



Law Society
of Scotland



The Law Society of Scotland's Response

The Progress of the UK's Negotiations on EU
Withdrawal – Role of Parliament Inquiry

April 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law sub-committee welcomes the opportunity to consider and respond to the inquiry by the Exiting the European Union Committee Progress of the UK's Negotiations on EU Withdrawal – Role of Parliament Inquiry. The sub-committee has the following comments to put forward for consideration.

General Comments

- *What legislation Parliament needs to pass ahead of withdrawal to provide for a functioning statute book*

Leaving with a Withdrawal Agreement

In the event of exit with a Withdrawal Agreement in place there will need to be a statute ratifying the Withdrawal Agreement. This will be achieved by the European Union (Withdrawal Agreement) bill:

The Bill will seek to give effect in UK law to the Withdrawal Agreement with the EU. The Withdrawal Agreement currently provides in Article 12b for a transitional period during which EU law will continue to apply to the UK until 31 December 2020 (subject to any potential change which negotiations may agree).

The UK Government's White Paper on legislation for the Withdrawal Agreement does not propose to achieve this by amending the date of exit day to 31 December 2020.

Instead it states that this should be achieved by "[amending the EU Withdrawal Act] so that the effect of the European Communities Act 1972 (ECA) is saved for the time limited implementation period" [paragraph 60]. In other words, by means of transitional provision the proposed EU (Withdrawal Agreement) Act will both preserve the effect of the ECA during the implementation period and ensure that its effect comes to an end on 31 December 2020.

This will mean that during the transition or implementation period to 31 December 2020:

- A. the relevant provisions of EU law will continue to have direct effect and be supreme over Acts of the UK Parliament;

- B. the UK will remain bound to implement any new non-directly effective EU law and even although it may be scrutinised by the UK Parliament or by the Devolved Legislatures the UK will not have any part to play in its making because it will no longer be a member of the EU.
- C. as the White Paper puts it, the EU (Withdrawal Agreement) bill “will amend the EU (Withdrawal) Act 2018 so that the conversion of EU law into “retained EU law” ...can take place at the end of the implementation period” [paragraph 69] and not on 22 May 2019. In other words, the Bill will need to extend the regulation amending powers contained in the EU (Withdrawal) Act 2018 to 2 years after the end of the implementation period that is until 31 December 2022. The Statutory Instruments and Scottish Statutory Instruments which are being drafted at present to take effect on exit day will also have to be extended to take account of EU law as it exists on 31 December 2020.
- D. the Withdrawal Agreement would also need approval under the Constitutional Reform and Governance Act 2010 (CRAGA) which requires treaties to be laid for 21 sitting days before ratification.

The Prime Minister indicated the approach the government would take to the requirements of CRAGA in Parliament in February:

“the European Union (Withdrawal) Act 2018 makes clear that the provisions of the 2010 Act apply to the withdrawal agreement and require it to be laid before Parliament for 21 sitting days. In most circumstances, that period may be important for the House to have an opportunity to study a piece of legislation, but in this instance, MPs will already have debated and approved the agreement as part of the meaningful vote. While we will follow normal procedure if we can, where there is insufficient time remaining following a successful meaningful vote, we will make provision in the withdrawal agreement Bill, with Parliament’s consent, to ensure that we are able to ratify on time to guarantee our exit in an orderly way”. (Hansard 12 February 2019 Vol 654,col 745).

The Scottish Government has indicated that it will not recommend consent to the EU (Withdrawal Agreement) bill if the timetable is too short for consideration (Statement by Michael Russell MSP, Cabinet Secretary for Government Business and Constitutional Relations 19 February 2019).

Leaving without a Withdrawal Agreement

In the event of withdrawal without a Withdrawal Agreement in place there will need to be:

- A. Transposition of EU law into retained EU law under the European Union (Withdrawal) Act 2018.
- B. Enactment of Brexit related legislation

A. Transposition of EU Laws into Retained EU Law

The Scottish Parliament’s information centre spotlight states that:

“At 20 March 2019, the Scottish Government has asked the Scottish Parliament to approve its proposed consent to 130 statutory instruments relating to devolved areas of policy being made by the UK

Government. [A full breakdown of the statutory instruments proposed and their status is available](#) It is important to note that the numbers provide a snapshot in time and will change as more SIs complete their parliamentary stages or are made.

67 of the 130 statutory instruments considered by the Scottish Parliament have been made and will come into force on exit day, or on the day set out in the regulation. The Common Fisheries (Transfer of Functions) (EU Exit) Regulations 2019 is no longer required. 62 have not yet been made. This means that, should the UK leave the EU before these statutory instruments are made, there is a risk that the domestic law governing these areas will not work as intended.

82 of the required 129 are subject to the affirmative procedure; 46 are subject to the negative. The Competitiveness of Enterprises and Small and Medium-Sized Enterprises (Revocation) (EU Exit) Regulations 2019 has an expected laying date of 4 April.

Of the 82 subject to the affirmative procedure: 23 have been made; 25 have been approved by Lords and the Commons, and 34 are awaiting completion of parliamentary stages.

44 of the 46 SIs subject to the negative procedure have been made. The Intelligent Transport Systems (EU Exit) Regulations 2018 and the Regulation (EC) No 1370/2007 (Public Service Obligations) (Amendment) (EU Exit) Regulations 2019 have not yet been made.” <https://spice-spotlight.scot/2019/03/27/statute-still/>

Ensuring that domestic law is fit for purpose will continue after Brexit day and priority has been given to correcting those areas of law considered most important.

We can expect more bills and statutory instruments will be required to make sure that the whole of the statute book still works effectively after exit day.

B. Brexit Related Legislation

There are 13 items of primary legislation associated with the process of exiting the EU.

Exit Related Acts

Parliament has enacted six of these: the European Union (Withdrawal) Act 2018; the Sanctions and Anti-Money Laundering Act 2018; the Haulage Permits and Trailer Registration Act 2018; the Nuclear Safeguards Act 2018; the Taxation (Cross-border Trade) Act 2018 and the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019.

Exit Related Bills

Trade Bill

The Trade Bill makes provision about the implementation of international trade agreements, establishes the Trade Remedies Authority and creates the legal framework for collection and disclosure of trade implementation. On 6 February the Secretary of State for International Trade, Liam Fox, MP told the International Trade Committee that he was “increasingly confident” that the Bill will pass. He stated that, “the Government has a range of contingency plans” if the Bill is not enacted. But he cautioned that, “even if we were able to put temporary measures in place we would still need the Trade Bill to give us long-term assurances.” The bill is currently at ping pong.

Agriculture Bill

The Agriculture Bill provides the framework for the transition from the EU Common Agricultural Policy to a UK agriculture policy and payment approaches in England and Wales and contains provisions to secure compliance with the WTO Agreement on Agriculture. The bill awaits its Report stage in the House of Commons. The passage of the Bill before ‘exit day’ would facilitate a smooth transition to the new framework.

Fisheries Bill

If there is no Withdrawal Agreement, the UK would become an independent coastal state from March 2019 would no longer be subject to the Common Fisheries Policy (CFP) and would and would be in control of its Exclusive Economic Zone. This would enable the UK to determine fishing opportunities in its waters.

The Bill gives the Secretary of State power to set and distribute fishing opportunities and access to UK waters. It also excludes foreign unlicensed fishing vessels from UK waters.

The bill awaits its Report stage in the House of Commons.

Immigration and Social Security Co-ordination (EU Withdrawal) Bill

The Immigration and Social Security Co-ordination Bill ends free movement of people under retained EU law relating to free movement and brings EEA nationals and their families under UK immigration control; it protects the status of Irish citizens in UK immigration law once their free movement rights end; and it empowers Ministers to change retained EU law governing social security coordination.

The bill awaits its Report stage in the in the House of Commons.

Financial Services (Implementation of Legislation) Bill [HL]

Most financial services regulation is currently done at the EU level. The Financial Services Bill enables the Treasury to make corresponding or similar provisions in UK law to upcoming EU financial services legislation. If the UK leaves the EU with no deal, without this Bill, there will be no mechanism through which financial services regulation can be updated.

The Bill awaits its Report stage in the House of Commons.

The Environmental Principles and Governance Bill 2017-19 and the Animal Welfare (Sentencing and Recognition of Sentience) Bill are draft Bills. These Bills are expected to be included in the next Queen's Speech.

The Scottish Government has indicated that it does not intend to lodge a legislative consent motion seeking consent to the Agriculture and Fisheries bills see: the Legislative Consent Memoranda at –

<http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-22.pdf>

<https://www.parliament.scot/S5ChamberOffice/SPLCM-S05-19.pdf>

- *What the challenges are for achieving this whether the UK exits with a deal or without a deal?*

Lack of parliamentary time is the primary issue. EU Exit statutory instruments are still being considered by Parliament in early April such as the Value Added Tax (Tour Operators) (Amendment) (EU Exit) Regulations 2019 (S.I., 2019, No. 73 and the draft Electronic Communications (Amendment Etc.) (EU Exit) Regulations 2019 and other orders referred to in Order Paper No.287.

The European Council conclusions made 10 April provide that the Council agreed to an extension for the ratification of the Withdrawal Agreement. Such an extension should be only as long as necessary and no longer than 31 October 2019. Furthermore the Council underlined that the extension cannot be allowed to undermine the regular functioning of the Union and its institutions.

If the UK is still an EU Member at the 23-26 May (EU election period) and if the Withdrawal Agreement is not ratified by 22 May the UK must participate in the elections to the EU Parliament.

Accordingly the parliamentary time available to enact the necessary legislation is limited to 31 October at the latest but could be more truncated if the Withdrawal Agreement is approved earlier.

- *In the event that a deal is ratified, what role Parliament should have in scrutiny of negotiations on the Future Relationship, and whether this role should be established in the legislation implementing the Withdrawal Agreement;*
- *In the event of a no deal exit, what role Parliament should have in scrutiny of any subsequent agreements reached with the EU;*

These two questions raise many of the same issues regarding parliamentary scrutiny of treaties.

There should be adequate mechanisms to would Parliament to hold Government to account more effectively. The various models from other jurisdictions provide examples of how such a system could work.

The Constitution Committee and the House of Commons' Exiting the European Union Committee have already expressed the view that the process for "treaty scrutiny under the Constitutional Reform and Governance Act 2010 is inadequate" and that there will have to be new mechanisms for scrutinising

proposed treaties (13th Report of Session 2017–19 HL Paper 193 Trade Bill paragraphs 22-24 and House of Commons Exiting the European Union Committee, Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship, Sixth Report of Session 2017–19, HC 1240, paras 105–106).

We agree with the views of both Committees and have given evidence to the House of Lords Liaison Committee that “the UK’s withdrawal from the EU and replacement of policy and law originating from the EU with that originating within the UK. This will require changed roles for committees and sub committees and the opportunity should be taken to rationalise and modernise the committee structure. Government’s aspirations to create a ‘Global Britain’ and to create a network of trade agreements will necessitate additional scrutiny requirements. Accordingly, this could translate into the creation of select committees on international trade, free trade agreements, private international law and citizens’ rights.”

- *Whether there is sufficient transparency in the Government’s approach to conclusion of international agreements; whether Parliament’s role needs to be clarified in respect of access to documents and the role of Select Committees or strengthened in respect of powers to approve negotiation mandates and ratification of agreements;*

There is not sufficient transparency in the Government’s approach to the conclusion of international agreements. The Foreign and Commonwealth Office publishes a monthly report on Government treaty actions which details the significant work which is undertaken in the field of diplomacy concerning treaties. This work appears to go largely unnoticed by Parliament and should be given a higher profile by for example being a standard reporting item on relevant Committee agendas.

There should be regular meaningful reporting of treaty negotiations. This should take place by way of ministerial statements, regular debates and ministerial appearances at relevant committees.

This issue has been considered by a number of Parliamentary committees over the years and the Joint Committee on Human Rights has issued many reports on, for example, scrutiny of international Human Rights law. Its report on Protocol No. 14 to the European Convention on Human Rights (First Report of Session 2004–05 HL Paper 8 HC 106) stated:

“5. In keeping with a number of recent recommendations, we consider it desirable for Parliament to be more involved before the ratification by the Executive of treaties which incur human rights obligations on behalf of the UK. The purpose of the constitutional practice known as the Ponsonby Rule is to enable Parliament to be informed about a treaty that the Executive intends to ratify, and to give it an opportunity to debate it if it is controversial.

In practice, however, there is no mechanism for reliably scrutinising treaties to establish whether they raise issues which merit debate or reconsideration before they are ratified.

6. The problem of lack of effective parliamentary scrutiny is particularly pressing in relation to human rights treaties, because it is now well established that UK courts will have regard to such treaties in a wide range

of circumstances, whether or not they are incorporated, and the Executive and administration also routinely have regard to such treaties in both policy-making and decision-making.

7. We have therefore decided to report to Parliament in future in relation to all human rights treaties, or amendments to such treaties, in respect of which there is a need to ensure that Parliament is fully informed about the background, content and implications of such treaties. This will enable parliamentarians to decide whether it is appropriate to call for a debate on the treaty concerned before it is ratified, and hopefully ensure that any such debate is properly informed. We consider that this will enhance the democratic legitimacy of human rights obligations incurred on behalf of the UK by the Executive pursuant to the prerogative power.”

These comments indicate that the problem of the inadequacy of scrutiny has been recognised for a considerable period of time. The current constitutional changes highlight that action ought to be taken to establish adequate scrutiny mechanisms before the prospective increase in treaty material begins.

Government and Parliament could engage more effectively with stakeholders and the public by using new ways of taking views, employing language which is more accessible and less legalistic or parliamentary in style.

Parliamentary Committees can also conduct broader outreach by holding sessions outwith Parliament and by choosing a more diverse range of locations in which to meet with the public.

Government and Parliament could also be more flexible about the channels of communication which they use and the engagement programme, which they undertake. Any new committee should have a communications plan to identify targets for engagement with the devolved administrations and legislatures, professional bodies, academia, community groups, representative bodies and also individuals, including those on the margins of society, who might be affected by the negotiations.

Although negotiation of a treaty can be a sensitive matter there must nevertheless be a robust mechanism for democratic accountability, regular reporting and the engagement with the stakeholder groups mentioned above. A failure to approach the negotiations openly could risk scrutiny problems at later stages or contribute to public concern, which may affect the outcome of the negotiations in the long run. Adopting inclusive methods of engagement could help to develop an authentic broad conversation with society and result in better treaty making.

- *What might the UK Parliament learn from models of treaty scrutiny in other countries?*

There are a number of scrutiny models which are considered to be effective in other jurisdictions. The crucial issue about any comparative analysis is that institutions from other jurisdictions may work well within their legal and political context but that is no guarantee that such institutions will translate well into our system.

Below we offer four examples - from the EU, the US, Australia and New Zealand – which may be of assistance.

European Union

EU Member States still largely control their own foreign relations. However, on some issues - for example trade policy - the EU exercises an exclusive competence; only the EU and not individual Member States can legislate on trade matters and conclude international trade agreements.

The European Commission negotiates on behalf of the EU after authorisation from the Council to negotiate a trade agreement with a trading partner, on the basis of a specific mandate agreed by the Council. The Commission reports regularly on the state of negotiations to the Council and the European Parliament.

When negotiations are finished, the Commission sends the agreement to the Council to decide on signature and conclusion. The agreement is then sent to the European Parliament, which can vote either for or against the agreement ahead of ratification. Where the agreement contains provisions that relate to Member State competences, the agreement must also be ratified by those member states in accordance with their ratification procedures.

The EU's policy concerning transparency of trade negotiations provides that all MEPs are granted access to texts currently made available to a select group of law-makers so members may inspect restricted text in special reading rooms. The Commission is also seeking to classify fewer documents as 'restricted' to make them more accessible outside the confines of a reading room.

United States

There are a few methods for the President to secure the authority to enter a treaty: Art II(2) of the US Constitution provides that the President 'shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.' The Senate can vote, not only on whether to accept or reject the treaty in its entirety, but can also amend the treaty. By taking this approach, there is no requirement to consult with the House of Representatives.

The President can also enter into 'executive agreements', which can be ratified without the consent of the Senate. These generally relate to foreign relations or military issues rather than those impacting on the rights and obligations of citizens. The Trade Promotion Authority (TPA) is a legislative procedure, established in 1974, by which Congress defines US trade negotiating objectives and sets out an oversight and consultation process for use during trade negotiations. Under the TPA, Congress retains the authority to review and decide whether any proposed US trade agreement will be implemented.

Through the TPA, Congress sets out:

- 1) guidance to the President on trade policy priorities and negotiating objectives;
- 2) requirements for the Administration to notify and consult with Congress, other stakeholders and the public during the negotiations of trade agreements; and

- 3) definitions of the terms, conditions and procedures under which it allows the Administration to enter into trade agreements and sets the procedures for consideration of bills to implement the agreements. This approach does not require a two-thirds majority in the Senate.

When the United States ratifies a treaty it immediately becomes law and a treaty provision that is sufficiently clear and precise to be applied as if it is a statute will be considered 'self-executing' like an Act of Congress. This can, however, create uncertainty about which treaty provisions are self-executing, and which require implementing legislation.

Australia

Section 51 xxix of the Australian Constitution provides that “the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: xxix external affairs...”

Executive powers - which are vested in the Queen and exercisable by the Governor General, including the power to enter into treaties - are granted under section 61 of the Constitution. Under this constitutional framework, decisions regarding negotiating, signing or acceding to a treaty are taken by the executive. The decision to pass implementing legislation - which is necessary because treaty commitments are not automatically incorporated into Australian law - is made by the parliament.

The Legal and Constitutional Affairs References Committee's 1995 inquiry into the Commonwealth's treaty-making power and external affairs power was the most comprehensive and detailed examination of these issues undertaken by a parliamentary committee. The Committee's report, “Trick or Treaty? Commonwealth Power to Make and Implement Treaties”, included recommendations most of which were accepted by the Australian Government.

The reforms introduced by the Australian Government in 1996 consisted of:

1. tabling of treaties in Parliament at least 15 (later increased to 20 for treaties with major political, economic and social significance) joint sitting days before binding treaty action is taken by the government;
2. preparation of a National Interest Analysis (NIA) and associated material for each proposed treaty action;
3. establishment of the Joint Standing Committee on Treaties (JSCOT) whose mandate is to inquire into and report on matters arising from treaties. Other than in exceptional circumstances, the Government does not take binding treaty action until JSCOT has reviewed and reported on the treaty. Other parliamentary committees may also consider specific proposed treaties;
4. establishment of the Treaties Council as an adjunct to the Council of Australian Government; and
5. establishment on the internet of the online Australian Treaties Library.

New Zealand

Under New Zealand's constitutional arrangements, the executive negotiates and enters into treaties and the legislature scrutinises treaties and passes the laws to implement them in domestic law. Although Governments may signal their intention to take internationally binding treaty action (for example, by signing a treaty), by convention they will not take that action until the treaty has been presented to Parliament and the minimum period for parliamentary scrutiny of a treaty has elapsed. Also by convention, the Government will generally prefer to pass any implementing legislation before ratifying a treaty. This way, the risk of breaching international obligations by failing to pass legislation is pre-empted.

Parliamentary procedure for treaty examination requires the Government to present to the House any treaty that is to be subject to ratification. The treaty and a national interest analysis (NIA) —prepared by the relevant department and the Ministry of Foreign Affairs and Trade are referred to the Foreign Affairs, Defence and Trade Committee. That Committee may refer the treaty and NIA to another select committee if the treaty is within that select committee's remit. The consideration process comprises —

- 1) a briefing from the Government on the international agreement and the NIA;
- 2) calling for written evidence from the public; and
- 3) hearing oral evidence.

The committee then reports its findings to the House.

The committee can ask the Government for additional time for its consideration, to supplement the minimum 15-sitting-day period.

The Parliament's Standing Orders contain a procedure for holding a plenary debate on international treaties. If the Government intends for the treaty to be implemented through a bill, the committee must draw this to the House's attention in its report. In such cases, the House may decide to hold a debate on the select committee report on the treaty examination, in exchange for there being no debate on the first reading of the implementing legislation.

Standard Parliamentary procedure applies to a treaty that requires legislation for implementation:

- Introduction;
- First reading (Without debate where the report on the treaty examination has been debated);
- Consideration by select committee;
- Second reading;
- Committee of the whole House;
- Third reading;
- Royal assent.

Bills to incorporate international treaty obligations into domestic law often do so by including the text of the treaty in a schedule of a bill.



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