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Dear Graham

Thank you for your letter of 23 May following the Committee's meeting on 7 May where you asked about planning assumptions for the remaining consent notifications under the SI protocol, and for examples of the Scottish Government agreeing to UK Ministers legislating in devolved areas.

Consent notifications under the SI protocol

In terms of what activity has been completed or is currently underway, the position is as follows. In the run up to the potential no deal scenarios arising on both 29 March and 12 April, the Scottish Parliament agreed under the SI protocol that the Scottish Government should consent to provision in devolved areas being included in 128 UK SIs covered by 85 notifications.

Since then, the Parliament has agreed to a further 5 notifications (bringing total notifications to 90) covering 5 SIs (bringing total SIs to 133). At the time of writing, a further 6 notifications covering 6 SIs have been sent to the Parliament.

We are working closely with the UK Government to develop a clear understanding of the content and timing of its remaining SI programme. As I emphasised at our meeting, the position remains fluid but our current understanding is that the Scottish Government may be asked to consent to the inclusion of provisions in devolved areas in at least a further 34 SIs. Subject to the Scottish Government being willing to consent, with the agreement of the Parliament, this would bring the running total number of notifications to 130 covering 173 SIs.

The power to make SIs under section 8 of the European Union (Withdrawal) Act 2018 (EUWA) is in place for two years after exit day. It is possible that during that timeframe the UK Government may identify further deficiencies which include provision for devolved areas, such as deficiencies arising from changes to EU law prior to exit day which require to be reflected in the statute book. We will keep Parliament informed about these future plans.

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UK powers in devolved areas

There are two principal sources where agreement has been given to the UK making provision in devolved areas – through primary legislation under the Legislative Consent process set out in Rule 9B of Parliament’s Standing Orders, and in secondary legislation through the SI notification protocol agreed between the Scottish Government and Scottish Parliament.

As noted above, to date the Scottish Parliament has agreed to Scottish Ministers’ consent being given to the UK Government to include devolved provision in 133 SIs. An example of where consent has been given is *The International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018*, in respect of which the protocol notification was agreed to by the Scottish Parliament last October. This SI is required as part of the UK’s overall preparations to achieve full independent contracting party status to the 2007 Hague Convention. The SI will ensure that the rules of the 2007 Hague Convention on the recognition and enforcement of cross-border maintenance decisions (including for child maintenance) can work effectively between the UK and all the existing contracting parties to this Convention including, amongst others, the EU, USA, Brazil, Turkey and Ukraine. It will also ensure that the UK (and by extension Scotland) can operate the 2007 Hague Convention with any future contracting parties to this Convention.

In terms of the Legislative Consent process, there are of course a number of current and anticipated EU-Exit related UK Bills which are, or are expected to be, relevant Bills under Rule 9B of the Parliament’s Standing Orders and therefore trigger, or are expected to trigger, legislative consent requirements. The Scottish Government will lodge legislative consent memorandums in line with Standing Orders for each of these, setting out our views on the substance of the UK proposals. We will continue to contribute fully to committee consideration and ensure that the Parliament is able to express its views on Brexit-related provisions in any such UK Bills.

The only UK EU-Exit Bill since EUWA to trigger consent requirements under the Sewel convention that has, to date, become an Act is the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019. Regulations made under this Act that contain provision which is within the legislative competence of a devolved legislature require the Secretary of State to consult the relevant devolved authority on that provision. Currently we anticipate that two SIs will be made under this Act which will include devolved provision. As you will be aware, SG and Parliamentary officials are considering how scrutiny of proposals to consent to devolved provision being included in legislation under non-EUWA powers might best be scrutinised. In the meantime, it is the Scottish Government’s intention to operate the existing Protocol in any such cases, including the two prospective SIs under the Healthcare Act.

I hope this is helpful and I would like to take this opportunity to reiterate my appreciation of the role the Committee fulfils in scrutinising the new and existing delegated powers.



GRAEME DEY

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