



Department
for Exiting the
European Union

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Dear Mike,

I am writing to inform you that tomorrow the UK Government will introduce the European Union (Withdrawal Agreement) Bill (the 'Bill') in the UK Parliament. I am writing in similar terms to Jeremy Miles AM, Counsel General and Brexit Minister in the Welsh Government. The Permanent Secretary of the Department for Exiting the European Union has also written to David Sterling, Head of the Northern Ireland Civil Service. An embargoed copy of the Bill has been shared with your officials.

Following the election result, the House of Commons can now vote on this Bill before Christmas and we can leave the European Union in January. Passing this Bill will allow us to respect the result of the referendum, move on to focus on other priorities and bring the country together.

Much of the content of this letter will be familiar from James Duddridge's letter in October. Nevertheless, I want to take the opportunity to set out the Government's position: i.e. that the Bill does what is necessary in domestic law to meet the international obligations set out in the EU Withdrawal Agreement, the separation agreement we have concluded with EEA EFTA states, and the agreement on citizens' rights with Switzerland. In addition, the Bill also contains measures, not directly related to the implementation of the Withdrawal Agreement, which provide additional assurances regarding the UK's exit from the EU.

As you are aware, parts of the Bill will affect the competence of devolved institutions and will legislate in devolved areas. I am therefore writing today to seek the consent of the Scottish Parliament for certain clauses of this Bill. I have set out in the Annex to this letter the clauses for which the UK Government is seeking legislative consent.

Following your letter of 22 October, I would also like to clarify the basis on which we are seeking the consent of the Scottish Parliament.

Following the Sewel Convention and associated practices, the UK Government is seeking the consent of the Scottish Parliament for those provisions in this Bill which legislate with regard to devolved matters or alter the competence of the devolved institutions.

The conduct of international negotiations and the approval of international agreements resulting from those negotiations, including the Withdrawal Agreement, is a reserved matter, and will be considered by the UK Parliament, including by MPs representing constituencies in Scotland. The implementation of those agreements, where it would otherwise fall within devolved competence, is devolved.

In line with the tests set out above, Scottish Parliament consent is not sought for the obligations in the Withdrawal Agreement, but for the manner in which provisions in this Bill implement those obligations in devolved domestic law.

In your letter of October 22 you welcomed the level of engagement on previous versions of the Bill. I would like to join you in recognising the engagement that has taken place between our administrations to develop this Bill. The consideration of how we legislate to implement the Withdrawal Agreement in devolved areas has been a joint endeavour and our governments discussed the Bill at successive meetings of JMC(EN). As you will recall, drafting on the Bill was first shared with you in November 2018. From then on, our officials worked collaboratively on the issues you raised in initial correspondence on the Bill in January 2019. That work resulted in the UK Government making the significant changes set out in James Duddridge's letter of 20 October 2019 including giving devolved ministers a strong role in relevant appointments to the board of the IMA.

I note that in previous correspondence you raised further concerns with these changes. I have attempted to address the points raised in your letter in the Annex to this letter.

You have my assurance that the UK Government remains committed to fully engaging with the Scottish Parliament and supporting its inquiries on the Bill.

I hope you will be able to support this request seeking legislative consent from the Scottish Parliament and that you will be able to recommend that the Scottish Parliament gives its consent. I look forward to continuing to work with you as this essential Bill moves through its parliamentary passage.

I am copying this letter to the Secretary of State for Scotland, the Minister for the Cabinet Office and the Chancellor of the Duchy of Lancaster.

Yours Sincerely,

Two handwritten signatures in blue ink, one on the left and one on the right, positioned above the title of the Secretary of State.

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

ANNEX

Clauses for which we are seeking legislative consent

Independent Monitoring Authority

I regret that we have been unable to reach agreement on the process for appointing the IMA member with knowledge of relevant matters in Scotland (both reserved and devolved), despite the changes made to the Bill's drafting since you first raised your concerns in January 2019.

The appointments process gives DA Ministers a full and robust role in appointments to the IMA:

- DA ministers will be consulted on the skills and experience required of candidates;
- The names of shortlisted candidates will be shared with DA ministers for comment;
- We have committed to consulting DA ministers before appointing the IMA's chair, to ensure this role has your full confidence;
- I have also ensured, on the face of the Bill, that the IMA's responsible minister must seek the agreement of the relevant DA minister before making appointments to the positions requiring knowledge of relevant devolved matters.

When these statutory and non-statutory commitments are combined, I am confident that this model strikes an appropriate balance in making appointments to a UK-wide body. Most importantly, I believe that it will give us the best chance of together ensuring that the strongest candidates are appointed to these positions, and that these appointments can secure the agreement of DA ministers.

I recognise your concerns about the mechanism for IMA appointments set out on the face of the Bill, and UK Ministers will work in good faith throughout the appointments process to ensure that the final candidate put forward by the Secretary of State has the approval of the relevant Scottish Government minister. However, I feel strongly that the IMA must contain the right expertise to operate effectively across different legal jurisdictions, including Scotland, so that the rights of EU and EEA EFTA citizens are upheld in every nation of the UK. That is why I have felt it necessary to include a contingency on the face of the Bill, which guarantees that this crucial IMA board position can be filled in the unlikely event that agreement on a candidate cannot be reached between our governments.

Protected Enactment Status

Your letter states that the protected status conferred on elements of this Bill inserted into the EUWA is unnecessary and unsuitable because these provisions are implementing an international agreement.

As you are aware, the position we have reached on the protected status of certain provisions in this Bill is the result of joint working between officials in both our administrations and

officials in the Welsh Government. We took on board your initial request to conduct a clause-by-clause analysis of the provisions of the Bill and only protect those provisions where protection is justified. The result of that analysis was set out to you in my letter to you of 20 October 2019.

As James Duddridge's original letter set out, we are only protecting a very limited number of clauses in this Bill from changes by devolved legislatures. These are clauses which are constitutional in nature. Limiting further changes to these clauses is essential for legal certainty and is consistent with precedent - for example, parts of the European Communities Act 1972 (which also implements an international agreement) were protected in a similar way.

It is a focussed protection, which is entirely in keeping with the protection afforded to other constitutional statutes under the devolution settlements.

Your letter states that provisions being inserted into the EUWA will become protected provisions. We have ensured that of the new provisions inserted into that Act, only those which are of a constitutional nature are being protected from modification (as set out in schedule 6 para 21 of the Bill).

Powers in the Bill

You have asked that the power conferred on UK ministers by clause 21 and devolved authorities by clause 22 are restricted so that they cannot amend the Scotland Act 1998.

The Government has committed to a wide range of obligations as part of the Protocol in order to avoid a hard border on the island of Ireland. It is imperative that the powers to implement the Protocol are drafted in a way which allows the UK Government to fully meet its international obligations. The power conferred on UK ministers by clause 21 and devolved authorities by clause 22 are therefore drafted to ensure that the UK can fulfil all of these obligations.

When the powers are used to amend primary legislation or retained direct principal EU legislation, the Regulations will be subject to the affirmative procedure in order to provide appropriate scrutiny. In addition, where any regulations made under these powers seek to, for example, establish a public authority or create or widen the scope of a relevant criminal offence, they will also be subject to the affirmative procedure.

We have also committed that we will not normally use the power for UK Ministers in areas of devolved competence without the consent of the relevant devolved administration. The Government respects and will continue to uphold the devolution settlement.

Other provisions

Preparations for Future Partnership Negotiations

The UK Government remains committed to involving the Scottish Government in preparations for future partnership negotiations, as set out in correspondence from the last Government.

The Chancellor of the Duchy of Lancaster and I wrote to you on 3 October setting out principles for working with the devolved administrations on preparations for future partnership negotiations, recognising your responsibilities to observe international obligations and implement them in areas of devolved competence. These principles will ensure that views from the whole of the United Kingdom are taken into consideration, as you set out.

The Chancellor of the Duchy of Lancaster and I will write separately in response to your letter of 14 October on the detail of the principles.

LCM Analysis

The UK Government is seeking legislative consent for the following provisions of the Bill:

- The clause giving effect to the implementation period and related provisions, as this will alter the competence of the Scottish Government and the Scottish Parliament;
- The conferral on UK Ministers of supplementary powers to make provision in connection with the implementation period as this legislates in areas of the Scottish Parliament's legislative competence;
- The conferral on the Scottish Ministers of supplementary powers to make provision in connection with the implementation period within devolved competence (as defined in the Bill), and amendments to the powers exercisable by the Scottish Ministers in Part 1 of Schedule 2 and Part 1 of Schedule 4 to the EU (Withdrawal) Act, as these will alter the competence of the Scottish Ministers;
- Clauses 5 and 6 (general implementation of the remainder of the Withdrawal Agreement and of related EEA EFTA separation agreements) as these alter the competence of the Scottish Ministers and the Scottish Parliament;
- In relation to the citizens' rights provisions in the Bill, the conferral on the UK Ministers and Scottish Ministers of powers to make provision within devolved competence (as defined in the Bill) in relation to social security coordination, mutual recognition of professional qualifications and equal treatment, as these will legislate in areas of the Scottish Parliament's competence and alter the competence of the Scottish Ministers;
- The clauses establishing the Independent Monitoring Authority (IMA), as these legislate in areas of the Scottish Parliament's legislative competence and alter the competence of the Scottish Ministers;
- The conferral on UK Ministers of a power to implement the other separation issues as this legislates in areas of the Scottish Parliament's legislative competence;

- The conferral on the Scottish Ministers of a power to implement the other separation issues so far as that is within devolved competence (as defined in the Bill), as this will alter the competence of the Scottish Ministers;
- The financial provision in clause 20 as this modifies the competence of the Scottish Ministers;
- The conferral on UK Ministers of a power to implement the Protocol on Ireland/Northern Ireland as this legislates in areas of the Scottish Parliament's legislative competence; the conferral on the Scottish Ministers of a power to implement the Protocol on Ireland/Northern Ireland, as this will alter the competence of Scottish Ministers;
- The conferral on the Scottish Ministers of ancillary fee charging powers as these will alter the competence of the Scottish Ministers;
- Provisions in Schedule 5 including:
 - giving effect to the mass deferral of statutory instruments which come into force by reference to exit day, and conferring on Scottish Ministers the power to disapply or make different provision in particular cases. These provisions will alter the competence of the Scottish Ministers; and
 - The provision dealing with the protected enactment status of amendments to the EU (Withdrawal) Act, as this will modify the competence of the Scottish Parliament.