted by the EU. However, Dr Whitten points out that “determining which pieces of EU law apply to Northern Ireland, and which do

not” is not straightforward and requires detailed study.<sup>7</sup>

25. Dr Whitten highlights the “extensive legislative complexity” involved in Northern Ireland being both part of the UK and maintaining dynamic alignment with many areas of EU law. She points out that the most significant changes to the Protocol-applicable EU law in the first year of its implementation have been in relation to acts which were agreed while the UK was still a Member State. As such, “the possibility of significant intra-UK divergence as a consequence of post-Brexit NI dynamic alignment has, therefore, not yet begun to take effect.”<sup>7</sup>
26. The Northern Ireland Chamber of Commerce and Industry told us that one of “our challenges is that more than 300 pieces of legislation apply to Northern Ireland” and this is “very complex and challenging.” They have raised concerns with the UK Government “about how it is making that accessible to business.” For example, the opportunities for business to engage if that “legislation will be subject to any change, reform or amendment.”<sup>8</sup>
27. Dr Whitten recommends that “more robust mechanisms for tracking relevant EU legislative change and its implications for NI need to be developed, and fast.”<sup>7</sup> The European Commission has recently launched a [website](#) providing details of EU legal instruments which apply to the Protocol.

28. **The Committee notes that dynamic alignment between NI and the EU is enormously complex and challenging especially for NI businesses in terms of awareness of the rules that apply in NI, for production and for sale of goods.**
29. **The Committee notes that while the non-regression principle and the level playing field provisions within the TCA may limit regulatory divergence, this is substantially different from the dynamic alignment between NI and EU law in areas covered by the Protocol. In particular, whereas the UK must keep Northern Ireland aligned with any changes made to the EU legal instruments included in the scope of the Protocol there is no such requirement within the other parts of the UK. The dynamic alignment of Northern Ireland to over 300 EU law instruments will inevitably result in GB-NI divergence.**
30. **A key question for the Committee and for the Parliament is to what extent there might be regulatory divergence within GB and to what extent the devolution settlement is robust enough to accommodate this divergence dynamic. We discuss this below.**

## The Divergence Dynamic within GB

31. Dr Whitten points out that “Scotland, under the continuity commitment, is potentially opting into the same divergence trajectory” as NI under the Protocol.<sup>8</sup> Professor Armstrong points out that we can begin to see divergences between the UK Government’s “desire to diverge and move away from that European model of the

regulatory state and the Scottish Government's keeping pace power and desire to remain closer to and aligned with that model of the regulatory state.”<sup>8</sup>

## Keeping Pace with EU Law in Scotland

32. The Scottish Government in its Statement of Policy on the use of the ‘keeping pace’ power states that Scottish Ministers’ default position will be to align with EU law. The document states that “Scotland will seek to align with the EU where appropriate and in a manner that contributes towards maintaining and advancing standards across a range of policy areas.”<sup>9</sup>
33. In deciding where to align Ministers “will take account of the full range of interests, whether economic, social, environmental or other.” This includes the effect of the UK Internal Market Act, as well as provisions of the TCA and existing international obligations. The Statement of Policy acknowledges that “the UK Internal Market Act and the constraints it places on devolved powers raises significant challenges in respect of achieving the desired policy effect.”<sup>9</sup>
34. The Cabinet Secretary points out that “many of the 2000 or so EU measures introduced annually will not be of any relevance to Scotland, in that they will be specific to the single market, specific member states, or address areas of policy that are not devolved.” Furthermore, “much of new EU law would not currently create a measurable effect if implemented in Scotland, due to it relating to technical operation of EU structures and mechanisms of which the UK is no longer part.”<sup>10</sup>
35. A key question for the Committee and the Parliament is the extent to which the Scottish Government’s commitment to align with EU law is achievable within the constraints of the UK internal market. Dr Whitten notes the need to recognise “the potential trade-off between alignment with EU legislation and EU legislative developments and the implications of that for Scotland’s place in the UK internal market and the operation of the UK internal market.”<sup>8</sup>
36. A Northern Irish business, John Thompson and Sons Ltd, told us that “the challenge for Scotland is, how do you follow [EU] regulations when you are under the UK single market rules?” In its view you can “impose a requirement on your own businesses that reduce their competitive ability to trade in Scotland or the rest of the UK and you cannot deny the products from the rest of the UK into your market under the UK single market rules.”<sup>8</sup>
37. Our Adviser, Professor Katy Hayward, points out that there is a lack of consideration in the Scottish Government’s policy statement on alignment with EU law regarding the practical consequences of alignment for Scottish producers (specifically those exporting to England and Wales). Specifically, the economic impact of the UK Government’s intended divergence from EU laws in areas that are highly regulated and subject to detailed legislation in the EU, namely food safety, and plant and animal health. Professor Hayward’s view is that it should be made clear that the more its closest market diverges from the EU, the more difficulty there will be for Scotland if it seeks continued alignment with EU law.<sup>11</sup>

## Dual standards

38. One of the key messages which the Committee heard during its recent visit to

Brussels was the concern within the EU about protecting the integrity of the Single Market. This related to areas such as animal health and food safety arising from possible UK divergence from EU regulatory standards. This includes concerns about different regulatory standards in each part of the UK.

39. As the Committee has noted previously, the market access principles within the UK Internal Market Act 2020 (UKIMA) mean that goods and services which originate elsewhere in the UK (or are imported into another part of the UK) under different regulatory conditions will still have access to the Scottish market. Given this, John Thompson and Sons Ltd point out that the EU “will remain concerned around the dual standards that will exist in the marketplace from which goods exported to Europe are sourced.” They point out that while a region of the UK may wish to continue to align with EU law “the fact that goods that have diverged on EU standards are freely circulating” within their borders “may place greater checks and burdens on that region’s exports to the EU regardless of the standards it is adhering to.”<sup>12</sup>
40. John Thompson and Sons Ltd also point out that “working to a different and perhaps more expensive standards for production in that devolved region may negatively impact on those businesses competitive position within the UK internal market unless the standards it works to commands a price premium.” This means that in “the years to come divergence at a UK level with Europe is likely to place additional burdens on UK trade with the EU regardless of the desires of individual devolved regions to minimise those divergences.”<sup>12</sup>
41. In the Committee’s report on the UK internal market we noted that given the size of the English population and economy relative to the three other nations within the UK, the Scottish Government will need to take account of market forces when considering regulatory divergence. It is unlikely that the devolved governments will want to put their own economies at a competitive disadvantage with the much larger English economy by introducing higher regulatory standards which imports from other parts of the UK do not need to comply with.<sup>3</sup>

42. **The Committee notes above that dynamic alignment between NI and the EU is complex and challenging especially in relation to the implementing legislation arising from over 300 EU Acts. The Scottish Government’s commitment to align with EU law is also likely to be complex and challenging.**
43. **The Committee recommends that the Scottish Government publishes a list of all EU acts with which it intends to align while recognising that the Cabinet Secretary has previously emphasised that some of the implementing legislation might not be of any relevance to Scotland or create a measurable effect if implemented in Scotland.**
44. **The Committee also recommends that this list is updated annually to reflect new EU acts.**
45. **The Committee notes the commitment of the Scottish Government to provide information to the Parliament annually on the EU’s legislative priorities including in relation to the European Commission’s annual work**

plan and the priorities of the EU Presidency and how its priorities might be relevant to the Scottish Government's approach to the EU. The Committee also notes that this "will provide the Scottish Government with an annual opportunity to set out that legislation which is expected to be materially relevant in maintaining Scotland's alignment with the EU" and the "information provided by the Scottish Government will set out specifically, as far as is possible at the work plan stage, the EU legislation which Scotland intends to align." <sup>13</sup>

## Brexit Freedoms Bill

46. In contrast to the Scottish Government's commitment to align with EU law the UK Government has indicated that it intends to introduce a 'Brexit Freedoms Bill' which will:
  - create new powers to amend, repeal or replace retained EU law and reduce the need to always use primary legislation to do so;
  - remove the supremacy of retained EU law as it still applies in the UK; and
  - clarify the status of retained EU law in domestic law.
47. The UK Government has stated that a "targeted power would provide a mechanism to allow retained EU law (REUL) to be amended in a more sustainable way to deliver the UK's regulatory, economic and environmental priorities." <sup>14</sup>
48. The UK Government published a *REUL Interactive Dashboard* on 22 June 2022. The dashboard details "over 2400 pieces of REUL, across 300 unique policy areas and 21 sectors of the UK economy." <sup>15</sup> The dashboard is "not intended to provide a comprehensive account of REUL that sits with the competence of the devolved administrations, but may contain individual pieces of REUL which do sit in devolved areas." <sup>16</sup>
49. The UK Minister for Brexit Opportunities and Government Efficiency in a statement to the House of Commons said as "we maximise the benefits of Brexit and transform the UK into the most sensibly regulated economy in the world, we must reform the EU law we have retained on our statute book." He added that this "will allow us to create a new pro-growth, high standards regulatory framework that gives businesses the confidence to innovate, invest and create jobs." With regards to REUL within devolved competence he stated that "the power to amend will be with the devolved authorities." <sup>17</sup>
50. The UK Government has also stated that "it will not seek to make changes to retained EU law within Common Frameworks without following the ministerially-agreed processes in each framework." <sup>14</sup> Professor Armstrong points out that Common Frameworks were deliberately a mechanism for co-operation and co-ordination between different levels of government to deal with modifications to retained EU law. However, he points out that a number of questions arise including

“where there are very clear differences between what the UK Government wants to do in changing that model of regulation and what the devolved Administrations may want to do.”<sup>8</sup>

51. The Scottish Government has stated that the “scale and breadth of the UK Government’s” proposals in the planned Brexit Freedoms Bill will “have massive implications for Scotland and put the Scottish Government’s policy of aligning with EU standards at risk.”<sup>18</sup> The Cabinet Secretary told the Parliament that the proposals taken alongside the powers of UKIMA mean that “devolved competences will be disastrously exposed.” He also raised concerns that the “common frameworks process, which is designed to manage divergence and alignment, looks to be side-stepped or ignored completely.”<sup>19</sup>
52. The Welsh Government has stated that “any proposals to deregulate in a way that could reduce the important social and environmental protections and high product standards that consumers and workers in Wales have come to expect are not acceptable.” It also states that UKIMA “presents further significant concerns that, should the UK Government deregulate in a way which is contrary to Welsh Ministers’ aims to maintain high standards, we could, consequently, have to accept in Wales products made elsewhere to lower standards.”<sup>20</sup>
53. The Welsh Government also points out that the *REUL Interactive Dashboard* “contains no information about which instruments of REUL are in devolved areas” or “what legislation made in Wales could be affected by the UK Government’s wider proposals to amend, repeal or replace all REUL.”<sup>20</sup>

**54. The Committee notes that there are substantive differences between the views of the UK Government and the Scottish and Welsh Governments regarding future alignment/divergence with EU law. This raises a number of fundamental constitutional questions for the Committee and the Parliament–**

- **to what extent can the UK potentially accommodate four different regulatory environments within a cohesive internal market and while complying with international agreements;**
- **whether the existing institutional mechanisms are sufficient to resolve differences between the four governments within the UK where there are fundamental disagreements regarding alignment with EU law and while respecting the devolution settlement;**
- **how devolution needs to evolve to address these fundamental questions.**

**55. In the next section of this report the Committee explores two significant areas in which devolution has begun to evolve following the UK’s departure from the EU: the operation of the Sewel Convention and the use of delegated powers.**

# Sewel Convention

56. The Sewel Convention (“the Convention”) is the mechanism for obtaining the consent of the devolved legislature where the UK Parliament intends to pass primary legislation in a devolved area. It does not apply to secondary legislation.
57. Professor Aileen McHarg explains that the Convention performs two distinct functions—
- “A *defensive function*, providing reassurance to the devolved legislatures that their primary political authority in relation to devolved matters will be respected, despite the continuing assertion of Westminster’s legislative omnipotence;
  - A *facilitative function*, enabling co-operation between the UK and devolved institutions in areas of intersecting competence or shared concern.”<sup>21</sup>
58. The *defensive function* of the Convention was put on a statutory footing by Section 2 of the Scotland Act 2016 which inserted a new Section 28(8) of the Scotland Act 1998: “But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.” In 2017, the UK Supreme Court ruled that the Sewel Convention was a political convention which could not be enforced legally through the courts.<sup>22</sup>
59. Devolution Guidance Note (DGN) 10<sup>i</sup> provides that the Convention applies where a Bill—
- ” “contains provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.”<sup>23</sup>
60. The *facilitative function* of the Convention is also recognised in DGN 10 which states that “there will be consultation with the Scottish Executive on policy proposals affecting devolved matters whether or not they involve legislative change”. For draft bills which do require consent, DGN 10 states that “the essential requirement is that by the time proposals reach LP<sup>ii</sup>, devolution related issues have been substantively resolved.”<sup>23</sup>
61. Some of our witnesses pointed out that a convention is a rule. Professor Stephen Tierney told us that it “might be a political rule, but it is binding.” In his view the Supreme Court could have said, “Yes, we can’t enforce this convention, but we can say it exists, we can articulate its content and we can declare it has been breached.’ The court did not go those steps.”<sup>24</sup> Professor Alan Page told us that a convention “is more than just a statement of practice. It is a rule.” In his view it is useful to look

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i The Devolution Guidance Notes supplement the [Memorandum of Understanding and Supplementary Agreements Between the UK Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee agreed in 2012](#)

ii “LP” means the UK Government Cabinet Committee which signs off proposals for bills.

at it in terms of “degrees of bindingness” and when Sewel was placed on a statutory footing in 2016 it “was on the point of crystallising and becoming a hard, binding rule.”<sup>24</sup>

62. Professor McHarg explained that it “is important to understand that a convention is not a mere description of constitutional practice, but rather a rule which prescribes constitutional behaviour, in order to uphold important constitutional principles, albeit that rule may be subject to exceptions.” In her view the Convention “is not a statement that Westminster would usually act with consent but sometimes might not. Rather it is a statement that Westminster should legislate only with consent, unless there is a good reason not to do so.”<sup>21</sup>
63. Professor Nicola McEwen’s view is that the Convention “has become an important symbol of the political authority of the devolved institutions that can empower the Scottish Parliament to exercise influence over Westminster legislation that affects devolved matters or devolved competence.”<sup>25</sup>

## Pre-Brexit

64. There was a broad consensus among our witnesses that prior to Brexit the Convention had worked effectively. The IfG point out that “disputes have been rare, and usually resolved by negotiation and compromise” and the Convention “has served to create a protected sphere of political autonomy for Scotland, and to facilitate cooperation between Westminster and Holyrood.”<sup>2</sup>
65. The IfG note that before 2018, consent had been withheld by one or other of the devolved legislatures on just nine occasions: The Welsh Senedd (7); Scottish Parliament (1); and Northern Ireland Assembly (1). Furthermore, before 2018 “the UK parliament had never passed legislation without consent in a situation where the UK government considered the relevant provisions of a bill to fall within the scope of the Sewel convention.”<sup>26</sup>
66. Our Adviser, Dr McCorkindale, points out both the historical frequency and relatively uncontroversial nature of the use of the Convention. He notes that by 2015 “before the demands of EU withdrawal changed the consent dynamics, the Sewel convention had been engaged more than 140 times in Scotland but consent had been withheld only once, in relation to the Welfare Reform Bill.” On that occasion, “aspects of the bill, as they related to devolved policies... and services... were amended by the UK Government”.<sup>1</sup>
67. In summary, Dr McCorkindale, describes the operation of the Convention pre-Brexit as follows—
- relatively well understood to include both a policy and a constitutional arm;
  - respected on both sides as a constitutional rule that protected devolved autonomy and facilitated shared governance;
  - any decision to withhold consent was the exception rather than the rule but such a decision generated a constructive response from the UK Government; and

- UK legislation in devolved areas would only be made where that legislation was necessary on the part of the UK Government or where it was invited or welcomed by the Scottish Government.

## Withdrawal from the EU

68. The IfG told us that one of the reasons why the Convention “worked so well before the Brexit period is that the threat of consent being withheld was enough to extract concessions when the UK Government and the devolved Administrations were in discussions.”<sup>27</sup> Professor McEwen’s view is that the “paradox of the Sewel convention is that it only functioned as a principle and process that fostered a culture of cooperation so long as its limits were untested.”
69. This is no longer the case as noted, for example, by Professor McHarg who points out that the Convention “has been severely tested by the Brexit process and its ongoing legislative aftermath.”<sup>21</sup> The IfG’s view is that “Brexit has exposed the convention’s limitations as a guarantee of devolved autonomy.”<sup>26</sup> This is partly “because it has increased uncertainty about the division of power between central and devolved government” and now “the limits have been tested, its ability to regulate UK-Scottish relations is cast into doubt.”
70. Dr McCorkindale points out that whereas the limits of devolved competence are statutory in nature “the safeguards for devolution against unwelcome intervention from the centre are political in nature, and boundary disputes are resolved between the parties themselves.” In his view in “each case the balance of control and decision-making power has tilted heavily towards the centre.”
71. Since 2018 a number of Brexit-related Bills have been passed at Westminster without the consent of at least one of the devolved legislatures. The Scottish Parliament has withheld consent in relation to the following–
- The European Union (Withdrawal) Act 2018;
  - The European Union (Withdrawal Agreement) Act 2020;
  - The European Union (Future Relationship) Act 2020;
  - The UK Internal Market Act 2020;
  - The Professional Qualifications Act 2022; and
  - The Subsidy Control Act 2022.
72. A key theme in our inquiry is the extent to which the UK’s withdrawal from the EU and subsequent impact on the UK’s internal constitutional dynamics has exposed the limitations of the Convention in relation to both its *defensive function* and *facilitative function*. As discussed below this has led to considerable and continuing disagreement between the UK Government and the devolved governments and parliaments.

## Limitations - Defensive Function

73. A number of our witnesses raised concerns with regards to the extent to which the limitations of the defensive function have been exposed both with regards to its scope and the application of “not normally”.

### Scope

74. As noted above the Convention has historically applied where UK Bills contain provisions—
1. applying to Scotland and which are for devolved purposes; and/or
  2. which alter the legislative competence of the Parliament; and/or
  3. the executive competence of the Scottish Ministers.<sup>23</sup>
75. Some of our witnesses questioned whether the UK Government has post-Brexit sought to change the scope of the Convention in relation to the second and third categories above. Dr McCorkindale states that while pre-Brexit there was “a well-understood definition of the convention that included both policy and constitutional arms, now we find disagreement about the scope of the convention at least with regard to the latter.”
76. The IfG’s view is that the UK Government “has in the past few years attempted to redefine the convention, claiming that only the first type of legislation falls within the scope of Sewel, and that consent is sought for legislation in strands 2 and 3 only as a matter of “practice”, rather than as part of the convention proper.” In their view this “argument has been advanced publicly by Lord Keen, the Advocate General for Scotland (a UK minister), during the passage of the Scotland Bill 2016 and in front of the Supreme Court, and it is reflected in the explanatory notes published alongside some government legislation.”<sup>26</sup>
77. The Law Society of Scotland point out that when the Convention was being incorporated into the Scotland Act 2016 the inclusion of the second and third categories of DGN 10 was “staunchly objected to by the Advocate General on behalf of the UK Government.” Therefore, “it was almost entirely predictable that the Government of the day then would interpret the Sewel convention in a narrow way.”<sup>24</sup>
78. Professor McHarg’s view is that “what is distinct about Brexit is that it is a change to the constitutional framework” with impacts on devolution and also for the whole of the UK. In her view it is “in relation to those aspects of the shared constitutional framework that I think we are seeing the limitations of the convention.”<sup>24</sup>
79. Some of our witnesses also raised concerns about the extent to which the Convention post-Brexit has evolved from an obligation to *obtain* consent, subject to exceptions, into an obligation to *seek* consent. Professor McHarg contends that the Convention (and the idea of devolved consent more generally) has been recast “from an obligation to obtain consent, subject to exceptions, into an obligation to seek consent.”
80. In Professor McHarg’s view it is then left to the UK Government “to decide whether

consent has been reasonably or unreasonably withheld.” But it is unclear “whether this new approach is limited to Brexit-related legislation; or whether it will apply to analogous changes to the UK-wide constitutional framework which have implications for devolution; or whether it applies to the practice of devolved consent generally.”

81. Dr McCorkindale suggests that “the requirement normally to obtain consent seems to be evolving into a requirement merely to seek consent (whether that consent is obtained or withheld).” Dr McCorkindale points out that “this less onerous condition of consent has now found expression in statute” including the regulation of delegated powers taken by UK Ministers to act in devolved areas in the EU (Withdrawal) Act 2018 and UK Internal Market Act 2020. Furthermore, he points out that this “trajectory – from a duty to seek consent to a duty (merely) to consult – has taken explicit form with the inclusion” of what has been described as a ‘consult plus’ requirement in the Professional Qualifications Bill.

### **'Not normally'**

82. Even prior to Brexit the lack of clarity regarding “not normally” was widely considered as a weakness of the legislative consent process. Professor McHarg points out that while it “has always been clear that there might be exceptional cases in which legislation might be enacted despite a refusal of devolved consent, there has never been any official attempt to clarify when those exceptional cases might arise.”<sup>21</sup>
83. Our witnesses emphasised that this weakness has become much more evident post-Brexit especially in relation to the Brexit-related Bills passed by Westminster without the consent of at least one of the devolved legislatures.
84. Professor McHarg points out that “in only two cases (the Withdrawal Agreement and Future Relationship Acts) was any substantive justification offered for proceeding without devolved consent.” In her view the urgency of the legislative timetable in both cases justified making an exception to the Sewel Convention on grounds of necessity.
85. However, she argues that for the other four Bills “it is difficult to see any compelling constitutional justification for legislating without devolved consent.” In her view the “decision to act without devolved consent seems simply to reflect the UK Government’s preference for a UK-wide legislative approach, and one which gave effect to its own, rather than agreed, policy choices.”<sup>21</sup>
86. Professor McEwen shares a similar view. She suggests while “the Brexit deals and their corresponding speedy implementation in domestic law may indeed be unique, it is difficult to mount a similar defence of proceeding without consent in the case of the United Kingdom Internal Market Act, the Professional Qualifications Act or key aspects of the Subsidy Control Act.”<sup>25</sup>
87. During the UK Parliament’s consideration of the EU (Withdrawal Agreement) Bill, the Chancellor of the Duchy of Lancaster stated that we “recognise that taking the Bill to Royal Assent without the consent of the devolved legislatures is a significant decision and it is one that we have not taken lightly. However, it is in line with the

Sewel convention.”<sup>28</sup>

88. He explained that while the UK Government remained committed to “not normally” legislating in devolved areas without the consent of the devolved legislatures “the circumstances of our departure from the EU, following the 2016 referendum, are not normal; they are unique.”<sup>28</sup>
89. However, as highlighted by Professor McEwen, the “problem arises when someone decides, after they sought consent, that something is so abnormal or so exceptional that they do not require consent.” In her view “you almost need agreement between the Governments prior to that process that something is such an unusual or exceptional circumstance that they can set aside their normal practice or convention.”<sup>24</sup>
90. The IfG highlighted a risk that “the UK Government might argue that just as Brexit itself is a “not normal” situation, and so justified legislating without consent, by extension the same applies to any legislation made necessary by Brexit.” In its view “such an approach would be difficult to justify.”<sup>26</sup>
91. Professor McHarg’s view is that, if the current approach whereby UK Ministers decide whether consent has been reasonably or unreasonably withheld continues to apply, “this amounts to a fundamental weakening of the constitutional protection for devolved decision-making autonomy.” She also suggests that it “implies a top-down rather than collaborative approach to the development of the constitutional framework within which the devolved institutions operate.”<sup>21</sup>
92. The Scottish Government’s view is that throughout “the Brexit period, we have seen an increasing disregard of the Sewel Convention” by the UK Government on the basis that the circumstances of EU exit were ‘not normal’. However, the Scottish Government argues that given the UK Government continued to seek the consent of the devolved legislatures within these circumstances indicates it was required for elements of each Brexit-related Bill. The Scottish Government believes that the not normal provision within the Convention “can have no meaning if it is only applied retrospectively once the Scottish Parliament has made its decision, and refused consent.”<sup>29</sup>
93. The IfG recommend that the UK and devolved governments should seek to define ‘not normally’ through agreeing “a joint statement setting out a list of circumstances in which legislative consent need not be sought.”<sup>26</sup> Professor McHarg recommends the introduction of a–
- ” “clear statement, agreed between the UK and devolved Governments and endorsed by the UK and devolved legislatures, of the constitutional importance and obligatory nature of the Sewel Convention, together with a statement of the circumstances in which, or reasons for which, a refusal of devolved consent can legitimately be overridden.”<sup>21</sup>

## Limitations - Facilitative Function

94. A number of our witnesses also raised concerns about the extent to which the UK

leaving the EU and its aftermath has exposed the limitations of the facilitative function of the Convention. As noted above, DGN 10 requires UK Government departments to consult with the Scottish Government on all policy proposals affecting devolved matters. Where a UK Bill contains provisions of major significance applying to devolved areas it is expected that when a UK Government department presents a proposed Bill for sign-off by the relevant Cabinet Committee, “there should have been prior consultation with the Scottish Executive” and that “it will be possible to confirm at Second Reading that the Scottish Parliament has consented”.<sup>23</sup>

95. As highlighted by Professor McEwen, in addition to setting out a clear parliamentary procedure, the Convention “should also be understood as an intergovernmental process”<sup>25</sup> and “an awful lot of intergovernmental interaction takes place prior to the decision to grant or withhold consent.”<sup>24</sup> Professor Tierney told us “we may take our eye off the ball if we focus too much on the convention when the solutions have to be intergovernmental” and “in particular, interparliamentary.” In his view “we are now in the realm of so many shared powers that the issue is one of intergovernmental and interparliamentary relations.”<sup>24</sup>
96. The IfG suggest that when the Convention “works well, it is due to open communication between the UK and devolved governments.” They point out that there “are clear expectations set out in internal Whitehall guidance notes that departments will consult early with devolved counterparts to identify whether any consent issues might arise later in the process, and how these can be resolved.” However, the IfG suggest that “practice appears to vary between departments and depending on the nature of the legislation in question” and there “have been recent cases where the UK government has apparently shared its legislative plans late or not at all.”<sup>26</sup>
97. This point is also made by Professor McEwen who states that “is notable that recent successes and failures of the Sewel convention mirror patterns of intergovernmental interaction.”<sup>25</sup> For example, she highlights the Scottish Government’s “productive relationship” with the Department for Environment, Fisheries and Rural Affairs (DEFRA) compared to the more “strained relationship” with the Department for Business, Enterprise and Innovation.
98. A number of our witnesses highlighted a post-Brexit rupture in the effectiveness of the facilitative function of the Convention on a similar basis to the defensive function. In particular, a breakdown in trust between the UK Government and the devolved governments. For example, the IfG point out that the legislative consent process “is based on trust between the UK and devolved governments” but that “trust has been damaged” by Brexit and its aftermath.
99. Dr Paul Anderson told us “you need to enter into negotiations with a willingness to compromise and work out problems and at times—certainly in recent years, since Brexit—that has not been the case with legislation, particularly on the part of the United Kingdom Government, where the onus has been to set the benchmarks a bit higher than they have been set in the past.” In his view the “issues around Sewel have created an atmosphere in which interaction between the Governments is undergirded by mistrust.”<sup>27</sup>

100. Professor Tierney told us that what the UK is attempting to do through these Bills “is filling the single market gap that has been left in the UK.” In his view “that is essentially an issue of intergovernmental relations, and it raises questions about whether Sewel is still fit for purpose.”<sup>24</sup> Professor McEwen’s view is that if the intergovernmental element of the Convention “is not working and is not functioning effectively, you have a problem—and I think that we have a problem.”<sup>24</sup>
101. Both the Scottish Government and Welsh Government have raised concerns in recent Legislative Consent Memorandums about the lack of meaningful engagement prior to the introduction of UK Bills. For example, in relation to the Northern Ireland Protocol Bill, the Welsh Government notes that this lack of engagement “plainly breaches the principles in the Intergovernmental Relations Review that sets out how the UK and devolved governments should work with each other.”<sup>30</sup>
102. The Scottish Government has stated that while Scotland has “direct interests at stake in the Protocol, particularly in trade and border control” the UK Government “has shown no willingness to engage us on these issues.”<sup>31</sup> The Scottish Government’s Legislative Consent Memorandum (LCM) notes that it was not involved in the preparation of the Bill, and “was provided with a copy of it only two hours before it was introduced.”<sup>32</sup>
103. The Scottish Parliament agreed a motion without division on 29 June 2022 that it “is fundamentally unacceptable for the UK Government to unilaterally disapply key parts of the EU-UK Withdrawal Agreement” and “calls, therefore, on the UK Government to withdraw the Northern Ireland Protocol Bill and restart negotiations with the EU immediately.”<sup>33</sup>
104. The Scottish Government lodged an LCM on 19 August 2022 which states that it believes the Scottish Parliament should not consent to the NI Protocol Bill. The LCM states that the Scottish Government cannot “support a Bill that may well be found to break international law and could lead to a trade dispute that would be very harmful to Scotland.”<sup>32</sup>
105. With regards to the proposed Brexit Freedoms Bill the Cabinet Secretary said “the UK Government has declined to share the Brexit Freedoms Bill instructions with us, or provide any settled certainty of its policy intentions.”<sup>19</sup> He added that “it is unacceptable that the UK Government seems ready to unveil sweeping measures that could have profound consequences for Scotland with such little discussion or, indeed, respect for this Parliament, the Scottish Government, or indeed the people of Scotland.” He also added that this “makes a mockery of the UK Government’s recent commitment to reset relationships with the Devolved Governments.”<sup>34</sup>
106. The Committee recognises that the Bill has yet to be published and the extent of recent consultation between the UK Government and the Scottish Government in advance of its publication is unclear.
107. In a written statement on the UK Government’s REUL interactive dashboard the Welsh Government stated that—

” “the nature of this announcement and the inadequate engagement with the Devolved Governments appear to be part of a wider trend of unacceptable behaviour from the UK Government. It comes on the back of its Northern Ireland Protocol Bill and a number of other Bills on which there has been no or little meaningful attempt to work with the Devolved Governments before an announcement is made. The UK Government needs to realise the damage that it is doing to the constitution of the United Kingdom through its actions and change course.”<sup>20</sup>

108. The Welsh Senedd Legislation, Justice and Constitution Committee have written to the UK Government raising “concerns regarding cooperation on UK Government Bills that make provision in devolved areas”<sup>35</sup> including the Northern Ireland Protocol Bill and the Bill of Rights Bill.
109. The IfG recommends that a “formal commitment be entered into by the UK government that it will share draft bills – or at least relevant sections – with the devolved administrations an agreed period (perhaps 21 or 28 days) prior to a bill being introduced into parliament.”<sup>26</sup> They propose that this “duty to consult and to share draft legislation in advance of a bill’s introduction should” be set out in a revised Memorandum of Understanding agreed by the four governments, and laid before the four legislatures.

## Dispute Resolution

110. Some of our witnesses highlighted the lack of an effective dispute mechanism for resolving intergovernmental disputes about legislative consent. They point out that the new dispute resolution process following the review of intergovernmental relations may provide a mechanism for addressing disagreements.
111. As the Committee noted in our report on the UK internal market, the revised agreement on intergovernmental relations stated that all “governments are committed to promoting collaboration and the avoidance of disagreements” and any “government may refer a disagreement to the IGR Secretariat as a dispute.”<sup>36</sup> The agreement also states that collaborative working will be founded on a number of principles including resolving disputes according to a clear and agreed process.
112. Professor McEwen told us during our inquiry on the internal market that this means whereas previously “the UK Government could deny the existence of a dispute, now any administration can escalate a disagreement to a formal dispute.”<sup>3</sup> In her view the days “when the UK government could act as the accused, the judge and the jury appear to be over”.<sup>3</sup>
113. Dr Anderson told us that the “movement in the new arrangements towards dispute resolution is good because it recognises that there is a problem, in that the UK Government should not be judge, jury and executioner in these arrangements, and that the independent secretariat should play an important role.” In his view this “significantly improves the way in which disputes should be handled” but the “the issue is whether the devolved Governments believe that that will necessarily lead to more effective relations or a dispute mechanism in which they will have faith.”<sup>27</sup>
114. The IfG told us that “there is scope for independent mediation, for example. I do not

think that those new processes have been tested, but that is one place that you could try to resolve such issues.”<sup>24</sup>

115. Professor McEwen suggests that the Committee “may want to explore the extent to which new intergovernmental machinery can facilitate and improve communication and consultation prior to the publication of legislation that may engage the Sewel convention.”
116. Professor McHarg recommends the need to develop “a mechanism for resolving disputes about whether the Sewel Convention applies to particular Bills, or particular provisions within Bills.”<sup>21</sup>
117. The House of Lords Constitution Committee “believe it would be desirable for all efforts to be taken” to resolve substantive disagreements on legislative consent matters before a bill is introduced to Parliament. In its view this “could be achieved through the more robust arrangements for joint working (including the new dispute resolution process) agreed as part of the review of intergovernmental relations.”<sup>37</sup>
118. The Scottish Government has previously recommended the need for “procedures for resolving disputes on the scope of reservations and the applicability of the Convention.”<sup>38</sup>

119. **The Committee agrees that the Sewel Convention is under strain following Brexit and notes the view of some of our witnesses that without reform, “there is a risk of the convention, and the legislative consent process that puts Sewel into practice, collapsing altogether.”<sup>26</sup> The Committee’s view is that there is a need for a much wider public debate about where power lies within the devolution settlement following the UK’s departure from the EU. In particular, as we recommend at paragraph 54 above this needs to address the extent of regulatory autonomy within the UK internal market. Any reform of the Convention needs to flow from the outcome of this discussion which also needs to be inter-parliamentary.**

## Delegated Powers: A Step Change

120. A key theme in the evidence we received is there has been a significant step change in the approach to the use of delegated powers<sup>iii</sup> during the preparations for EU exit and its aftermath. When the Scottish Parliament was established in 1999, UK Ministers' powers to make secondary legislation in devolved areas were transferred to Scottish Ministers with only a few exceptions.
121. A key exception was the power to make secondary legislation that implemented EU obligations. This power was not removed from UK Ministers and was available to both Scottish Ministers and UK Ministers. Before EU exit, UK Ministers regularly used that power, with the Scottish Government's consent. However, that power was for implementing policy decisions that had been agreed at EU level rather than implementing the UK/Scottish Governments' own policy.
122. Transposition guidance provided by the UK Government made clear that for "matters falling within their responsibility, it is for the devolved administrations to consider, in consultation with the Whitehall departments and other devolved administrations, if appropriate, how the obligation should be implemented and enforced within the required timescale, including whether the devolved administrations should implement separately, or opt for GB or UK legislation."<sup>39</sup>
123. Beyond this key exception, the UK Government did not generally have powers to make secondary legislation in devolved areas and did not often do so.<sup>iv</sup>
124. The Committee has previously highlighted that there are significant differences between the legislative process for policy areas within EU competence while the UK was a Member State and post-Brexit.<sup>11</sup>
125. While Scottish Ministers had a formal role in influencing EU policy-making at UK level and an informal role at an EU level there was limited autonomy in implementing EU law. Outside of the EU there is much more discretion for UK and Scottish Ministers to make policy choices which may or may not align with EU law. The Committee's view is there is a need to take account of the significant differences between a legal obligation to *comply* with EU law and a policy *choice* to

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iii Delegated powers are powers to make secondary legislation which are delegated by a parliament/legislature to government ministers.

iv Limited 'joint' powers, meaning that the powers are exercisable jointly by Scottish Ministers and UK Ministers acting together have existed since devolution. Examples of joint powers are the power to make changes to cross-border public authorities and powers in relation to rivers that form the Scotland-England border. A small number of joint powers have been created since devolution, for example the power to create greenhouse gas emissions trading schemes. Importantly, legislation made under 'joint' powers normally needs to be laid in and approved by both the Scottish and UK Parliaments. Similarly, some 'concurrent' powers, meaning powers which are conferred on both Scottish Ministers and UK Ministers and are exercisable by either of them separately, have existed since 1999. These powers were specified in the Scotland Act (in a list in section 56(1) and in secondary legislation made under that Act. They include, for example, concurrent powers to regulate sea fishing for conservation purposes.

align with EU law.<sup>11</sup>

126. The session 5 Delegated Powers and Law Reform Committee (DPLRC) stated in its stage 1 report on the UK Withdrawal from the EU (Continuity) Bill that the keeping pace delegated power “would allow Scottish Ministers to decide whether or not to keep pace with EU law in circumstances where it has no formal ability to influence that law given that the UK is no longer an EU member state.” The DPLRC also pointed out that the power “can be used across the full range of policy areas” previously “governed by EU law and affords discretion as to whether and how to implement particular aspects of chosen EU laws.”
127. As noted above, the European Union Withdrawal Act 2018 (EUWA) created a new body of domestic law known as REUL. The Act also provided delegated powers to the UK and devolved administrations to fix deficiencies in this area. This power was given to the UK and devolved administrations and is exercisable by each separately or both jointly. The power expires at the end of 2022.
128. EUWA also contains other new powers for UK and devolved administrations to make secondary legislation. There is no requirement written into EUWA for the UK Government to obtain the consent of the devolved administrations before exercising these powers in devolved areas. However, the then UK Government gave a political commitment that it would do so. The commitment was that the UK Government would not normally use the powers in EUWA to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved government.
129. In addition to the powers contained in EUWA itself, a huge number of new delegated powers to make secondary legislation within devolved competence were conferred on the UK Government and/or the Scottish Government through the EU Exit SIs (the “deficiencies” instruments) themselves. Often these were powers to make delegated legislation which were previously held by the European Commission and were transferred to the Scottish and/or UK Ministers.
130. These powers were conferred in a mixture of ways: some (a minority) were conferred on Scottish Ministers alone; some were conferred concurrently (on both Scottish and UK Ministers); some were conferred on UK Ministers alone. Some, but not all, of the powers that were conferred on UK Ministers are exercisable within devolved competence only with Scottish Ministers’ consent.
131. New powers that are exercisable within devolved areas were also conferred on UK Ministers by other primary legislation which deals with EU withdrawal, for example the EU (Withdrawal Agreement) Act 2020. Similarly, further such powers have been conferred by primary legislation which deals with the new relationship between the UK and the EU, and other post-EU primary legislation, such as the EU (Future Relationship) Act 2020, the Agriculture Act 2020 and the Fisheries Act 2020. The result being that more secondary legislation which is within the Scottish Parliament’s competence may be made in the UK Parliament rather than in the Scottish Parliament.
132. The Committee also notes that a significant number of powers for UK Ministers are being conferred in subject areas that were not formerly governed by the EU. As of May 2022, 10 of the Bills for which LCMs have been lodged in session 6 so far conferred at least one delegated power on UK Ministers which is exercisable for

Scotland within the Scottish Parliament's legislative competence. Of these, powers in 7 of the Bills are not in a former EU policy area. Examples are seen in the–

- Police, Crime, Sentencing and Courts Bill (now the Police, Crime, Sentencing and Courts Act 2022);
- Health and Care Bill (now the Health and Care Act 2022); and
- Elections Bill (now the Elections Act 2022).

## Scope

133. One of the key issues the Committee considered was the scope of delegated powers being conferred on UK Ministers in devolved areas and on Scottish Ministers where these powers are concurrent. The DPLRC has raised concerns in considering a number of LCMs about the appropriateness and scope of delegated powers within UK Bills. For example, in relation to some of the powers in the Professional Qualifications Bill.
134. The DPLRC's report on the LCM stated that "insufficient justification had been provided for why all provision that can be made under clause 1 is suitable for secondary, rather than primary, legislation." The report also stated that "in the absence of further specification in the Bill of how the power can be used, the power is too wide."<sup>40</sup>
135. The Scottish Government's LCM on the Procurement Bill raises concerns with regards to clause 83 which is drafted as a Henry VIII power, meaning that it may be used to modify primary legislation. The LCM states that "this appears to be a significantly broader power than is necessary" particularly "given that...the UK Ministers could use this power without further consent being required." The Scottish Government's view is that "should the Scottish Parliament elect to amend procurement Regulations by primary legislation in the future, then that would be the appropriate moment for the Scottish Parliament to consider whether a Henry VIII power should be delegated to the Scottish Ministers."<sup>41</sup>
136. The LCM on the Levelling-up and Regeneration Bill states that it "contains provisions which would effectively give UK Ministers powers to override existing and established environmental protections in Scotland" and that this "is fundamentally at odds with the devolution settlement."<sup>42</sup> The Scottish Government's LCM on the Economic Crime (Transparency and Enforcement) Bill raised concerns that the "regulation-making powers in Part 3 of Schedule 4 are very wide in their scope."<sup>43</sup>
137. The supplementary LCM on the Environment Bill states that "two UK Government amendments fall within the legislative competence of the Scottish Parliament." With regards to the amendment in relation to the guiding principles on the environment the supplementary LCM states that "it is inappropriate for the UK Government to seek to impose its own environmental principles on Scottish Ministers with respect to decisions with respect to Scotland." It also states that "these matters are clearly within devolved competence and has strongly objected to the approach now being taken by the UK Government."<sup>44</sup>
138. The UK Government's view as set out in a letter to the Net Zero, Energy and

Transport Committee is that it does not consider that these amendments fall within devolved competence and as such have not sought consent from the Scottish Parliament.<sup>45</sup>

139. During the third reading debate on the Bill in the House of Lords, the Minister of State, Department for the Environment, Food and Rural Affairs, Lord Goldsmith, stated that “throughout the passage of the Bill, Ministers and officials from the UK Government have worked very closely with Ministers and officials from the devolved Administrations.” He added that the UK Government have “consistently engaged with the Scottish Government on many of its contents and will continue to do so in future.”<sup>46</sup>
140. The Committee also received evidence raising concerns about the scope of delegated powers in the EU (Future Relationship) Act 2020 and the proposed Brexit Freedoms Bill. Professor Craig suggests that the “complex Brexit legislation contains a very great number of instances where far-reaching power is accorded to ministers, with little by way of parliamentary oversight.”<sup>4</sup>
141. The EU (Future Relationship) Act 2020 “makes provision for increased executive discretion to make regulations concerning TCA implementation, which is backed up by Henry VIII clauses that enable the regulations to modify, amend or repeal legislation, including primary statute.”<sup>4</sup> The “relevant national authority” which includes devolved Ministers is accorded broad discretion to make regulations as are considered appropriate to implement the TCA and related agreements.
142. Professor Craig points out that the UK Parliament “exercises little power over the subject matter dealt with by the TCA” and that the “decisions will largely be made by ministers aided by those with technocratic expertise in the relevant areas. There is little parliamentary involvement in any of this. The reality is that the TCA regime has diminished democratic oversight of the decisions that will be made thereunder compared to the position under EU law.”
143. With regards to the Brexit Freedoms Bill the UK Government stated in January 2022 that the efficient use of parliamentary time required a change to the mechanism for amending retained EU law given that many of these laws “are afforded the status of primary legislation for the purposes of amendment.” On this basis the UK Government proposes introducing a “targeted power” which “would provide a mechanism to allow retained EU law to be amended in a more sustainable way.”<sup>14</sup>
144. SPICe and our Adviser, Professor Tobias Lock, state that the proposals “would suggest that the Bill will provide extensive powers to Ministers to change and replace laws which fall into the category of retained EU law by secondary legislation rather than under the conditions set out in EUWA.”<sup>47</sup>
145. In written evidence to the Committee the Public Law Project noted that a “broad Henry VIII power for the UK Executive to make law in any area of former EU competence would be constitutionally inappropriate.”<sup>48</sup> In their view such “a power is without precedent in the UK’s legal system and would constitute an astonishing transfer of legislative competence from Parliament to the Executive.”<sup>49</sup>

146. The Hansard Society suggest that the proposals “would transfer more power from the legislative branches to the executive, a matter of considerable constitutional concern.” In its view “without overhaul of the current procedures for parliamentary scrutiny of Statutory Instruments” this “would further increase the democratic deficit that currently exists with respect to delegated legislation.” Furthermore, “the democratic deficit may be particularly acute in the devolved nations, given the lack of formal guarantees for the devolved legislatures in scrutinising and approving SIs made by UK Ministers that engage devolved matters.”<sup>50</sup>
147. Dr Emily Hancox suggests there is a risk that “attempt to introduce a broad delegated lawmaking power to amend all types of retained EU law” would “contribute to the general shift of power away from the UK Parliament to the UK Government” while also noting that UK parliamentary oversight of secondary legislation remains weak.<sup>51</sup>
148. More general concerns about the shift in power from the UK Parliament to the Executive have been raised recently by the House of Lords Secondary Legislation Scrutiny Committee (SLSC) and Delegated Powers and Regulatory Reform Committee (DPRRC). They published a joint news release on 21 November 2021 which highlighted the “urgent need for the balance of power between Parliament and the executive to be re-set and the role of Parliament restored.”<sup>52</sup> This follows the publication of the SLSC report, [Government by Diktat: A Call to return power to Parliament](#) and the DPRRC report, [Democracy Denied? The urgent need to rebalance power between the Parliament and the Executive](#).
149. The DPRRC report states -
- ” “We acknowledge that the delegation of legislative powers is necessary — and even, on occasion, that Henry VIII powers can be justified. But far too often primary legislation has been stripped out by skeleton provisions and the inappropriate use of wide delegated powers. This means that it is increasingly difficult for Parliament to understand what legislation will mean in practice and to challenge its potential consequences on people affected by it in their daily lives.”<sup>53</sup>
150. The SLSC report states -
- ” “This Report is intended to issue a stark warning—that the balance of power between Parliament and government has for some time been shifting away from Parliament, a trend accentuated by the twin challenges of Brexit and the COVID-19 pandemic. A critical moment has now been reached when that balance must be re-set: not restored to how things were immediately before these exceptional recent events but re-set afresh.”<sup>54</sup>
151. Both committees “condemn a growing trend, made worse by the twin challenges of Brexit and the COVID-19 pandemic, in using skeleton bills to give ministers sweeping powers to make secondary legislation.” They suggest that if “Parliament is being asked to accept new methods of legislating, then it is surely right that the government must stand ready to accept new methods of scrutiny and of holding them to account.”<sup>52</sup>
152. The Committee notes that concerns have also previously been raised about the

scope of the Scottish Government’s keeping pace power in the UK Withdrawal from the EU (Continuity) Bill. The session 5 DPLRC noted “the significant width” of the keeping pace power, “which would enable proposals to be brought forward that would otherwise be expected to be contained in primary legislation.”<sup>55</sup>

153. The session 5 DPLRC concluded that it “remains uncertain as to whether the width of the power to keep pace with EU law in section 1(1) of the Bill is appropriate” and suggested that the “power might be limited by only being available to ensure that existing standards in retained EU law keep pace with evolving EU standards in technical areas.”<sup>55</sup>

## Legislative Consent Mechanism

154. As noted above, the Sewel Convention does not apply to secondary legislation. However, the Convention was established at a time when it was not anticipated that the UK Government would have numerous wide powers to make secondary legislation in devolved areas. As noted by Professor McHarg a “practice has also developed of creating consent mechanisms under particular statutory provision for the exercise of secondary legislative powers by UK Ministers affecting devolved matters.” Examples of UK legislation where such consent mechanisms have been included are—

- European Union (Withdrawal) Act 2018;
- United Kingdom Internal Market Act 2020;
- Direct Payments to Farmers (Legislative Continuity) Act 2020;
- Professional Qualifications Act 2022.

155. While Professor McHarg acknowledges this “as a positive development insofar as the Sewel Convention does not apply to secondary legislation”, in her view “it is problematic in a number of respects.” First, the “practice in relation to secondary legislative powers potentially affecting devolved competences is ad hoc and inconsistent.” Professor McHarg points out that where “consent obligations are imposed, these are differently worded—

- in some cases, an obligation is imposed merely to consult relevant devolved authorities;
- in other cases, UK ministers are expressly prohibited from legislating in devolved areas
- while in some cases no constraints are imposed at all.

156. This is a view shared by Professor Page who stressed the “need for much greater consistency in the framing or procedural requirements governing the exercise of ministerial powers to legislate in devolved areas.” In his view what “we have at the moment is a confusing mess” and instead “of having a pick-and-mix, choose-what-you-want approach in relation to whatever piece of legislation is being promoted, there needs to be an agreed model—the Sewel equivalent—in relation to

- subordinate law-making powers in the devolved areas.”<sup>24</sup>
157. Second, Professor McHarg raised concern that even “where subject to a requirement for devolved consent, such powers normalise the idea that it is constitutionally acceptable for UK Ministers to exercise powers, including Henry VIII powers, in devolved areas.” She told us that “different issues of principle apply to secondary legislation in comparison with primary legislation” because “the UK ministers are not the same as the UK Parliament; they are not in the same constitutional position.”<sup>24</sup>
158. Professor McHarg points out that unlike the UK Parliament, UK Ministers do not hold residual powers to act in devolved areas and are not accountable to the Scottish Parliament for their exercise of such powers. Accordingly, in her view, “any decision to confer powers on UK Ministers to act in devolved areas should require particularly strong justification.”<sup>21</sup>
159. Third, Professor McHarg suggests that with “the exception of the provision in s.3 of the Direct Payments to Farmers (Legislative Continuity) Act 2020, the requirement to seek devolved consent is a misnomer.” In her view this is because “Ministers may proceed to legislate on devolved matters even if consent is not granted, albeit with an obligation to justify that decision.”
160. While on “one view, this simply reflects the fact that the Sewel Convention does not create an absolute obligation to obtain devolved consent in all circumstances” she notes that “once again the circumstances in which a lack of devolved consent may justifiably be ignored are not specified.” She also suggests that “it is more objectionable in principle for a Minister to be able to decide to dispense with devolved consent than for the UK Parliament to be able to do so.”<sup>21</sup>
161. To address these concerns Professor McHarg recommends the need for an agreement “between the UK and devolved governments (and endorsed by the respective legislatures) of a consistent, principled, and mandatory approach to the making of secondary legislation by UK Ministers affecting devolved matters.”<sup>21</sup>
162. Professor Tierney’s view is that the European Union (Withdrawal) Act 2018 “is a model of good practice” given that “delegated legislation in devolved areas requires an attempt to get consent and definite consultation all the way through the process.” He points out that the House of Lords Constitution Committee is routinely recommending that this model “is followed in every single bill where there is any attempt to reduce or step into devolved competence by way of secondary legislation.” In his view “if the UK Government makes secondary legislation in devolved areas” the consent and consultation process is “the standard approach.” However, “in the end, the UK can go ahead even if consent is not there.”<sup>24</sup>
163. The Law Society of Scotland point out that while there is no Sewel Convention for consent for subordinate legislation it “has to be in accordance with the vires of its parent act” and the parent act does require legislative consent. As such there is a need to “focus our attention at the point at which the parent act is being enacted to ensure that the powers that are loaned by Parliament to ministers are proper and can be exercised in a way that satisfies everyone.”<sup>24</sup>
164. The DPLRC and a number of subject committees have raised concerns about the

lack of a statutory requirement in UK Bills to seek the consent of Scottish Ministers when using delegated powers to legislate in devolved areas. 9 of the 10 Bills for which LCMs have been lodged in session 6 so far contain at least one power for which there is no statutory consent requirement.

165. An example is the Professional Qualifications Act 2022 which contains a statutory requirement for consultation rather than consent. It contains what is being referred to as a “consult plus” provision, which is a statutory requirement that UK Ministers consult the Scottish Ministers before making legislation within devolved competence and publish a report on that consultation process within a specified timescale explaining whether and how the Scottish Ministers’ views were taken into account.
166. The Economy and Fair Work Committee in its report<sup>v</sup> on the Scottish Government’s LCM on the Professional Qualifications Bill agreed that “the legislation should require the UK Government to obtain the consent of the devolved administrations, rather than simply relying on the present UK Government’s assurances that it will do so.” The DPLRC has agreed, as a matter of principle, that “powers which are conferred on Secretary of State/Lord Chancellor and are exercisable within devolved competence should be subject to a requirement for the Scottish Ministers’ consent.”

## Statutory Instrument Protocol (SIP) 2

167. The Scottish Parliament and the Scottish Government agreed SIP 2 in Session 5 which gives the Scottish Parliament a voice in the scrutiny of powers being exercised within devolved areas by UK Ministers with the Scottish Ministers’ consent. SIP 2 recognises that “the Parliament should be able to exercise effective scrutiny in relation to consent by the Scottish Ministers to such provisions, which may make significant changes to the post-Brexit devolved legislative landscape.”
168. This protocol builds upon but expands the scope of its predecessor agreement. Where SIP 1 applied only in relation to regulation-making powers under the EU (Withdrawal) Act 2018, SIP 2 applies to a much broader range of EU withdrawal-related regulation-making powers (including to various provisions of the UK Internal Market Act 2020).
169. Dr McCorkindale points out that “the capacity for scrutiny by the Scottish Parliament under the protocol is itself dependent upon the strength of any consent mechanism in the relevant UK legislation” as follows—
- where there is a statutory requirement on the part of UK ministers to obtain the consent of devolved counterparts the protocol has bite: the Scottish Government would not consent, and the UK Government therefore could not proceed, where the Scottish Parliament expresses disapproval;
  - where there is no statutory consent requirement but the protocol is nevertheless engaged because of the political commitment of the UK Government to seek consent, disapproval has no meaningful impact because

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<sup>v</sup> Note that neither the EFWC or the DPLRC scrutinised the “consult plus” amendment which was lodged after both Committees had considered the initial LCM.

the consent of the Scottish Government is not of UK Government action;

- where there is no statutory requirement or political commitment on the part of the UK Government to seek consent the protocol is redundant: there is no consent decision on the part of the Scottish Government upon which the Scottish Parliament's scrutiny function can bite.
170. Professor Page's view is that SIP2 "is clearly incomplete" and that "needs to be addressed." <sup>24</sup> SPICe identify some limitations with regards to the operation of SIP2.
171. 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.
172. 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.
173. The powers which are conferred on UK Ministers are powers to make secondary legislation (SIs) in the UK Parliament. The Scottish Parliament cannot scrutinise secondary legislation laid at the UK Parliament (unless the legislation is made under a special "joint procedure" and is scrutinised by both Parliaments, but this is very rare). This raises the question of the level of scrutiny at Westminster of SIs which contain provisions relating to devolved matters.
174. The Hansard Society "has longstanding and deep-rooted concerns relating to the use of delegated powers and delegated legislation at Westminster." <sup>50</sup> They told us that through their research "we find that scrutiny of UK statutory instruments in Westminster does not, in our view, provide for adequate oversight by the legislature of Executive action to make regulations." <sup>8</sup> They believe "the system needs wholesale reform to prevent further erosion of Parliament's legislative authority." <sup>50</sup>
175. The Public Law Project share a similar view and state that the "UK's system of scrutiny of delegated legislation does not have the capacity to provide proper parliamentary oversight for powers of wide breadth and scope" and "the lack of scrutiny also produces poorer quality laws and policy." <sup>48</sup>
- 176. The Committee notes that the Secretary of State for Levelling Up, Housing and Communities recently stated in a letter to the DPLRC that powers for the UK Government to make SIs in devolved areas "are not new and have been used across a wide range of policy areas since the advent of devolution." <sup>56</sup> However, as noted above, prior to the UK leaving the EU, UK Ministers would principally make secondary legislation in devolved areas that implemented EU obligations and with the consent of Scottish Ministers. The UK Government did not generally have powers to make**

**secondary legislation in devolved areas and did not often do so.**

177. **As the Committee has noted previously there is a considerable difference between delegated powers being conferred on Ministers to deliver a legal obligation to comply with EU law and delegated powers in the same policy area without this constraint.**<sup>11</sup>
178. **The Committee's view is that the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change. We have considerable concerns that this has happened and is continuing to happen on an ad hoc and iterative basis without any overarching consideration of the impact on how devolution works.**
179. **This raises a number of questions which require further detailed scrutiny–**
- **Whether it is appropriate for UK Ministers to have considerable new delegated powers in devolved areas without any overarching consideration of the impact on how devolution works;**
  - **To what extent there is a risk to the Scottish Parliament's legislative and scrutiny function from the post-EU increase in the size and use of delegated powers both at a UK level in devolved areas and by Scottish Ministers;**
  - **How the post-EU limitations of the Sewel Convention discussed above need to be addressed in considering the effectiveness of legislative consent mechanisms for secondary legislation.**

# Conclusion

180. **The Committee’s findings above demonstrate that there are fundamental concerns which need to be addressed by the Scottish Parliament in relation to how devolution works outside the EU. The Committee will seek time for a debate on this report in the Chamber and will also invite the Conveners’ Group to consider our findings.**
181. **At the same time the Committee’s view is that there needs to be a much wider public debate to address the fundamental questions arising from the impact of Brexit on how devolution works.**
182. **The Committee will pursue the findings of this report at an interparliamentary level through the interparliamentary forum. We will circulate the report in advance of the next meeting of the forum in Cardiff on 28 October 2022.**
183. **The Committee will also launch a significant committee inquiry which will allow businesses, civic society and the wider public to engage on these core issues.**
184. **To inform this inquiry the Committee will seek the views of the UK Government and the Welsh Government as well as the Scottish Ministers in response to the findings of this report.**

# Annexe A - Minutes

## Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 13th Meeting, 2022 - Thursday 19 May 2022

**2. Legislative Consent after Brexit:** The Committee took evidence in a round table format from—

- Professor Nicola McEwen, Professor of Territorial Politics, University of Edinburgh;
- Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh;
- Professor Aileen McHarg, Professor of Public Law and Human Rights, Durham University;
- Akash Paun, Senior Fellow, Institute for Government;
- Michael Clancy, Director Law Reform, Law Society of Scotland;
- Professor Alan Page, Emeritus Professor of Public Law, University of Dundee.

## Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 14th Meeting, 2022 - Thursday 26 May 2022

**2. Implementation of the Trade and Co-Operation Agreement:** The Committee took evidence from—

- Dr Fabian Zuleeg, Chief Executive and Chief Economist, European Policy Centre;
- Professor Catherine Barnard, Deputy Director, UK in a Changing Europe;
- Professor Christina Eckes, Professor of European Law, University of Amsterdam;
- Ian Forrester QC LLD, Honorary Professor of European Law, University of Glasgow.

## Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 15th Meeting, 2022 - Thursday 9 June 2022

**3. Intergovernmental Relations:** The Committee took evidence from—

- Jess Sargeant, Senior Researcher, Institute for Government;
- Dr Paul Anderson, Senior Lecturer in International Relations and Politics, Liverpool John Moores University;
- Dr Coree Brown Swan, Lecturer in Comparative Politics, Queen's University Belfast.

## Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 18th Meeting, 2022 - Thursday 30 June 2022

**1. Implementation of the Ireland/Northern Ireland Protocol:** The Committee took evidence from—

- Stuart Anderson, Head of Public Affairs, Northern Ireland Chamber of Commerce and Industry;
- Dr Lisa Claire Whitten, Research Fellow, Post-Brexit Governance NI, Queen's University Belfast;
- Declan Billington, Chief Executive, John Thompson and Sons Ltd.

**2. Retained EU Law:** The Committee took evidence from—

- Professor Kenneth Armstrong, Professor of European Law, University of Cambridge;
- Michael Clancy OBE, Director of Law Reform, Law Society of Scotland;
- Dr Tom West, Researcher, Hansard Society;
- Dr Emily Hancox, Lecturer in Law, University of Bristol School of Law;
- Kirsty Hood QC, Faculty of Advocates.

# Annexe B - Evidence

## Oral Evidence

- [19 May 2022 - Legislative Consent after Brexit](#)
- [26 May 2022 - Implementation of the Trade and Co-operation Agreement](#)
- [9 June 2022 - Intergovernmental Relations](#)
- [30 June 2022 - Implementation of the Ireland/Northern Ireland Protocol; Retained EU Law](#)

## Written Evidence

- [Professor Nicola McEwen](#)
- [Institute for Government](#)
- [Professor Aileen McHarg](#)
- [Professor Ian Forrester QC](#)
- [Professor Christina Eckes](#)
- [Professor Paul Craig](#)
- [Dr Paul Anderson](#)
- [Dr Coree Brown Swan](#)
- [Dr Lisa Claire Whitten](#)
- [John Thompson and Sons Ltd](#)
- [Dr Emily Hancox](#)
- [Hansard Society](#)
- [Faculty of Advocates](#)
- [Law Society of Scotland](#)
- [Public Law Project](#)

## Briefings from Committee Advisers

- [Dr Chris McCorkindale - Legislative Consent after Brexit](#)
- [Professor Tobias Lock and SPICe - EU-UK Trade and Co-operation Agreement](#)
- [Professor Michael Keating and SPICe - Intergovernmental Relations](#)
- [Professor Katy Hayward and SPICe - Protocol on Ireland/Northern Ireland](#)

- [Professor Tobias Lock and SPICe - Retained EU Law](#)

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