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22 October 2019

Dear James

EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL

Thank you for your letter of 20 October 2019.

The Scottish Government does not support the Withdrawal Agreement and Political Declaration and will not recommend that the Scottish Parliament consent to the Withdrawal Agreement Bill.

Firstly and most importantly, leaving the EU is not the will of the people of Scotland, and the deal that has been negotiated with the EU for leaving will be damaging to Scotland and to the United Kingdom. Scotland voted to remain but this deal would take Scotland out of the EU, out of the Single Market and out of the Customs Union. This agreement, and the approach of the UK Government, does not even remove the possibility of a no-deal exit at the end of the implementation period, which would be yet more damaging still.

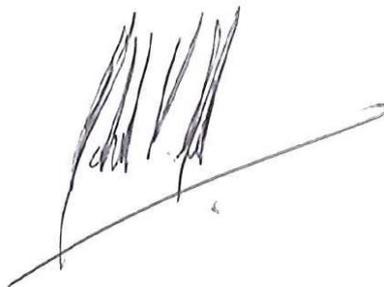
Secondly, the approach of the UK Government to the passage of the Bill is irresponsible and disrespectful of the legislatures of these islands and the devolution settlements. This is one of the most important pieces of legislation ever to be considered by the UK and Scottish Parliaments as the implementation of the Withdrawal Agreement involves a fundamental adjustment to the constitution of our nations. It is essential that it should receive scrutiny in all of the UK's legislatures, that there should be the proper opportunity for civil society to consider it and for citizens to understand its meaning and significance, and for all constitutional conventions, including the Sewel Convention, to be respected during its passage.

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Thirdly, the Bill as drafted does not respect the devolution settlement, or afford the Scottish Parliament and devolved institutions their proper role in the process of fundamental constitutional importance of EU exit and negotiation of the new relationship with the EU. I have set out in an Annex to this letter the changes that we consider are required to the Bill in order for it to properly respect the devolution settlement. This Annex also sets out the clauses which we consider require the consent of the Scottish Parliament, which differ from the limited clauses set out in your letter. Scottish Ministers will support any scrutiny of this Bill that the Scottish Parliament is able to do in the time available, and we expect too that the Scottish Parliament's views on its provisions should be given weight.

Finally, I call on the UK Government to guarantee the rights of EU citizens now. The Scottish Government has always been clear that EU citizens should not need to apply to maintain rights they already have and that the EU Settlement Scheme should be declarative. The UK Government has the power to provide EU citizens with clarity and certainty about their future rights by introducing separate primary legislation to clearly set out and protect the rights of EU citizens who are resident in the UK at the point of leaving the EU.

Under the previous Prime Minister, and the previous ministerial team at the Department for Exiting the EU, there was good quality engagement over the drafts of this Bill prepared in respect of the withdrawal agreement then concluded with the EU, and I thank those Ministers for that.



MICHAEL RUSSELL

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Annex

Independent Monitoring Authority (IMA)

Your proposals concerning the make-up of the Independent Monitoring Authority do not ensure that this important body has the authority, accountability and legitimacy when operating in devolved areas that it will require to have.

The appointment to the IMA board in respect of Scotland should require the consent of the Scottish Ministers, meaning that it has been agreed between all the governments with responsibility in the areas that the IMA superintends. Instead of requiring consent, the Bill imposes a complex process in contemplation of there being a disagreement between administrations about the appointment in respect of Scotland. In doing so, it appears to directly envisage the imposition of a Scottish member of the IMA Board who is objected to by the Scottish Government. That is not consent. The purpose of requiring consent is to ensure that both governments work together to agree an appointment, rather than one having the final say. The Scottish Ministers would work in good faith in respect of such an appointment, as both we and the UK Government would be required to do by a provision which made consent an essential precondition to appointment.

You have committed to consulting the Scottish Ministers before the appointment of the chair of the IMA is made. We would like to see that commitment reflected in the Bill.

Without such changes being made, there is a risk that the IMA is seen in Scotland as lacking authority and legitimacy in respect of all its functions, and particularly where its functions have an effect on, intersect with or are within devolved competence.

Preparations for Future Partnership negotiations

Your letter states that you are committed to involving the Scottish Government in preparations for future partnerships negotiations, yet no provision has been made for that in your Bill to implement the UK Government's negotiated deal. The terms of reference of the Joint Ministerial Committee (EU Negotiations) as agreed by all four administrations, are that the Committee shall "seek to agree a UK approach to and objectives" and to provide oversight of the negotiations to achieve those objectives. The provisions on oversight of the negotiations in the proposed Bill only engage a role for the UK Parliament in debating and consenting to the objectives for the future relationship, and provide only for reports on progress to be sent to the devolved legislatures and devolved governments.

The Bill currently provides that any treaty resulting from the 'future relationship' negotiations would need to be approved by the House of Commons prior to ratification. However, in such scenarios, the ratification obligations under CRAGA would not apply. Neither is there any indication of a formal role for the Scottish Government or Scottish Parliament.

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The Scottish Government is of the view that there should be formal roles provided for both the devolved administrations and devolved legislatures to ensure the views of the entire UK are taken into consideration.

Protected enactment status

As you note in your letter, certain provisions of the Bill, once enacted, will be made protected enactments under the Scotland Act 1998 by virtue of their inclusion in the EU (Withdrawal) Act 2018.

The Scottish Government does not agree with the protection of EUWA as it constrains the competence of the Scottish Parliament, and the Parliament withheld its consent to this provision.

The Scottish Government similarly disagrees with the limitation of legislative competence that will follow once certain provisions in the current Bill are included in this protected enactment status.

It is the view of the Scottish Government that the protected enactment status of EUWA should be removed and that the status afforded to the elements of EUWA introduced by this Bill is unnecessary and unsuitable since the relevant 'protected' provisions which the Bill inserts into the EU (Withdrawal) Act are implementing an international agreement which, in devolved areas, it would otherwise be the obligation of the Scottish Government and Parliament to implement. The Scottish Government and Parliament take seriously their responsibility to implement all international obligations in devolved areas.

Restricting powers in the Bill from amending the devolution statutes

The Scottish Government considers that when broad or purposive powers which allow the amendment of primary legislation are included in UK Bills, significant constitutional legislation such as the Scotland Act 1998 should be protected from being amended under these powers.

This has been done for some powers in the Bill: for example, the new power amended into EUWA by clause 18 concerned with other separation issues. The power in clause 21, to make provision in connection with the Ireland / Northern Ireland protocol, and the corresponding power for devolved authorities in clause 22, do not contain any restrictions of this sort. It is the position of the Scottish Government that these powers should not be able to amend the Scotland Act 1998.

It is disappointing not to have these protections for the Scotland Act 1998 in the Bill on introduction.

Clauses requiring the consent of the Scottish Parliament

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We note your legislative consent analysis and confirm we agree that the clauses identified by UK Government do require the consent of the Scottish Parliament. However, it is the view of the Scottish Government that the following clauses also require the Scottish Parliament's consent:

- **Clause 3** which amends EUWA to provide UK Ministers supplementary powers to address deficiencies in domestic law as a result of withdrawal
- **Clause 5** which provides for the general implementation of the Withdrawal Agreement into domestic law. It also provides for all rights, powers, liabilities, obligations, restrictions, remedies and procedures created or provided for by the Withdrawal Agreement (other than Part 4) to be directly recognised and enforced in domestic law
- **Clause 6** which replicates the approach in clause 5 to the EEA EFTA Separation Agreement.
- **Clause 18** which inserts new powers into EUWA for UK Ministers to make provision to implement Part 3 of the Withdrawal Agreement (separation issues) and equivalent provisions of EEA EFTA separation agreement. Part 3 issues include devolved matters.
- **Clause 20** which provides powers in connection with fees and charges, and provides that devolved authorities may incur expenditure in preparation for the making of statutory instruments under the Bill.
- **Clause 21** which provides powers to UK Ministers to implement the protocol on Ireland / Northern Ireland in the Withdrawal Agreement.
- **Clause 25** which makes amendments to specified provisions of EUWA, for example, by substituting various references to “exit day” so that they are references to “IP completion day”. This is to ensure that the conversion of EU law into ‘retained EU law’ will now take place at the end of the implementation period.
- **Clause 26** which makes further amendments to substitute references to ‘exit day’ so that they refer to ‘IP completion day’. This clause also defines the term ‘relevant separation agreement law’ and sets out rules of interpretation so that, so far as applicable, that body of law is interpreted in accordance with the Withdrawal Agreement, the EEA EFTA separation agreement and the Swiss citizens’ rights agreement.
- **Clause 28**, which is an ancillary fee charging power, amends the scope of fee charging powers in Schedule 4 to EUWA, which are conferred on the DAs as ‘appropriate authorities’.

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