

Legislating for a Post-Brexit Scotland: Scottish Parliamentary Scrutiny of UK Statutory Instruments on Retained EU Law

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A. INTRODUCTION

The UK formally left the European Union (EU) at 11pm on 31 January 2020 (“Exit Day”), and entered a transition period until 31 December 2020 (“IP Completion Day”). Thereafter, EU law was no longer binding on the UK as an international source of law, and was replaced by a domestic equivalent, known as “retained EU law”. One of the questions which arose prior to IP Completion Day was how to correct retained EU law in advance of it taking effect, so that it would operate effectively and avoid a so-called “cliff-edge scenario”. Most of these corrections were made using delegated legislation by the UK Government. This was typically done with the consent of the devolved administrations where retained EU law included policy areas within the devolved competences of Scotland, Wales and Northern Ireland. In Scotland, new processes were introduced to provide the Scottish Parliament with an opportunity to approve such consent being given by the Scottish Government.

The authors of this article were seconded to the Scottish Parliament in 2020/21 to provide the first independent analysis of the process for approving consent, its implementation and impact, and to explain the same to MSPs who had not been directly involved. This included consideration of relevant UK Statutory Instruments (SIs), notifications sent from the Scottish Government to the Scottish Parliament requesting approval, and discussion with Scottish Parliament officials. The project considered in particular the period from the process’s commencement in September 2018 until IP Completion Day. Three briefing papers were published on those findings.¹

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¹ R B Taylor and A L M Wilson, Briefing Paper on *Brexit Statutory Instruments: Powers and Parliamentary Processes* (Scottish Parliament Information Centre SB 21-45, 2021); Idem,

The purpose of this article is to highlight some of the key findings from that work, and to additionally provide new analysis of the impact of this process and its significance for Scots law and Scottish parliamentary scrutiny as well as to consider the extent to which the challenges observed with that process have been addressed by the successor process which has been in place since IP Completion Day. As shown, these findings raise various questions of significance for the devolution settlement, the effectiveness of parliamentary scrutiny under these arrangements, and for interparliamentary scrutiny of intergovernmental legislative initiatives. The observations, analyses and opinions in this article are those of the authors, and not those of the Scottish Parliament or Scottish Parliament Information Centre (SPICe).

This article will first explain the legal powers and political background against which these changes were made. Secondly, it will consider the impact of the changes to retained EU law on devolved matters. Thirdly, it will outline the processes for scrutiny and approval at the Scottish Parliament before and after IP Completion Day. Thereafter, it will consider alternative legislative solutions to the same legal ends which would have offered an increased scrutiny opportunity to the Scottish Parliament at the time, or which may be preferred going forward under different circumstances. The article will conclude by reflecting on the greater interdependency between the UK's legislatures post-Brexit, and how this be addressed in the future.

B. LEGAL AND POLITICAL BACKGROUND

(1) EU withdrawal and EU law pre-Brexit

Article 50 of the Treaty on European Union (TEU) is the formal mechanism by which a member state may leave the EU. Once Article 50 is triggered, a member state will leave the EU automatically after a period of two years should no withdrawal agreement be reached or extension be agreed. On 23 June 2016, 52 percent of the UK electorate voted in a national referendum to leave the EU. Accordingly, on 29 March 2017, the then Prime Minister Theresa

Briefing Paper on *Brexit Statutory Instruments: Impact on the Devolved Settlement and Future Policy Direction* (Scottish Parliament Information Centre SB 21-52, 2021); Idem, Briefing Paper on *Brexit Statutory Instruments: Identifying the Challenges* (Scottish Parliament Information Centre SB 21-53, 2021).

May triggered Article 50 TEU, thus beginning the UK's formal withdrawal from the EU with a provisional "Exit Day" of 29 March 2019.²

However, in order to facilitate the UK's membership of what is now the EU in 1973, the UK Parliament had previously enacted the European Communities Act 1972 (ECA 1972), which gave direct effect and supremacy to EU law within the UK. As a result, not only could EU law be enforced in UK domestic courts, but a new legal hierarchy was also established whereby EU law would prevail against any inconsistent domestic law, including an Act of Parliament. This was established in the 1991 landmark case of *Factortame (No. 2)*, where provisions of an Act of Parliament were disapplied by the House of Lords for the first time.³

In *Miller (No. 1)*,⁴ the majority of the UK Supreme Court acknowledged that the ECA 1972 acted as a "conduit pipe" whereby EU law on the international level entered UK domestic law.⁵ As the Court noted:

although the 1972 Act gives effect to EU law, it is not itself the originating source of that law ... So long as the 1972 Act remains in force, its effect is to constitute EU law as an independent and overriding source of domestic law.⁶

Furthermore, the Court acknowledged that a complete withdrawal from the EU treaties would constitute "a fundamental change in the constitutional arrangements of the United Kingdom".⁷ This monumental change to domestic law would occur "irrespective of whether Parliament repeals the 1972 Act", once Article 50 was triggered.⁸

Following Exit Day, the UK would no longer be a member state of the EU, meaning that the UK would cease to be a party to the EU treaties. As a result, EU law at the international level would no longer filter down into UK domestic law via the "conduit pipe" of the ECA 1972, thus also making the ECA 1972 unnecessary. However, because the UK had been a member of the EU for more than four decades, EU law governed a substantial number of policy areas within the UK. Should the UK have left the EU and repealed the ECA 1972 without a

² For the subsequent debate on the revocation of the Article 50 notice and the UK's potential constitutional requirements for this, see R B Taylor and A L M Wilson, "Brexit, the revocation of Article 50, and the path not taken: *Wightman and Others for Judicial Review against the Secretary of State for Exiting the European Union*" (2018) 22 ELR 417.

³ *R v Secretary of Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.

⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁵ *Ibid* [65].

⁶ *Ibid* [65].

⁷ *Ibid* [78].

⁸ *Ibid* [81].

replacement framework, then whole areas of UK policy would have been without legal regulation.

(2) The European Union (Withdrawal) Act 2018 and retained EU Law

In order for the UK to avoid the “cliff edge” just described upon its exit from the EU, the European Union (Withdrawal) Act 2018 was introduced into the UK Parliament as a Bill on 13 July 2017 and received royal assent on 26 June 2018. The 2018 Act made provisions for the repeal of the ECA 1972 on Exit Day, and the replacement of EU law with “retained EU law” at that time. Expressed differently, the otherwise international body of EU law as it was immediately before Exit Day would be copied into UK domestic law. This included direct EU legislation and a general saving of rights, powers and rules received from EU law by virtue of section 2(1) the ECA;⁹ a formal saving provision was also included to ensure that earlier EU-derived domestic legislation was preserved.¹⁰ This new legal framework retained both the content of the rules themselves as well as the principle of EU supremacy over domestic statutes enacted prior to IP Completion Day, although not those enacted thereafter.¹¹

However, during the withdrawal process, Exit Day was postponed several times, primarily as a result of opposition in the House of Commons to the terms of the Withdrawal Agreement negotiated between the UK and EU. Although Exit Day was initially planned for 29 March 2019, it was subsequently changed to 30 June 2019, 31 October 2019, and then finally 31 January 2020, which is when the UK formally left the EU.¹² However, in accordance with the terms of the European Union (Withdrawal Agreement) Act 2020, a transition period then took effect until 11pm on 31 December 2020, known as “IP Completion Day”. During this transition period, EU law generally continued to apply in the UK as it had before Exit Day, with retained EU law then taking effect after IP Completion Day.

⁹ European Union (Withdrawal) Act 2018 ss 3-4.

¹⁰ Ibid s 2.

¹¹ Ibid s 5.

¹² Report on *Brexit Timeline: Events Leading to the UK’s Exit from the European Union* (House of Commons Library CBP No 7960, 2021), available at <https://commonslibrary.parliament.uk/research-briefings/cbp-7960/#:~:text=At%2011pm%20on%2031%20December,note%2C%20including%20Brexit%20Day%20itself.>

(3) Correcting retained EU law

In order to facilitate the transformation of EU law into domestic law, changes to retained EU law needed to be made in advance of IP Completion Day. Consequently, section 8 of the 2018 Act empowered UK Ministers to make delegated legislation in the form of UK Statutory Instruments (SIs) where they considered it appropriate “to prevent, remedy or mitigate ... any failure of retained EU law to operate effectively, or ... any deficiency in retained EU law ... arising from the withdrawal of the United Kingdom from the EU”.¹³

The process of correcting retained EU law was made even more complex by devolution. Although Northern Ireland had devolution from 1921-1972,¹⁴ the current devolution settlements for Scotland, Wales and Northern Ireland have only been in existence since the late 1990s. Consequently, the devolution settlements were constructed within the context of the UK’s EU membership. Due to its supremacy, adherence to EU law across the whole of the UK had to be guaranteed. As a result, EU law was made an explicit limit on the legislative and executive powers of the devolved bodies, meaning that they could not change EU law, even on matters which would otherwise have been within devolved competence. In order to maximise the legislative competence of the devolved legislatures, all three devolution settlements generally state only those policy areas which belong exclusively to the UK Parliament, thus leaving everything else to the devolved legislatures.¹⁵ The competence of the devolved bodies would therefore increase substantially following the UK’s withdrawal from the EU.

The devolved administrations would therefore also need to participate in the correcting of retained EU law prior to IP Completion Day. They were given an equivalent concurrent power to do so under Schedule 2 of the 2018 Act, although the UK Government’s section 8 power was more extensive, extending also to matters of retained EU law which, post-IP Completion Day, would fall under the jurisdiction of the devolved bodies.

It is notable that the Sewel convention (the political rule that the UK Parliament will not normally legislate on devolved matters without seeking the consent of the devolved bodies) does not apply to delegated legislation. However, the UK Government in 2017 stated that it

¹³ On the traditional use of delegated legislation, see Report on *The Legislative Process: The Delegation of Powers* (Select Committee on the Constitution HL 225, 2018), available at <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/225.pdf>, paras 8-12.

¹⁴ Northern Ireland devolution was suspended in 1972, and then formally abolished by the Northern Ireland Constitution Act 1973.

¹⁵ Although different, both Scotland and Northern Ireland have operated such a model of devolution since their creation. Wales, on the other hand, only adopted such an approach subsequently as a result of the Wales Act 2017.

would “not normally use the power to amend domestic legislation in areas of devolved competences without the agreement of the relevant devolved authority”.¹⁶ In 2018, the UK Government reiterated this undertaking, adding further that “[i]n any event, the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency”.¹⁷ As observed elsewhere by the authors, these statements “clearly show an undertaking by the UK Government to only use its section 8 power on devolved matters as follows: (1) normally with the consent of the devolved administrations; and (2) primarily for administrative efficiency, not to enact new policy”.¹⁸

This process ran in parallel to and intersected with the establishment of common frameworks. These were intergovernmental agreements to “work together to establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations of legislatures”.¹⁹ The process of agreeing and implementing common frameworks was ongoing during the withdrawal process.

C. IMPACT OF CHANGES TO RETAINED EU LAW

By IP Completion Day, approximately 200 UK SIs had been made under the UK Government’s section 8 power to correct retained EU law on matters within Scottish devolved competence with the consent of the Scottish Government.²⁰ Around 80 percent of this delegated legislation was considered by the Scottish Government to have been technical in nature, with the remaining 20 percent identified as making more significant changes to retained EU law.²¹

¹⁶ Department for Exiting the European Union, Bill Memorandum on *European Union (Withdrawal) Bill Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee* (2017), available at [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20\(Withdrawal\)%20Bill.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf), para 11.

¹⁷ Cabinet Office, (2018). Report on *Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks* (2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf, para 8.

¹⁸ Taylor and Wilson, *Powers and Parliamentary Processes* 6.

¹⁹ Joint Ministerial Committee (EU Negotiations) Communique, “Common Frameworks: Definition and Principles” (2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf.

²⁰ Taylor and Wilson, *Impact on the Devolved Settlement* 5.

²¹ *Ibid* 7-9.

Principal among these more significant changes (both in terms of frequency and importance) were corrections that transferred legislative powers from EU bodies to UK equivalents, with sometimes a single UK SI transferring legislative powers and other functions under several items of EU law.²²

Often legislative powers were transferred to both the Scottish and UK Governments concurrently. However, it was also common for such legislative powers to be transferred only to the UK Government, typically to be exercised with the consent of the Scottish Ministers.²³ The explicit motivations for investing legislative powers concurrently or in the UK Government only were said to be the recognition that current practice in many relevant policy areas already operated on a UK-wide level, as well as the cost of maintaining a separate devolved framework. That the UK Government would often require consent from the Scottish Government to exercise these powers was deemed to be sufficient protection for the devolution settlement.²⁴

The relevant legislative powers created or transferred were typically narrow in scope, such as to make delegated legislation to determine processes, revise targets, set standards or revise statutory lists relating to importing activities.²⁵ However, the importance of these transfers lies in the fact that they determine which Government is now able to implement policy and make delegated legislation which affects the law of Scotland. Moreover, from a scrutiny perspective, which Government is able to make delegated legislation on these matters affects

²² Ibid 13. See e.g. the Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019, which transferred legislative functions under fifteen items of EU law, but was notified as “respect[ing] and protect[ing] the Scottish Ministers’ powers under the devolution settlement” as “the lists in question are published and / or amended on a UK-wide basis”: Scottish Government, “Notification to the Scottish Parliament: Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019” available at [https://webarchive.nrscotland.gov.uk/20210613062344/https://archive2021.parliament.scot/S5_Delegated_Powers/General%20Documents/gougeon_to_rec\(1\).pdf](https://webarchive.nrscotland.gov.uk/20210613062344/https://archive2021.parliament.scot/S5_Delegated_Powers/General%20Documents/gougeon_to_rec(1).pdf), 3.

²³ Taylor and Wilson, *Impact on the Devolved Settlement* 13-14, 17-19.

²⁴ Ibid 17.

²⁵ See e.g. Scottish Government, “Notification to the Scottish Parliament: Human Tissue (Quality and Safety for Human Application) (Amendment) (EU Exit) Regulations 2018” (2018), available at https://archive2021.parliament.scot/S5_Delegated_Powers/20180928SINotification.pdf; Scottish Government, “Notification to the Scottish Parliament: Aquatic Animal Health and Plant Health (Transfer of Functions) (EU Exit) Regulations 2019” (2019), available at https://external.parliament.scot/S5_Rural/20181219_REC_Committee_-_Public_Papers.pdf, REC/S5/18/34/3 Annex A.

whether the Scottish Parliament will have the opportunity to scrutinise that delegated legislation when it is made²⁶—a concern which was raised by the Scottish Parliament itself.²⁷

Many administrative functions were also transferred during this process, most of which were existing EU functions, but new functions were also created to keep pace with changes in EU law.²⁸ Administrative functions were frequently transferred to a Government, but were also often transferred to other public bodies.²⁹ Particularly notable administrative functions within areas of devolved competence transferred by this process included those given to a newly created public body (such as a new scientific advisory committee³⁰), and those which previously rested with the Scottish Government being transferred to a UK Government agency (such as functions regulating the chemicals market being transferred to the Health and Safety Executive³¹).

This transfer of legislative and administrative functions is additionally notable in three respects. First, as will be shown below, the transfer of both legislative and administrative functions was sometimes described to the Scottish Parliament in opaque terms, both with respect to the body receiving the functions and to the nature of the functions themselves.³²

²⁶ Taylor and Wilson, *Impact on the Devolved Settlement* 14.

²⁷ Letter from the Minister for Public Health, Sport and Wellbeing to the Convener of the Health and Sport Committee (14 December 2018), available https://external.parliament.scot/S5_HealthandSportCommittee/General%20Documents/20181214_Ltr_IN_from_MinisterPHSW_Nutrition.pdf, Annex A, 2.

²⁸ See e.g. Scottish Government, “Notification to the Scottish Parliament: The Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2019” (2019), available at <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2019/07/chemicals-persistent-organic-pollutants-2/documents/notification-to-the-scottish-parliament-the-persistent-organic-pollutants-amendment-eu-exit-regulations-2019/notification-to-the-scottish-parliament-the-persistent-organic-pollutants-amendment-eu-exit-regulations-2019/govscot%3Adocument/Notification%2Bto%2Bthe%2BScottish%2BParliament%2B-%2BThe%2BPersistent%2BOrganic%2BPollutants%2B%2528Amendment%2529%2B%2528EU%2BExit%2529%2BRegulations%2B2019.pdf>.

²⁹ See e.g. functions transferred to the Health and Safety Executive by the REACH (Amendment) (EU Exit) Regulations 2019.

³⁰ Scottish Government, “Notification to the Scottish Parliament: Nutrition (Amendment) (EU Exit) Regulations 2019” (2018), available at https://webarchive.nrscotland.gov.uk/20210613060407/https://archive2021.parliament.scot/S5_Delegated_Powers/20181205Nutrition.pdf, 4.

³¹ Scottish Government, “Notification to the Scottish Parliament: The REACH (Amendment) (EU Exit) Regulations 2019” (2018), available at https://webarchive.nrscotland.gov.uk/20210613060301/https://archive2021.parliament.scot/S5_Delegated_Powers/20181127SINotification.pdf, 3.

³² An example of both issues is found in Scottish Government, “Notification to the Scottish Parliament: The Floods and Water (Amendments etc) (EU Exit) Regulations 2018” (2018),

Secondly, it will likely take some time before the impact of this transfer of legislative functions will be known, owing both to the complexity of retained EU law and the fact that these powers only became exercisable after IP Completion Day.³³ The Conveners Group have already noted, however, that “Parliament has seen a move towards instruments which set the new policy direction in post-EU areas ... made under powers in retained EU law”.³⁴

Thirdly, the Scottish Government’s consent to the transfer of a large number of legislative powers in devolved areas to the UK Government, in order to maintain UK-wide frameworks and minimise costs, stands in stark contrast to the Scottish Government’s overall political position. Throughout the withdrawal process, the Scottish Government’s view was that the triggering of the Brexit process legitimised a second Scottish independence referendum, with criticism and concern being raised that the Brexit process would lead to the constraining of devolved powers.³⁵

D. SCRUTINY AND APPROVAL UNDER PROTOCOL 1

As highlighted above, section 8 did not explicitly require the consent of the Scottish Government or Scottish Parliament, although the UK Government undertook to seek the consent of the Scottish Government when making changes to retained EU law in devolved areas. A solution was then devised to engineer a scrutiny opportunity for the Scottish Parliament to approve the Scottish Government giving any such consent.

This approval process was outlined in a Protocol agreed between the Scottish Government and Scottish Parliament on 11 September 2018, referred to here as “Protocol 1”.³⁶ Under this Protocol, the Scottish Government would agree with the UK Government that a UK

available at

https://webarchive.nrscotland.gov.uk/20210613052221/https://archive2021.parliament.scot/S5_Delegated_Powers/20181105SINotificationECCLR.pdf.

³³ Taylor and Wilson, *Impact on the Devolved Settlement* 14.

³⁴ Report on *Post EU-legislative Scrutiny: Review of Subordinate Legislation Protocols* (Scottish Parliament Conveners Group CG/S6/22/3/2, 2022), available at <https://www.parliament.scot/-/media/files/committees/conveners-group/conveners-group-meeting-papers-30-march-2022.pdf>, para 7.

³⁵ See e.g. First Minister, “Address to the Scottish Parliament: Brexit and Scotland’s future” (24 April 2019), available at <https://www.gov.scot/publications/first-minister-statement-brexit-scotlands-future/>.

³⁶ “Protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament” (2018), available at https://archive2021.parliament.scot/S5_Delegated_Powers/20180911CabSec.pdf.

SI should be made under section 8 of the 2018 Act to address and correct a deficiency in retained EU law within devolved competence.³⁷ The Scottish Government would then send a notification to both the relevant Scottish Parliament subject committee based on its policy remit and the Delegated Powers and Law Reform Committee (DPLRC).³⁸ This notification would include various points of information, as required by Protocol 1.³⁹

The Scottish process of approval was a purely political one. This stands in contrast to the approach in Wales, where the Standing Orders of the now Welsh Parliament were changed to provide a similar but nevertheless distinct scrutiny opportunity.⁴⁰

Given the importance of the above stated changes to retained EU law, it is necessary to understand the effectiveness of this process in terms of parliamentary scrutiny. As will be shown below, the Protocol 1 process was generally effective, particularly when the unprecedented nature, complexity and scale of the task is considered. However, significant challenges nevertheless arose which at times undermined the scrutiny opportunity sought.

(1) Not seeing the draft UK SI

The Scottish Government had not always seen the draft UK SI before writing the notification.⁴¹ The subject committees then routinely had to approve the proposals solely based on that notification, also without reference to draft material or the draft UK SI, with occasional further detail being given through prior correspondence or oral evidence with the relevant minister or other government official.⁴²

The unavailability of the UK SI to the subject committees, and at times the Scottish Government, impacted the opportunity for effective scrutiny. On at least one occasion, the

³⁷ Protocol 1 para 12; Taylor and Wilson, *Powers and Parliamentary Processes* 8.

³⁸ Protocol 1 para 14; Taylor and Wilson, *Powers and Parliamentary Processes* 8-9.

³⁹ Protocol 1 para 17.

⁴⁰ On which, see Report on *Scrutiny of Regulations made under the European Union (Withdrawal) Act 2018: Operational Matters* (National Assembly for Wales Constitutional and Legislative Affairs Committee, 2018), available at <https://senedd.wales/laid%20documents/cr-ld11654/cr-ld11654-e.pdf>; Report on *Scrutiny of Regulations under the European Union (Withdrawal) Act 2018: Progress Report* (National Assembly for Wales Constitutional and Legislative Affairs Committee, 2019), available at <https://senedd.wales/laid%20documents/cr-ld12128/cr-ld12128-e.pdf>; Letter from Leader of the House and Chief Whip to the Chair of the Constitutional and Legislative Affairs Committee (13 September 2018), available at <https://business.senedd.wales/documents/s78319/%20Welsh%20Government%20response%20-%2013%20September%202018.pdf>.

⁴¹ Taylor and Wilson, *Powers and Parliamentary Processes* 5.

⁴² Taylor and Wilson, *Identifying the Challenges* 8-9.

Scottish Government changed its position and refused consent once the draft UK SI had been seen by Ministers, owing to concerns over the impact of the draft legislation (and more specifically the funding transfer mechanisms outlined) on the devolution settlement.⁴³ Such differences between the outline proposals as notified and the draft UK SI highlights the importance of seeing the draft legislation, and raises the question as to whether committees might likewise have refused approval if they had seen the draft UK SI. Indeed, the subject committees complained about having to approve proposals “on the Scottish Government’s best guess about what the UK Government will do”,⁴⁴ and it is observed elsewhere that “this caused difficulties for holding the Scottish Government to account for UK Exit SIs it had not seen.”⁴⁵

(2) Vagueness and complexity

The notifications were frequently vague, or sometimes erroneous, even as to key aspects of the proposals. This was perhaps most concerning with respect to the detail around the transfer of legislative and administrative functions (such as which body might receive powers, or the number and nature of those powers), the specific items of EU law being amended, and the practice of cross-referencing between notifications within the same policy area.⁴⁶ Indeed, the subject committees expressed frustration at this in some cases.⁴⁷

Meanwhile, the highly complex nature of retained EU law added to the scrutiny challenge. During the period of the UK’s membership of the EU, when the UK was bound by EU law, the wording of EU law could not be changed at a UK domestic level. However, during the withdrawal process, UK SIs were being used to revise the wording of EU law items as they would be retained on IP Completion Day. This process of correction was typically implemented

⁴³ Scottish Government, “Notification to the Scottish Parliament: The Creative Europe Programme and Europe for Citizens Programme Revocation (EU Exit) Regulations 2019” (2019), and Letter from the Cabinet Secretary for Culture, Tourism and External Affairs to the Convener of the Culture, Tourism, Europe and External Affairs Committee (1 February 2019), available at https://external.parliament.scot/S5_European/Meeting%20Papers/20190221_CTEEA_PublicPapers.pdf, CTEEA/S5/19/5/3 Annex A and B respectively.

⁴⁴ Scottish Parliament, Official Report, Health and Sport Committee (23 October 2018) col 2.

⁴⁵ Taylor and Wilson, *Identifying the Challenges* 5; Scottish Parliament, Official Report, Health and Sport Committee (23 October 2018) col 4.

⁴⁶ Taylor and Wilson, *Impact on the Devolved Settlement* 15-17.

⁴⁷ Letter from the Convener of the Environment, Climate Change and Land Reform Committee to the Cabinet Secretary for Environment, Climate Change and Land Reform (2020), available at https://webarchive.nrscotland.gov.uk/20210611084609/https://archive2021.parliament.scot/S5_Environment/General%20Documents/Consent_letter_to_the_Cabinet_Secretary.pdf.

by substituting EU law phrasing rather than reissuing a complete, revised text.⁴⁸ Moreover, the practice of cross-referencing between proposals in the notifications could lead to confusion when scrutinising subsequent proposals.⁴⁹

The same item of EU law might also be revised by successive UK SIs as governmental agreements on how to proceed with the various policy areas were reached and implemented. Additionally, the process of correction had to respond to law reform within the EU during the withdrawal period,⁵⁰ and to the Withdrawal Agreement and Northern Ireland Protocol once agreed; the Protocol led to a large number of additional changes late in the process of correction, as Northern Ireland became legally more distinct from the remainder of the UK.⁵¹

Thus, as noted by the authors elsewhere, committee scrutiny was made much more complex in that “understanding the transfer of functions might only be had by reference to multiple items of EU law in addition to the UK Exit SI, and subsequent UK Exit SIs which provided later amendments.”⁵²

(3) Categorisation

It was anticipated that a large number of notifications of UK SIs would need to be approved by the Scottish Parliament. The Scottish Government therefore categorised the proposals to assist the subject committees in adopting a “differentiated scrutiny approach”.⁵³ Protocol 1 anticipated three categories: a residual category “A” for proposals which were largely technical or involved only minor policy questions; category “B” for proposals which included more significant policy questions, transfer of significant functions, and like issues of importance; and category “C” for proposals which might necessitate laying of the SI at both Parliaments simultaneously, as a UK SI and SSI.⁵⁴

Even though the subject committees did not see the draft UK SI where notifications were categorised as A or B, and expressed frustration at this, as mentioned above, they never used the Category C mechanism to require joint laying.⁵⁵ Even on the few occasions when a

⁴⁸ Taylor and Wilson, *Impact on the Devolved Settlement* 16.

⁴⁹ Ibid 15-16.

⁵⁰ Ibid 17.

⁵¹ Taylor and Wilson, *Identifying the Challenges* 6.

⁵² Taylor and Wilson, *Impact on the Devolved Settlement* 17.

⁵³ Protocol 1 para 10.

⁵⁴ Protocol 1 para 22.

⁵⁵ Taylor and Wilson, *Identifying the Challenges* 10; Letter from the Convener of the Environment, Climate Change and Land Reform

draft UK SI was provided,⁵⁶ this was not owing to recategorisation as a C on the request of the subject committee or the offer of joint procedure by the Scottish Government. It is possible that category C remained unused because of the time constraints inherent in the withdrawal process and the difficulties which may have arisen where the UK SI had already been laid at the UK Parliament by the point of notification to the Scottish Parliament, both of which are discussed below.

A close analysis of the notifications revealed that the Scottish Government's categorisation of proposals as A or B was arguable: a very narrow interpretation was taken of the criteria for classification as a B, even in relation to proposals that might be significant or include widespread changes.⁵⁷ Moreover, the categorisation of proposals did not significantly lighten the workload of the subject committees or help to direct their scrutiny. The subject committees sometimes explicitly disagreed with the categorisation of proposals by the Scottish Government, and directed scrutiny independently of this mechanism. Accordingly, the subject committees might approve category B proposals without comment, while expressing concern over category A proposals and sometimes seeking evidence from stakeholders on such proposals.⁵⁸

(4) Consultation and impact assessments

One of the considerations underpinning categorisation was whether consultation with stakeholders should be done by the UK and Scottish Governments before notification, and whether the seriousness of the proposals might lead the subject committees to want to undertake further consultation.⁵⁹ Where supplied by the Scottish Government, details of any consultations were typically across a general policy area rather than specific to single legislative proposals, and intimated to the Scottish Parliament subject committees in very broad terms without detail directly relevant to the legislative matter at hand.⁶⁰

Meanwhile, impact assessments were to be shared with the Scottish Parliament subject committees only "if available".⁶¹ It was typical for notifications to indicate that no impact

Committee to the Cabinet Secretary for Environment, Climate Change and Land Reform (n 47).

⁵⁶ Taylor and Wilson, *Identifying the Challenges* 8.

⁵⁷ Ibid 13; Taylor and Wilson, *Impact on the Devolved Settlement* 11-12.

⁵⁸ Taylor and Wilson, *Identifying the Challenges* 13.

⁵⁹ Protocol 1 para 22.

⁶⁰ Taylor and Wilson, *Identifying the Challenges* 15-16.

⁶¹ Protocol 1 para 17.

assessment had been done; the Scottish Government explicitly attributed this to the accelerated timeframe of the withdrawal process. However, the Scottish Parliament subject committees nonetheless requested impact assessments be provided. These requests were refused because Protocol 1 only required impact assessments to be conducted where there was a policy change,⁶² and such policy changes were almost never acknowledged by the Scottish Government. Additionally, financial impact assessments were rare, and indeed often the financial implications could not be assessed.⁶³

As noted by the authors elsewhere:

This lack of consultations, impact assessments and financial considerations could push the need to seek further information onto the lead subject committees ... [and] was particularly challenging where key stakeholders indicated that their work would be seriously affected by the proposed UK Exit SI, but the approval timetable did not allow further investigation and issues remained outstanding.⁶⁴

Additionally, although considered within the terms of Protocol 1, the subject committees' ability to initiate separate stakeholder consultation as part of their scrutiny was significantly curtailed by the timetable for approval,⁶⁵ discussed below.

(5) Approval and post-approval

On completion of its scrutiny, the relevant subject committee could approve the Scottish Government giving its consent to the UK SI, or request the laying of the legislation under the joint procedure or only as a Scottish Statutory Instrument (SSI).⁶⁶ However, the subject committees are not known to have ever refused to approve consent being given. Should refusal have happened, Protocol 1 specified that the Scottish Government could choose whether to adhere to this decision and refuse consent. If the Scottish Government did not accept the subject committee's refusal, the Parliament could refer the matter for debate in the main chamber, the outcome of which was still not binding on the Scottish Government.⁶⁷

Once the matter of approval was settled, the Scottish Government would consent to the UK Government making the legislation. The Scottish Government would then monitor the progress of the UK SI, and report to the subject committee when it had been made and whether

⁶² Taylor and Wilson, *Identifying the Challenges* 15-16.

⁶³ *Ibid* 16.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ Protocol 1 para 25.

⁶⁷ Protocol 1 para 26.

it was “consistent with the consent granted”.⁶⁸ If there were discrepancies between the proposal as notified and the final UK SI, the Scottish Government determined whether these were “so significant as to engage the need for a further process of obtaining the Parliament’s approval” or “no longer reflect[ed] what the Scottish Parliament approved”, and whether an Exit SSI or joint laying should be made instead.⁶⁹ These decisions and initiative all rested with the Scottish Government, and it is understood that no discrepancies were identified as being so significant as to require further parliamentary consideration.

The fact that discrepancies were identified “is unsurprising given the notifications were often written without the final UK Exit SI having been seen by the Scottish Government and because policy might still be evolving in these areas.”⁷⁰ However, there were important discrepancies which were arguably mischaracterised by the Scottish Government—in particular involving the transfer of legislative functions (such as quota-setting and license-granting functions going to a different regulator than originally indicated)—and no intimation of any subsequent relaying of UK SIs appears to have occurred.⁷¹

(6) Time

A key issue underpinning the problems highlighted above was the lack of time, as retained EU law had to be corrected prior to Exit Day, subsequently extended to IP Completion Day.⁷² In advance of these dates, the Governments had to review all of EU law to anticipate potential problems and to identify policy areas which required correction. They then had to map those policy areas onto the different administrations’ devolved competences, and to collaborate on a solution. Such collaborative solutions had to be identified in advance of and in parallel to the common frameworks being agreed. Thousands of items of EU legislation thus had to be corrected, typically through making delegated legislation at the UK Parliament.

This press of business within a constrained timeframe at the national level in turn caused timing issues for the Scottish Parliament, with scrutiny to be conducted within 28 days (although the Protocol itself requires a “maximum of 28 days”).⁷³ Sometimes this full period

⁶⁸ Protocol 1 para 29.

⁶⁹ Protocol 1 para 29.

⁷⁰ Taylor and Wilson, *Identifying the Challenges* 6.

⁷¹ On both of these issues, see *ibid* 6-7.

⁷² On the impact of the postponing of Exit Day, see Taylor and Wilson, *Impact on the Devolved Settlement* 6-7.

⁷³ Protocol 1 para 16.

was not allowed.⁷⁴ This proved challenging, and in their report reviewing Protocol 1, the Finance and Constitution Committee noted “[t]here needs to be some flexibility to allow for more than a 28 day scrutiny period where there are significant issues to consider”.⁷⁵

A separate issue arose in that Protocol 1 was unclear on whether consent had to be given prior to the laying or making of the UK SI, or instead could be given at any point in the process. This resulted in the UK Government frequently laying the draft UK SI at the UK Parliament concurrently with the Scottish Government seeking approval from the Scottish Parliament. This was, admittedly, with the expectation that such consent would be forthcoming and normally an assurance was given by the UK Government that any debate on an affirmative instrument would be scheduled once the Scottish Parliament had “given a view”.⁷⁶ A strict reading of the UK Government’s initial commitment—that it would not normally “use” its section 8 power without consent—would indicate that consent should have been received prior to laying or making of the UK SI. However, in practice, the timeframe in which the process had to be completed led to the scrutiny processes having to run in parallel.

This raises the question as to what would have happened if consent was not in the end received. The UK Government showed that it was prepared to amend draft UK SIs where consent was refused prior to laying or making. In one instance, the Scottish Government sought parliamentary approval to give consent while discussions regarding relevant funding disbursement mechanisms for cultural projects were still ongoing. The Scottish Government subsequently decided that consent would not be consistent with the devolution settlement, owing to the UK Government’s decision to disburse payments directly to Scottish cultural institutions, despite culture being a devolved matter. The Scottish Government therefore refused their consent and withdrew their request for approval from the Scottish Parliament. The UK Government in response amended the UK SI, which correspondence suggests had already been drafted by that stage but had not yet been laid.⁷⁷

⁷⁴ Taylor and Wilson, *Identifying the Challenges* 11.

⁷⁵ Letter from the Convener of the Finance and Constitution Committee to the Cabinet Secretary for Government Business and Constitutional Relations (2019), available at https://archive2021.parliament.scot/S5_Finance/General%20Documents/2019.6.27.Convener_to_Mike_Russell.pdf, 3.

⁷⁶ Taylor and Wilson, *Identifying the Challenges* 12; Letter from the Minister for Rural Affairs and the Natural Environment to the Convener of the Rural and Economy Connectivity Committee, 18 June 2019, available at [https://archive2021.parliament.scot/S5_Delegated_Powers/General%20Documents/gougeon_to_rec\(1\).pdf](https://archive2021.parliament.scot/S5_Delegated_Powers/General%20Documents/gougeon_to_rec(1).pdf).

⁷⁷ Scottish Government, “Notification to the Scottish Parliament: The Creative Europe Programme and Europe for Citizens Programme Revocation (EU Exit) Regulations 2019”,

However, on another occasion, the UK Government chose to make a UK SI on devolved matters under the urgent made affirmative procedure without providing the opportunity for consent and approval. The UK Government did not seek consent after making the UK SI, but merely indicated that it “hope[d]” that the Scottish Government would concur that “this [was] the pragmatic approach” in that instance.⁷⁸ Similarly, the Scottish Government stopped short of offering consent after the fact, based on the lack of prior Scottish parliamentary approval, but did confirm that it “accept[ed] the steps ... taken”.⁷⁹ Urgency or expediency could therefore trump the need for consent if required.

It is therefore unclear what the UK Government’s response might have been should either the Scottish Government have changed its initial position and refused consent, or the Scottish Parliament refused to approve consent being given, once any relevant UK SI that had already been laid or made—and specifically whether the UK Government would have adhered to this lack of consent and withdrawn or replaced the instrument.

E. SCRUTINY AND APPROVAL UNDER PROTOCOL 2

(1) Protocol 2

The power under section 8 of the 2018 Act was subject to a sunset clause,⁸⁰ so Protocol 1—created to operate in combination with that power—would naturally expire. It was clear, however, that such an arrangement would need to continue going forward. Indeed, prior to IP

and Letter from the Cabinet Secretary for Culture, Tourism and External Affairs to the Convener of the Culture, Tourism, Europe and External Affairs Committee (n 43); UK Government, “Explanatory Memorandum to the Creative Europe Programme and Europe for Citizens Programme (Revocation) (EU Exit) Regulations 2019”, available at https://assets.publishing.service.gov.uk/media/5c5d81c7ed915d0462af188e/20190204_Annex_B_-_EM_v3__1_.pdf.

⁷⁸ Letter from the Parliamentary Under Secretary of State for Rural Affairs and Biosecurity to the Minister for Rural Affairs and Natural Environment (2019), available at https://archive2021.parliament.scot/S5_Rural/Meeting%20Papers/RECC_20190918_Public_Papers.pdf, REC/S5/19/25/1 Annex D, 13.

⁷⁹ Letter from the Minister for Rural Affairs and the Natural Environment to the Parliamentary Under Secretary of State for Rural Affairs and Biosecurity (2019), available at https://archive2021.parliament.scot/S5_Rural/Meeting%20Papers/RECC_20190918_Public_Papers.pdf, REC/S5/19/25/1 Annex E.

⁸⁰ 2018 Act s 8(8).

Completion Day, the Protocol 1 process had already been used for UK SIs under different legislative frameworks, albeit ones which were still related to Brexit.⁸¹

Following cross-parliamentary consultation, a subsequent protocol, referred to here as “Protocol 2”, was agreed in anticipation of IP Completion Day and has been in effect since 1 January 2021.⁸² It has an expanded scope relative to Protocol 1, comprising “secondary legislation to be made by UK Ministers that include provisions that are within devolved competence and relate to matters within the competence of the EU until immediately before IP Completion Day (31 December 2020 at 11pm)”.⁸³

Protocol 2 was meant to be subject to a review within six months of its implementation.⁸⁴ Although this review has been postponed,⁸⁵ a second version was released in June 2021.⁸⁶ The second version has no substantial changes, but additional statutory provisions were added to the list in Annex A of powers to which this Protocol would apply.

(2) A new system of categorisation

The key difference between the two Protocols is that Protocol 2 replaced the earlier categorisation system with an alternative, which divided notifications into either “Type 1” or

⁸¹ Two UK SIs were notified together under Protocol 1 but made under the Direct Payments to Farmers (Legislative Continuity) Act 2020 “and in accordance with” the European Union (Withdrawal Agreement) Act 2020: see Scottish Government, “Notification to the Scottish Parliament: The Rules for Direct Payments to Farmers (Amendment) Regulations 2020 and the Financing, Management and Monitoring of Direct Payments to Farmers (Amendment) Regulations 2020” (2020), available at https://archive2021.parliament.scot/S5_Rural/Meeting%20Papers/Direct_Payments_to_Farmers_Legislative_Continuity_Bill.pdf, Appendix A; Financing, Management and Monitoring of Direct Payments to Farmers (Amendment) Regulations 2020, SI 2020/90; Rules for Direct Payments to Farmers (Amendment) Regulations 2020, SI 2020/91.

⁸² “Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit”, available at https://archive2021.parliament.scot/S5_Delegated_Powers/General%20Documents/SI_Notifications_Protocol_2.pdf. See also Letter from the Cabinet Secretary for the Constitution, Europe and External Affairs to the Convener of the Finance and Constitution Committee (2020), available at https://archive2021.parliament.scot/S5_Delegated_Powers/General%20Documents/Letter_from_the_CSCEaEA_-_Protocol_2_-_Convener_FCC.pdf.

⁸³ Protocol 2 para 15.

⁸⁴ Protocol 2 para 50.

⁸⁵ Conveners Group (n 34) para 22.

⁸⁶ “Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit”, vrsn 2 (2021), available at <https://www.parliament.scot/-/media/files/committees/statutory-instrument-protocol.pdf>.

“Type 2”.⁸⁷ The introduction of Type 1 and Type 2 categorisation under Protocol 2 can be seen as broadly equivalent to the category A and B distinction found under Protocol 1. Type 2 notifications (like category A notifications) concern technical changes, while Type 1 notifications (like category B notifications) deal with non-technical or policy-based changes.

However, unlike Protocol 1, where categorisation was associated with the suggested level of scrutiny, the new categorisation system determines whether the subject committee will see the notification prior to consent being given to the UK SI by the Scottish Government. Type 1 notifications are subject to parliamentary scrutiny and approval in advance of consent being given, while Type 2 notifications must be received within five days of consent being given by the Scottish Government without prior parliamentary approval.⁸⁸

Moreover, there is no subsequent approval possibility envisaged for Type 2 notifications, merely an opportunity for the Scottish Parliament to determine whether any unspecified further action might be required if concerns are raised.⁸⁹ Even here, Protocol 2 includes no obligation or duty on the Scottish Government to reverse its decision to consent,⁹⁰ although this would not prevent the Scottish Parliament from passing primary legislation with an alternative effect. Any such measure, however, would likely have to come after the relevant UK SI had been laid or made, and the process at the UK Parliament started, even if that UK SI was not already law. Scrutiny and approval are therefore effectively removed for Type 2 notifications.

With Type 1 notifications, the relevant subject committee continues to have 28 days to scrutinise the proposals, although “[t]he Scottish Government will endeavour to provide more than 28 days’ notice where this is possible”.⁹¹ This timeframe does not, however, apply in “[u]rgent or immediate” cases.⁹² On the other hand, where there are “significant policy developments that are expected to lead to a use of UK regulation-making powers on matters within devolved competence”, the Scottish Government committed to consulting the Scottish Parliament “where possible” in advance of notification for early awareness.⁹³

⁸⁷ On which, see Taylor and Wilson, *Powers and Parliamentary Processes* 15-18.

⁸⁸ Protocol 2 paras 19-26, 38; Taylor and Wilson, *Powers and Parliamentary Processes* 16-18.

⁸⁹ Protocol 2 para 42; Taylor and Wilson, *Powers and Parliamentary Processes* 19-20.

⁹⁰ Taylor and Wilson, *Powers and Parliamentary Processes* 20.

⁹¹ Protocol 2 para 27, subject to para 36.

⁹² *Ibid* paras 44-46.

⁹³ *Ibid* para 14.

As with Protocol 1, the subject committee can recommend consent, the use of an “an alternative Scottish legislative solution”, or joint laying.⁹⁴ However, Protocol 2 is more explicit in giving the subject committee an option to recommend that no legislative action be taken.⁹⁵ Again, too, the presumption is that the Scottish Government will not consent where the Scottish Parliament recommends otherwise, and will “normally” adhere to any preferred parliamentary alternatives unless these are “unavailable or unviable”.⁹⁶ Once consent is given, it remains the case that the Scottish Government should track and report to the Scottish Parliament any discrepancies between the proposal outlined and the final UK SI,⁹⁷ although Protocol 2 also includes a new duty to report the UK SI’s “annulment or non-approval” at the UK Parliament.⁹⁸

Finally, Protocol 2 outlines the content which is required within notifications. For Type 1 notifications, this remains largely the same as under Protocol 1, albeit with some expanded requirements, such as reference to wider governance arrangements, technical standards, or any association with common frameworks.⁹⁹ Some “necessary adjustments” to this content is permitted for Type 2 notifications to reflect the fact that consent has already been given, while the need to provide justification for categorisation as Type 2 is added.¹⁰⁰

(3) Impact of new categorisation process on scrutiny and approval

The difference in categorisation raises the question of whether Protocol 2 addresses or exacerbates the difficulties identified above in relation to Protocol 1.

Protocol 2 evidently tries to provide “effective and proportionate” scrutiny for the Scottish Parliament,¹⁰¹ by having an expanded list of content required in a notification and by narrowing the criteria for categorisation as Type 2. A proposal for a UK SI which will make only technical changes or resolves redundancies, and does not involve any policy decisions, can be categorised as Type 2; all other proposals must be categorised as Type 1.¹⁰²

There is a risk that the new categorisation under Protocol 2, when coupled with the differential scrutiny process, not only fails to address issues over categorisation identified with

⁹⁴ Ibid para 30.

⁹⁵ Ibid para 30.

⁹⁶ Ibid para 33.

⁹⁷ Ibid para 34.

⁹⁸ Ibid para 35.

⁹⁹ Ibid para 26.

¹⁰⁰ Ibid 39-40. Any late sending of the Type 2 notification would also need to be justified under para 41.

¹⁰¹ Protocol 2 para 12.

¹⁰² Protocol 2 Annex B.

Protocol 1 above, but arguably undermines committee scrutiny. As discussed above, decisions as to whether certain notifications should have been categorised as A or B according to the definitions of “technical” or “policy” changes under Protocol 1 were arguable, and the subject committees and Scottish Government sometimes disagreed on categorisation of particular proposals. Additionally, the Scottish Government’s definition of “policy change” was often very narrow: almost all notifications under Protocol 1 stressed that they made “technical” rather than policy-based changes, even where the UK SI would make changes which were important in practice.¹⁰³ Meanwhile, reoccurring types of policy decisions (such as the creation of a UK scheme to replace an EU scheme) might be categorised differently between notifications.¹⁰⁴

Moreover, Protocol 1 required that proposed UK SIs which transferred legislative or important administrative functions had to be categorised as B, suggesting that such notifications should be subject to greater committee scrutiny.¹⁰⁵ However, under Protocol 2, the transfer of legislative or administrative functions is not an explicit criterion for categorisation. Based on the implementation of Protocol 1, there is a risk that UK SIs which transfer such functions can be categorised as technical changes or non-policy changes, with notification being made under Type 2. These functions could thus be transferred without the opportunity for committee scrutiny and approval prior to consent being given by the Scottish Government. This is problematic because the transfer of functions, particularly legislative functions, was one of the most important outcomes of the Protocol 1 process for the devolution settlement, as highlighted above.

(4) Continuation of prior challenges

With the exception of notification content and categorisation, the two Protocols are largely the same. This means that issues and challenges encountered with Protocol 1 also persist under Protocol 2.

A copy of the draft UK SI should be provided under Protocol 2 “if available”,¹⁰⁶ but this did not occur in early examples of Protocol 2 notifications. Committee scrutiny has therefore continued to be heavily reliant on the description provided by the Scottish Government: the Conveners Group identified the unavailability of the draft UK SI prior to their approval as being a “limitation[] on transparency and accountability which [is] inherent in the

¹⁰³ Taylor and Wilson, *Impact on the Devolved Settlement* 9, 11-12.

¹⁰⁴ *Ibid* 11-12.

¹⁰⁵ Protocol 1 para 22.

¹⁰⁶ *Ibid* para 25.

design of the SI Protocol, and in its operation in practice”.¹⁰⁷ Indeed, the early letters indicated that the draft UK SI had still not even been seen by the Scottish Government.¹⁰⁸ Consequently, too, the notifications continue to be vague, with discrepancies arising between the UK SI as proposed and as made.¹⁰⁹

Additionally, whereas Protocol 1 gave a “maximum of 28 days”,¹¹⁰ Protocol 2 gives a “minimum of 28 days” and includes a commitment by the Scottish Government to provide more time where possible.¹¹¹ This change of phrasing from “maximum” to “minimum” might be an attempt to provide more time for committee scrutiny, or simply a revision to the phrasing for clarity. Yet, already within a month of Protocol 2’s introduction, subject committees were being asked to complete their scrutiny within a narrower timeframe.¹¹² Indeed, the Conveners Group found that “[p]roposals are often notified to the Parliament with far less than the 28-day period provided for in the Protocol, leading to insufficient time for committee scrutiny.”¹¹³

Even if the change of phrasing here was an attempt to increase the amount of time available to committees for scrutiny, such an action would not always improve the opportunity for scrutiny if the draft UK SI were not available. Indeed, the more time a committee has to scrutinise a notification in advance of it being laid, the less likely it is that they will see a draft of the UK SI. Protocol 2 also leaves open the aforementioned question of whether the Scottish scrutiny opportunity should run simultaneously with or in advance of scrutiny periods at the UK Parliament.

¹⁰⁷ Conveners Group (n 34) para 24.

¹⁰⁸ See Scottish Government, “Notification to the Scottish Parliament: The Approved Lists (Animals and Animal Products) (Amendment) Regulations 2021” (2021), available at https://archive2021.parliament.scot/S5_Rural/public_paper_20210224.pdf, REC/S5/21/7/2 Annex A.

¹⁰⁹ Letter from the Minister for Rural Affairs and the Natural Environment to the Convener of the Rural Economy and Connectivity Committee (2021), on the Organics (Amendment) Regulations 2021, available at https://archive2021.parliament.scot/S5_Rural/General%20Documents/Annex_H_letter_-_AG-034_and_AG-17_-_Mr_Macpherson_to_RECC_-_4_February_2021.pdf.

¹¹⁰ Protocol 1 para 16.

¹¹¹ Protocol 2 para 27.

¹¹² See e.g. in relation to the Plant Health (Place of Destination) (Phytosanitary Conditions) Regulations 2021: Letter from the Minister for Rural Affairs and the Natural Environment to the Convener of the Rural Economy and Connectivity Committee (2021), available at https://archive2021.parliament.scot/S5_Rural/General%20Documents/PH31_covering_letter.pdf.

¹¹³ Conveners Group (n 34) para 24.

F. ALTERNATIVE METHODS: PRIMARY LEGISLATION AND SCOTTISH STATUTORY INSTRUMENTS

Following the above, the question arises as to whether alternative processes would have provided an improved scrutiny opportunity for the Scottish Parliament before IP Completion Day, and whether those alternatives continue to do so relative to Protocol 2. Two alternative legislative approaches are relevant in this context, namely the passing of primary legislation and the Scottish Statutory Instrument (SSI) process. These would have been difficult to institute during the withdrawal process, owing to the time constraints discussed above, but now may present a more viable option.

(1) Primary legislation

When the 2018 Act was first introduced as a Bill in 2017, clause 11 originally sought to continue the pre-Brexit EU law restriction on devolved competence by preventing the devolved legislatures from making any changes to retained EU law, even if the policy area fell within their competence post-Brexit. The UK Government would then have released former EU policy areas into devolved competence as required, probably once joint agreements on how to approach issues on a UK-wide basis were in place. However, following a significant political backlash during the 2018 Act's passage through the UK Parliament, this clause was replaced with what became section 12. This section gave the UK Government a power to issue "freezing orders" via delegated legislation, to prevent the devolved administrations from legislating on specific matters of former EU policy. The 2018 Act was also made a "protected" statute,¹¹⁴ thus preventing the devolved legislatures from amending it or legislating incompatibly with any of its terms in relation to retained EU law.

Therefore, theoretically, the Scottish Parliament could have passed more primary legislation on retained EU law matters in preparation for Exit Day. Indeed, this was indicated by the UK Supreme Court in the *Scottish Continuity Bill Case*, albeit the Scottish Parliament was held not to be able to legislate on the retained EU law generally, owing to the 2018 Act being a protected statute.¹¹⁵ However, although the section 12 power was never used and has now lapsed, there was always the risk that a freezing order might be made. This may have been

¹¹⁴ Scotland Act 1998, Sch 4, para 1(2)(g).

¹¹⁵ *Reference by the Attorney General and Advocate General for Scotland on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 at paras 33, 98-99.

an implicit contributing factor in the Scottish Government choosing to rely on UK SIs rather than primary legislation.

However, the lack of time was clearly the greatest barrier to the use of primary legislation in practice. The scale and complexity of correcting retained EU law under an accelerated and erratic timetable likely prevented the passing of primary legislation, which would have taken considerably longer than secondary legislation. Indeed, the Scottish Government indicated the need to rely on secondary legislation for this very reason, even in areas which had initially been identified as likely requiring primary legislation.¹¹⁶

(2) Exit SSIs

As discussed above, the Scottish Government received the power to correct retained EU law under Schedule 2 of the 2018 Act, albeit this was also subject to a potential UK Government freezing order.¹¹⁷ A new Protocol was agreed between the Scottish Government and the Scottish Parliament in January 2019 with respect to SSIs related to Brexit, here referred to as the “Exit SSI Protocol”.¹¹⁸ This Protocol largely adopted the existing negative and affirmative procedures: the DPLRC would continue its normal role in scrutinising the “technical aspects of the SSI”, while the relevant subject committee and Scottish Parliament were provided with the normal 40 days for either annulment under the negative procedure or for approval under the affirmative procedure as appropriate.¹¹⁹

However, three additional procedural features were added under the Exit SSI Protocol beyond the normal SSI process. First, the Scottish Government categorised SSIs made under the Schedule 2 power as needing “Low”, “Medium” or “High” levels of scrutiny.¹²⁰ As with Protocol 1 and 2 for UK SI notifications, this categorisation was to assist the subject committees in prioritising and directing their scrutiny.¹²¹

¹¹⁶ Taylor and Wilson, *Impact on the Devolved Settlement* 22-23; Scottish Parliament, Official Report, Environment, Climate Change and Land Reform Committee (28 October 2020).

¹¹⁷ European Union (Withdrawal) Act 2018, Sched 3, Part 1, para 1 modifying the Scotland Act 1998 s 57.

¹¹⁸ “Protocol on the scrutiny of SSIs made using powers under the European Union (Withdrawal) Act” (2019), available at https://archive2021.parliament.scot/S5_Delegated_Powers/20190108MRtoConveners.pdf.

¹¹⁹ *Ibid* para 45.

¹²⁰ *Ibid* para 13.

¹²¹ *Ibid* para 9.

Secondly, under the 2018 Act, certain ministerial statements had to be made when laying SSIs using the Schedule 2 power.¹²² These statements were provided to the subject committee in policy notes, in addition to the normal explanatory notes,¹²³ and can be seen as broadly equivalent to notifications under Protocols 1 and 2. The basic content of the statement was specified in the 2018 Act and supplemented by additional requirements under the Exit SSI Protocol. This included items such as a note of any impact assessments undertaken¹²⁴—although, as with Protocols 1 and 2, undertaking such assessments was not mandatory.

Thirdly, a new sifting process was outlined for relevant SSIs laid under both the affirmative and the negative procedures. However, sifting would only be engaged where the Scottish Government had discretion as to which procedure it would use to lay the SSI,¹²⁵ although sifting would be bypassed in urgent cases.¹²⁶ In addition to its typical technical scrutiny, the DPLRC would consider whether it agreed with the Scottish Government’s choice of procedure and categorisation of the SSI, and could report any concerns on either point to the relevant subject committee.¹²⁷ The choice of affirmative or negative procedure used for laying was also separately considered by the subject committee, which could recommend that the alternative procedure be used; this implies that the Scottish Government would, depending on the procedure used, revoke or withdraw the SSI and lay a new instrument under the recommended procedure, with the DPLRC conducting its technical scrutiny of the instrument afresh.¹²⁸

The enhanced procedures under the Exit SSI Protocol can be seen to address many of the scrutiny challenges for UK SI notifications encountered under Protocols 1 and 2. First, scrutiny took place once the relevant policy decisions and the fine detail were known, meaning the vagueness and subsequent deviation associated with the notifications of proposed UK SIs did not arise. Secondly, the subject committees had the benefit of seeing the draft SSI itself

¹²² 2018 Act, Sch 7 part 3 para 29. See also para 28 for the equivalent provisions for joint laying.

¹²³ Policy notes imported more information than explanatory notes normally would, covering the statutory requirements plus detail required under the Exit SSI Protocol, including categorisation and exemption from sifting statement.

¹²⁴ Exit SSI Protocol para 27.

¹²⁵ *Ibid* para 14.

¹²⁶ *Ibid* para 20.

¹²⁷ *Ibid* paras 30-37.

¹²⁸ *Ibid* paras 43-7.

during this scrutiny period, in addition to both the explanatory note and policy note.¹²⁹ Thirdly, the subject committees received considerably more time to scrutinise both negative and affirmative Exit SSIs than UK SI notifications, being the normal 40 days for scrutiny of SSIs rather than 28 days.

Despite this, the Exit SSI Protocol process did not address all of the challenges associated with the UK SI Protocols. For example, categorisation under the Exit SSI Protocol was broadly similar to categorisation under the UK SI Protocols, and was designed to assist the subject committees in prioritising their scrutiny in anticipation of a potential press of business in advance of Exit Day or IP Completion Day as appropriate.¹³⁰ However, as with Protocol 1, the categorisation of proposals was not found to affect the level of scrutiny applied by the subject committees.¹³¹ Categorisation under the Exit SSI Protocol was, nonetheless, at least subject to formal review: the DPLRC as part of its sifting role would review the appropriateness of the categorisation, and could recommend an alternative categorisation if required,¹³² albeit no changes to the procedure were ever recommended.¹³³

The Exit SSI Protocol process thus offered an alternative to reliance on UK SIs made by the UK Government, with a more direct scrutiny and approval opportunity for the Scottish Parliament. Yet, only approximately 70 SSIs were made, typically in areas which were more fully devolved, compared to the approximately 200 UK SIs consented to by the Scottish Government.¹³⁴ There was no explicit reason found for the preference for UK SIs relative to SSIs, although it is possible to speculate that the aforementioned factors of the tight timeframe, overlapping devolved and reserved competences, policy areas already often operating on a UK-wide basis, and the scale of the task were contributing factors in this decision.

Moreover, going forward, the additional mechanisms to support committee scrutiny included in the Exit SSI Protocol will no longer be available. The Exit SSI Protocol was due to lapse with the expiry of the 2018 Act power, but was retired early by agreement between the

¹²⁹ Ibid paras 27-28.

¹³⁰ Ibid paras 3, 10, 12.

¹³¹ Conveners Group (n 34) para 5.

¹³² Exit SSI Protocol paras 34-35. See e.g. DPLRC, “Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 1 December 2020” (Scottish Parliament Paper 872, 2020), available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2020/12/3/237b65af-3798-4356-adbd-1cee28f422cf/DPLRS052020R71.pdf>, 3 regarding its recommendation on the Invasive Non-native Species (EU Exit) (Scotland) (Amendment etc) Regulations 2020 (SSI 2020/draft) as re-laid.

¹³³ Conveners Group (n 34) para 5.

¹³⁴ See Taylor and Wilson, *Impact on the Devolved Settlement* 5-6.

Scottish Parliament and the Scottish Government. This step was recommended to the Conveners Group by the Constitution, Europe, External Affairs and Culture Committee, and approved by the DPLRC, seemingly to reduce the committee workload associated with sifting and in recognition that “scrutiny is now shifting towards instruments which set the new policy direction in post-EU areas ... not generally covered by the [Exit] SSI Protocol”.¹³⁵

However, the Scottish Parliament requested that the Scottish Government agree to continue the Exit SSI Protocol’s practice regarding the expanded content of the policy notes.¹³⁶ This highlights the important role that the expanded policy notes had for committee scrutiny. However, the Scottish Government indicated that it would only provide that level of information in policy notes where legally required.¹³⁷

That decision—and the Scottish Parliament’s acceptance of it—has been unfortunate. Even though the subject committees will continue to see policy notes, the additional content was helpful in providing scrutiny. Given the Scottish Government’s reluctance to do so unless legally required, should the committees change their position and insist on expanded policy notes being provided, this requirement likely would need to be put into law or, at the very least, into the Standing Orders.

G. CONCLUSION: THE PATH FORWARD

During the Brexit process, the UK’s governments and legislatures faced the unprecedented challenge of correcting a body of international law so as to make it operable and effective as domestic law. In Scotland, a new process was devised to provide a scrutiny opportunity for the Scottish Parliament in relation to UK SIs made on devolved matters. This process was broadly effective, albeit with some significant challenges. Crucially, this process was favoured over the alternative options of primary legislation or SSIs, with the constrained timeframe likely being a significant factor in this choice.

¹³⁵ Letter from the Convener of the Delegated Powers and Law Reform Committee to the Minister for Parliamentary Business (2022), available at <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/convener-to-minister-for-parliamentary-business-ssi-Protocol.pdf>.

¹³⁶ *Ibid.*

¹³⁷ Letter from the Minister for Parliamentary Business and Veterans to the Minister for Parliamentary Business (2022), available at <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/eu-exit-ssi-protocol.pdf>.

Going forward, there may be new restrictions on the ability of the Scottish Government to legislate in these areas. The power to amend retained EU law given to the Scottish Government under Schedule 2 of the 2018 Act expired in December 2022. Unless new powers are provided then the ability to make delegated legislation in these areas will potentially end. However, the UK Government's planned Brexit Freedoms Bill—or any other equivalent—is likely to provide such powers, although it is unclear as yet what these will comprise.¹³⁸

Meanwhile, in practice, restrictions have been placed on both the Scottish Government and the Scottish Parliament by the Internal Market Act 2020 and common frameworks. Whatever the Scottish Parliament passes in primary legislation or the Scottish Government in delegated legislation is subject to the terms of the Internal Market Act, by requiring Scotland to accept standards introduced in other parts of the UK. Meanwhile, any agreed common frameworks are a commitment to cooperate with the other constituent nations in a UK-wide approach, and so present a restriction—albeit a political rather than a legal restriction—on divergence with the rest of the UK.

For these reasons, as well as the significant transfer of functions to the UK Government under the processes discussed above, it is likely that UK SIs will continue to be a primary tool for legislative reform of some aspects of devolved competence. However, while Protocol 2 probably provides effective and targeted scrutiny in most cases, this article has shown that in other cases the arrangements under Protocol 2 have potentially reduced the opportunity for Scottish parliamentary scrutiny in comparison to what was in place before IP Completion Day. The Protocol 2 process also relies on both the UK Government and the Scottish Government agreeing both a consent process and a scrutiny opportunity for the Scottish Parliament. It is not clear that this cooperation will continue—particularly where powers have been transferred to the UK Government in isolation.

This is all perhaps particularly notable since the 2018 Act was enacted without the Scottish Parliament's legislative consent, and yet the UK SIs made using the section 8 power on matters within devolved competence were given consent and approval by the Scottish Government and Scottish Parliament. As mentioned above, the Sewel convention does not

¹³⁸ Report on *Retained EU Law: Where Next* (European Scrutiny Committee HC 122, 2022), available at <https://committees.parliament.uk/publications/23174/documents/169821/default/>. See also the oral and written evidence given by the authors to the Committee on the impact of any future Bill on the devolved settlement: Minute of *Evidence Session on Retained EU Law* (European Scrutiny Committee, 2022), available at <https://committees.parliament.uk/oralevidence/10253/pdf>.

apply to delegated legislation. Going forward, the need for a process to protect Scottish parliamentary scrutiny is clearly apparent.

Indeed, the Brexit process has more generally highlighted a greater interdependency between the UK's legislatures, and new solutions are required to help capture and support that interdependency. However, there are problems with this, an obvious one being that Protocols 1 and 2 have tried to provide a scrutiny opportunity to a devolved Parliament for legislation which is being made or laid at a different—and also sovereign—Parliament. Making UK-level legislation at the UK Parliament, even delegated legislation on devolved matters, directly conditional on approval from a devolved legislature would be politically and legally unprecedented, and any such change would likely vary the balance of power and hierarchy in the current UK constitution.

One way forward which might be considered is how to introduce greater interparliamentary cooperation, beyond intergovernmental cooperation, to facilitate mutual scrutiny. Indeed, the Scottish Parliament Conveners Group has indicated its view that “interparliamentary working ... is essential in developing more effective scrutiny of intergovernmental relations.”¹³⁹ However, interparliamentary relations is still in its infancy in the UK, and there is currently “no formal role for the UK Parliament, Scottish Parliament, Welsh Parliament and Northern Ireland Assembly in scrutinising intergovernmental relations”.¹⁴⁰

During the EU withdrawal process, from October 2017 until at least September 2019, committee Chairs and Conveners on Brexit-related issues from across all of the UK's legislatures would meet regularly as part of an Interparliamentary Forum on Brexit.¹⁴¹ The broad purpose of the Forum was to “discuss the process of the UK's withdrawal from the European Union” and to provide “collective scrutiny of that process”.¹⁴² At a meeting of the Forum in March 2018, they noted that:

¹³⁹ Report on *Post-EU Scrutiny Issues* (Scottish Parliament Conveners Group CG/S6/22/3/1, 2022), available at <https://www.parliament.scot/-/media/files/committees/conveners-group/conveners-group-meeting-papers-30-march-2022.pdf>, para 28.

¹⁴⁰ Report on *Intergovernmental Relations in the United Kingdom* (House of Commons Library No CBP8371, 2022), available at <https://researchbriefings.files.parliament.uk/documents/CBP-8371/CBP-8371.pdf>, 18.

¹⁴¹ Scottish Parliament, “Press Release: Parliamentary Committees engage in interparliamentary dialogue on Brexit at Westminster” (2017), available at <https://archive2021.parliament.scot/newsandmediacentre/106395.aspx>.

¹⁴² Interparliamentary Forum on Brexit, Minute of meeting, 12 October 2017, available at https://archive2021.parliament.scot/S5_Finance/General%20Documents/FCC_2017.10.12_Final_statement.pdf.

the current system of inter-governmental relations in the UK is not fit for purpose and that there is an urgent need for substantial reform in the context of the Brexit process. This process will also present substantial challenges for legislatures across the UK in scrutinising these processes.¹⁴³

Following the UK's withdrawal from the EU, the Interparliamentary Forum on Brexit was succeeded by an Interparliamentary Forum, which launched on 25 February 2022. In a joint statement, the Forum confirmed that the continuation of such a group post-Brexit "provides an important start for vital dialogue and cooperation between parliamentarians".¹⁴⁴ It will seek to "improve scrutiny through the mutual exchange of information and by seeking a consistent approach to improving transparency and accountability at both a Ministerial and inter-governmental level in our respective jurisdictions".¹⁴⁵

Certainly, should the UK's legislatures seek to embed interparliamentary scrutiny through this or other mechanisms, these processes would need to be put in place soon: the Internal Market Act and the anticipated Brexit Freedoms Bill suggest that there may be a further volume of delegated legislation in this space in the near future. It will fall on the UK's legislatures to insist on the level of scrutiny they need to guarantee that the devolution settlements will be protected.

¹⁴³ Interparliamentary Forum on Brexit, Joint statement, 26 March 2018, available at https://archive2021.parliament.scot/S5_Finance/General%20Documents/2018.03.26_IPF_Brexit_Statement_Final.pdf.

¹⁴⁴ Interparliamentary Forum on Brexit, Joint statement, 25 February 2022, available at <https://www.parliament.uk/business/news/2022/february-2022/joint-statement-of-the-interparliamentary-forum/>.

¹⁴⁵ Ibid.