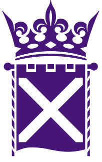


The Scottish Parliament
Pàrlamaid na h-Alba

SPICe The Information Centre
An t-Ionad Fiosrachaidh

SPICe Briefing
Pàipear-ullachaidh SPICe

Brexit Statutory Instruments: Powers and Parliamentary Processes

Dr Robert Brett Taylor and Prof Adelyn L M Wilson, University of Aberdeen School of Law

This briefing is the first in a series of three briefing papers on Brexit Statutory Instruments produced as part of a Scottish Parliament Academic Fellowship undertaken with the Scottish Parliament Information Centre. This first briefing sets out the process followed by the Scottish Parliament to consider Brexit Statutory Instruments.

8 August 2021
SB 21-45

Contents

Introduction 3
European Union (Withdrawal) Act 2018 5
Concurrent Powers: Section 8 and Schedule 2 5
UK Government commitments in relation to its use of section 8 5
UK Exit SIs: Protocol 1 7
The Protocol 1 Process 8
Notifications made under Protocol 1 9
Categorisation of proposed UK Exit SIs under Protocol 1 10
The process at the UK Parliament to which Protocol 1 runs parallel 12
UK Exit SIs: Protocol 2 15
Scope of Protocol 2 16
New categorisation 16
New differential scrutiny process 17
Updated notification content 18
Committee recommendations and Scottish Government responses 19
Exit Scottish Statutory Instruments (SSIs) 21
Conclusion 23
Bibliography 24

Introduction

The European Union (Withdrawal) Act 2018 [1] provides legislative continuity after Brexit by transforming EU law from a body of international law into a body of UK domestic law, known collectively as 'retained EU law', from 11pm on Implementation Period (IP) Completion Day, 31 December 2020. However, this retained EU law had to be amended to allow it to work effectively at the domestic level. In relation to Scottish devolved matters, these changes have either been made by the UK Government through Statutory Instruments laid at the UK Parliament with the consent of the Scottish Government (UK Exit SIs), or by the Scottish Government through Scottish Statutory Instruments (Exit SSIs) laid in the Scottish Parliament.

A new process was introduced to enable the Scottish Parliament to approve the Scottish Government giving its consent to the UK Government making UK Exit SIs on devolved issues. This was introduced by an agreement between the Scottish Government and the Scottish Parliament and referred to as Protocol 1, which ran from September 2018 until IP Completion Day on 31 December 2020. This Protocol 1 process was replaced by an amended process introduced under Protocol 2, which has been in effect since 1 January 2021.

This briefing paper is the first in a series of three briefing papers on Brexit Statutory Instruments produced as part of a Scottish Parliament Academic Fellowship undertaken with the Scottish Parliament Information Centre (SPICe) to explain and analyse the implementation of the Protocol 1 process. The purpose of these papers is to help inform the implementation of Protocol 2, and any other future processes by which scrutiny of UK SIs on devolved matters will be undertaken.

This first paper outlines the following:

- the powers under the European Union (Withdrawal) Act 2018 used to make changes to retained EU law;
- the Protocol 1 process by which the Scottish Parliament approved the Scottish Government consenting to the UK Government making UK Exit SIs which involved devolved issues prior to IP Completion Day;
- the processes by which UK Exit SIs are laid and made at the UK Parliament;
- the subsequent Protocol 2 process which replaced Protocol 1 after IP Completion Day and which remains in effect; and
- the process for making Exit SSIs at the Scottish Parliament.

The second briefing paper in this series will examine: the implementation of Protocol 1, the impact of UK Exit SIs on the devolution settlement, and who will set the future policy direction in Scotland in devolved areas. The third briefing paper will highlight some of the challenges encountered in the implementation of Protocol 1 which, it is hoped, will assist the committees and MSPs in future scrutiny exercises under Protocol 2.

These papers recognise that both the Scottish Government and the Scottish Parliament had to respond to a situation that was not of their making or choosing. They have had to engage in the exceptionally complex task of correcting deficiencies in retained EU law on

devolved matters. This process involved coordination between multiple governments and legislative bodies, but was initiated and led by the UK Government. The scale of the task was unprecedented, had to be performed in advance of Exit Day and other deadlines, some of which transpired to be moveable, and had to incorporate changes in EU law during this time.

European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 received royal assent on 26 June 2018. The Sewel Convention requires that the consent of the devolved legislatures be sought when the UK Parliament seeks to pass primary legislation either on devolved matters or to change devolved competences. However, although the 2018 Act did not receive the consent of the Scottish Parliament, it was nevertheless enacted by the UK Parliament. This was the first time that this had happened, although it has occurred several times since. The 2018 Act was subsequently updated by the European Union (Withdrawal Agreement) Act 2020 to reflect the Withdrawal Agreement with the EU and the associated Northern Ireland Protocol.

The principal purpose of the 2018 Act was to transform the otherwise international body of EU law into a new body of UK domestic law called 'retained EU law'. Originally this change would have been from Exit Day, 31 January 2020, when the UK formally left the EU. However, as amended by the 2020 Act, the change took effect from 11pm on IP Completion Day, 31 December 2020, at the end of the transition period.

However, retained EU law had to be corrected to allow it to work effectively at the domestic level. The powers to do so were set out in section 8 and Schedule 2 of the 2018 Act, with the use of the section 8 power being subject to UK Government commitments discussed below.

Concurrent Powers: Section 8 and Schedule 2

The 2018 Act gives concurrent powers to the UK Government (section 8(1)) and the devolved administrations (paragraph 1(1) of Schedule 2) to change retained EU law via secondary legislation. These are equivalent powers that can be exercised separately by the UK or devolved governments within their competence. The Act granted these powers to allow the Governments to correct 'any failure of retained EU law to operate effectively' or 'any other deficiency in retained EU law'. Changes to retained EU law can also be made jointly between the UK Government and the devolved administrations (paragraph 1(2) of Schedule 2). Here an instrument is laid simultaneously at both the UK Parliament and the devolved legislature (paragraph 2 of Schedule 7).

Although subject to a sunset clause by which the power expires (section 8(8)) at the end of December 2022, the power of UK Ministers under section 8 is nevertheless extensive. UK Ministers are capable of making provisions 'that could be made by an Act of Parliament' (section 8(5)). They can also legislate for the UK as a whole, even on devolved matters, without any legal requirement for the consent of the devolved administrations. In contrast, the equivalent power of devolved administrations under Schedule 2 is limited to matters within devolved competence (paragraph 2(1) of Schedule 2). The meaning of 'devolved competence' with respect to Scotland is found under paragraph 8 of Schedule 2.

UK Government commitments in relation to its use of section 8

The Delegated Powers Memorandum accompanying the draft European Union

(Withdrawal) Bill in July 2017 stated in relation to the section 8 power that '[t]he UK Government will not normally use the power to amend domestic legislation in areas of devolved competences without the agreement of the relevant devolved authority'. [2]

In April 2018, a further agreement was reached between the UK Government and the Welsh Government in relation to the powers to make secondary legislation proposed under the Bill. The Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks stated that:

> " The UK Government and the Devolved Administrations … will work together to ensure that the European Union (Withdrawal) Bill … and associated secondary legislation creates a fully functioning statute book across the UK on exit from the European Union."
>
> UK Government Cabinet Office, 2018[3]

Crucially, the accompanying Memorandum to that Intergovernmental Agreement between the UK and the Welsh Governments stated that:

> " The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved administrations. In 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."
>
> UK Government Cabinet Office, 2018[3]

The Scottish Government did not agree to either the Intergovernmental Agreement or the accompanying Memorandum. Despite this, the Intergovernmental Agreement and accompanying Memorandum, along with the Delegated Powers Memorandum, 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.

Crucially, consent to the use of section 8 to make UK Exit SIs on devolved matters would only be required from the devolved governments, not the devolved legislatures.

UK Exit SIs: Protocol 1

On 11 September 2018, the Scottish Government and the Scottish Parliament agreed a Protocol (hereafter Protocol 1) [4] . It specified a process by which the Scottish Parliament would approve proposals for the Scottish Government to consent 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. Protocol 1 required the Scottish Government to notify the Scottish Parliament ‘about all proposals which may result in UK [Exit] SIs containing relevant provisions prior to consent being given by Scottish Ministers to the UK Government to proceed’. [4] It accordingly created a new process whereby the Scottish Parliament would have the opportunity to both scrutinise and approve any proposal for the Scottish Government to consent to a UK Exit SI being made under section 8 of the 2018 Act on a devolved matter [4] . This was a political rather than a legal process.

Protocol 1 came into effect in September 2018 and would be subject to review and potential revision [4] .

The Protocol 1 Process

Figure 1 - Protocol 1 process

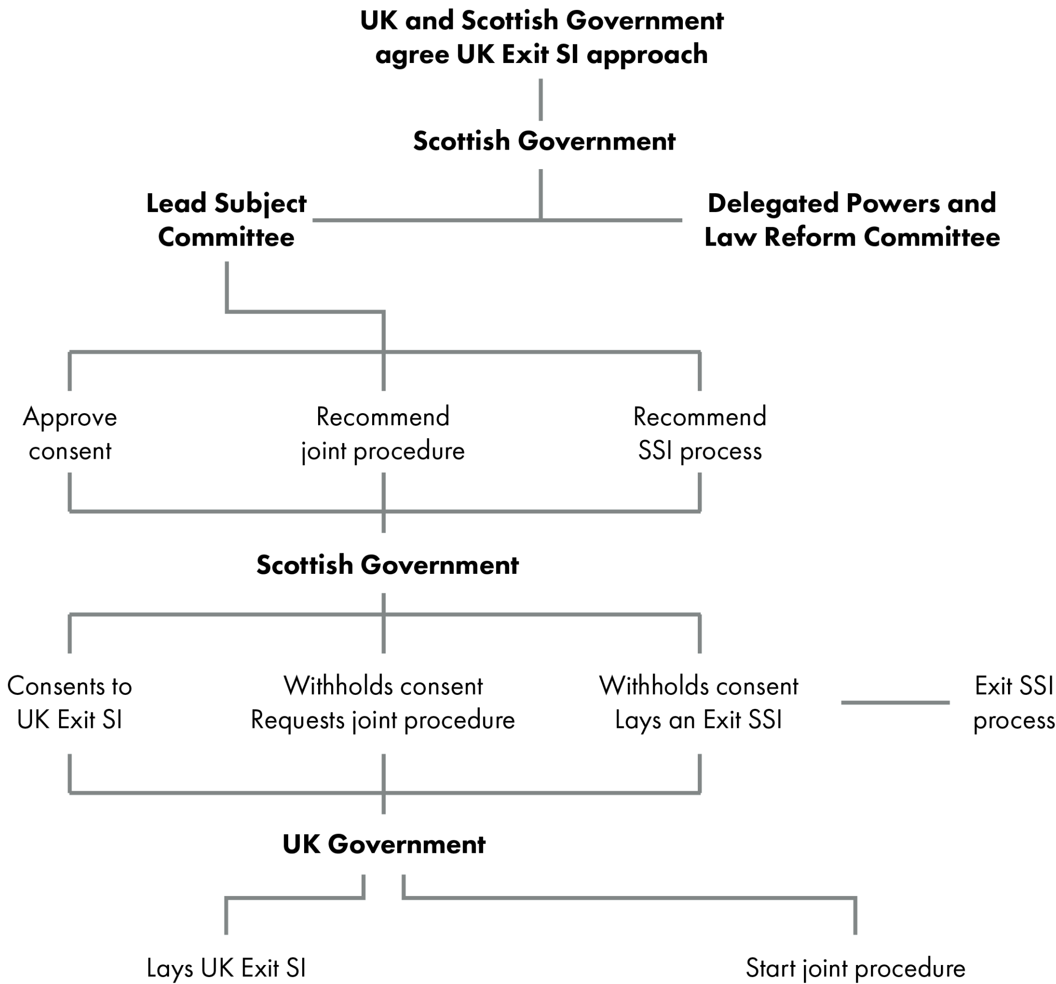


Figure 1 above shows the process by which the Scottish Parliament would be notified of the Scottish Government's intention to consent to a UK Exit SI being made by the UK Government, and by which the Scottish Parliament would approve that consent being given. Protocol 1 described this as a four-phased approach [4] .

Phase 1 comprised the identification of 'any failure of retained EU law to operate effectively' or 'any other deficiency in retained EU law'[1], by the UK or Scottish Government, and the joint decision on how to address that issue:

> " Discussions will take place between the Scottish Government and UK Government counterpart departments on how to fix the deficiencies identified and the most appropriate legislative vehicle to use (UK [Exit] SI, [Exit] SSI or instrument subject to Joint Parliamentary procedure). If the legislative vehicle considered appropriate is a UK [Exit] SI then the process moves to phase 2."
>
> Scottish Parliament, 2018[4]

Phase 2 of the Protocol 1 process was the provision of a short document summarising the

proposed change to retained EU law (a 'notification') and an accompanying letter to the 'relevant lead subject committee' and Delegated Powers and Law Reform Committee (DPLRC). Protocol 1 stated that, depending on the nature of the legislation in question, a single notification 'may cover a number of proposals for correcting deficiencies or it may only cover a proposal to correct a single deficiency'. [4]

Phase 3 involved the Scottish Parliament undertaking scrutiny of the notification and accompanying letter. The relevant lead subject committee scrutinised the notification as appropriate, and should 'normally have [had] a maximum of 28 days' to do so. [4] To assist the lead subject committees in prioritising their workload within this timeframe, notifications of proposed UK Exit SIs were categorised by the Scottish Government according to the importance of the changes they made. The required content of the notifications and the criteria underpinning categorisation are examined further in the following two subsections.

Once the relevant lead subject committee completed its scrutiny, it was able to make one of three recommendations, which were described in Protocol 1 as follows: [4]

1. That the Scottish Ministers should proceed to notify the UK Government of their decision to consent to the proposals being included in a UK [Exit] SI to be made by UK Ministers.

2. That the Scottish Ministers should not consent to the proposal being included in a UK [Exit] SI to be laid solely in the UK Parliament and instead request that the proposals be included in a UK [Exit] SI to be made under the joint procedure.

3. That the Scottish Ministers should not consent to the proposals being included in a UK [Exit] SI and instead should include the proposals in an [Exit] SSI.

Should a lead subject committee have recommended either the second or third option above, then it would have needed to communicate this recommendation to the Scottish Government in writing. The Scottish Government would then normally have had 7 days to respond. If the Scottish Government did not accept the committee's recommendation, then a motion supporting the recommendation would have been tabled and debated in the Scottish Parliament. Any such debate should have taken place within 14 days of the 28 days having expired. Where the Scottish Parliament supported the motion, 'the Scottish Government would normally not [have] consent[ed] to the proposal being included in a UK SI'. [4]

Phase 4 began once consent was given. The Scottish Government tracked the progress of the proposals into legislation and reported to the Scottish Parliament whether the final UK Exit SI was 'consistent with the consent granted'. Where it was not consistent, the Scottish Government considered whether this discrepancy was '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'. [4] In the latter case, the Scottish Government would have decided whether an Exit SSI or a joint laying of the UK Exit SI was required.

Notifications made under Protocol 1

Protocol 1 stated that, depending on the nature of the legislation in question, a single notification could propose one UK Exit SI or more than one UK Exit SI. Either way,

Protocol 1 stipulated that that each notification would detail the following [4] :

- The name of the instrument in question (if known) or a title describing the policy area
- A brief explanation of law that the proposals amend
- Summary of the proposals and how these correct deficiencies
- An explanation of why the change is considered necessary
- Scottish Government categorisation of significance of proposals
- Impact on devolved areas
- Summary of stakeholder engagement/consultation
- A note of other impact assessments, (if available)
- Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislating
- Intended laying date (if known) of instruments likely to arise
- If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposals to consent, why not?
- Information about any time dependency associated with the proposal
- Any significant financial implications

Categorisation of proposed UK Exit SIs under Protocol 1

Protocol 1 made provision for 'a proportionate approach' or 'differentiated scrutiny approach' in order to support the work of the lead subject committees by helping them to 'prioritise scrutiny of more significant proposals'. [4] The reason for this approach appears to have been the need to pass a significant number of UK Exit SIs in advance of 29 March 2019, which at the time was anticipated to be Exit Day, and to ensure the appropriate use of parliamentary time and resource. As Protocol 1 stated, '[t]he Scottish Government is taking a prioritised approach to the legislative fixes that are necessary before the end of March 2019 and will aim to fix all deficiencies by the end of December 2020'. [4]

Protocol 1 sought to achieve this by introducing three categories in relation to UK Exit SIs: 'A', 'B' or 'C'.

Category A was the 'residual category' consisting of all proposals 'where the relevant provision [was] not significant enough to fall within categories B and C'. The expectation was that such proposals were insufficiently important to require the lead subject committee to take evidence from Scottish Ministers or stakeholders, although the lead subject committees could take evidence should they wish and could still recommend that the Scottish Government refuse to consent to the proposed UK Exit SI.

Category B included matters ‘considered to be more significant than those contained in category A’. The expectation was that these proposals would involve matters on which the lead subject committee might wish to take evidence from the Scottish Government and/or external stakeholders where notification was ‘particularly significant’. It was for the lead subject committee to decide whether to take evidence, although it was under no obligation to do so, and it could still recommend that the Scottish Government refuse consent.

Category C included matters on which it was anticipated that the Scottish Parliament would want to consider the terms of the UK Exit SI rather than just the notification. It included matters which would be subject to the joint procedure under paragraph 2 of Schedule 7 of the 2018 Act, although Protocol 1 was not itself applicable where the joint procedure was engaged. Crucially, Protocol 1 suggested that such notifications would never be classified as C by the Scottish Government, because the joint procedure fell outside of the Protocol. The category therefore existed to assist the lead subject committees in deciding whether a particular proposed UK Exit SI should instead be subject to the joint procedure as part of their scrutiny of notifications.

Protocol 1 provided a list of expected characteristics or criteria to guide the Scottish Government in identifying the appropriate category (A or B) for each proposed UK Exit SI. These criteria are set out in the table quoted below [4] .

Figure 2 - Protocol 1 characteristics for EU Exit SIs

One or more expected characteristics of UK Exit SIs which fall under these categories (illustrative examples):

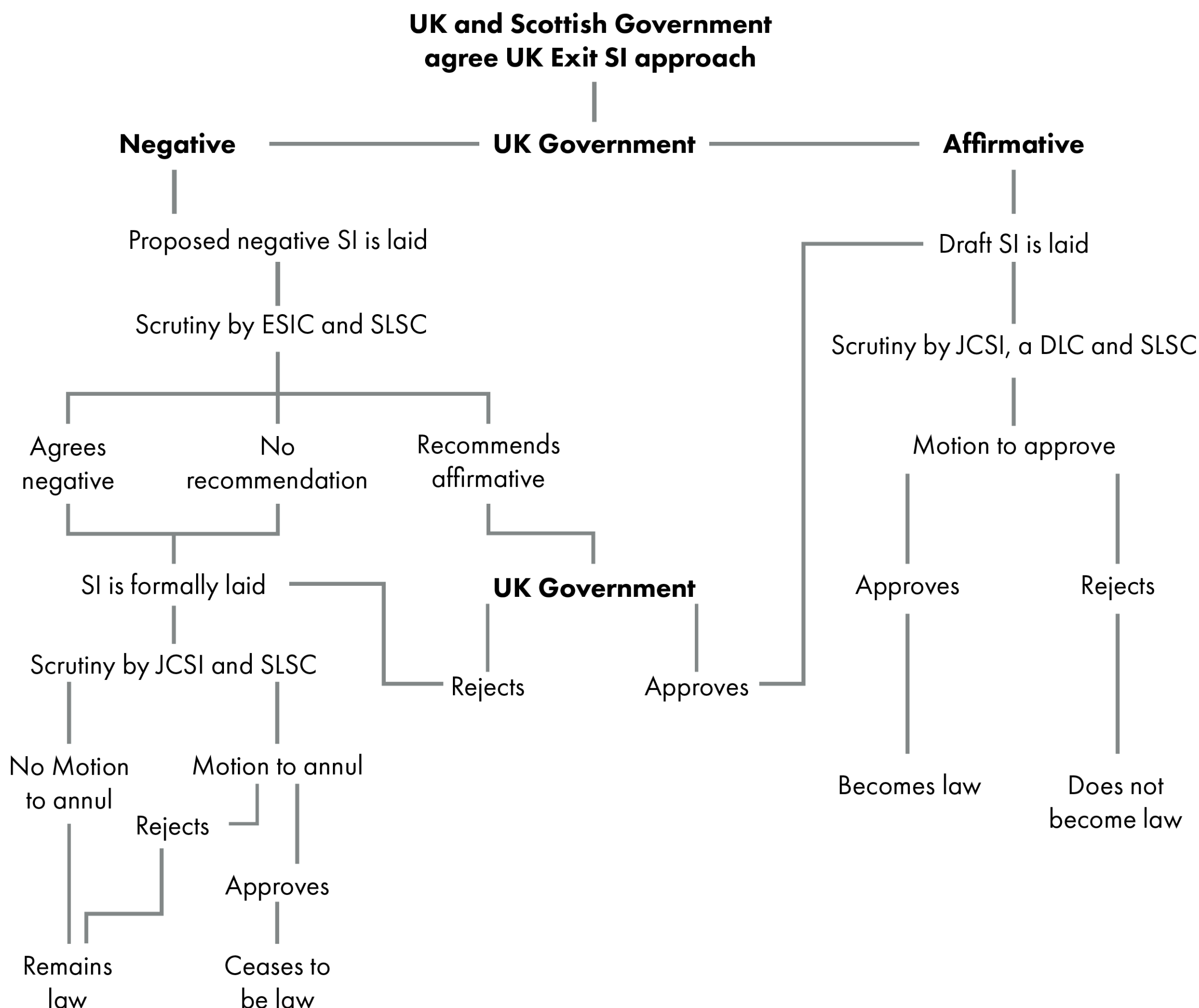
A	B
• Minor and technical in detail; • Ensuring continuity of law; • Clear there is no significant policy decision for Ministers to make; • Proposals necessary for continuity where there may be minor policy change, but limited policy choice and an “obvious” policy answer; • Proposals where Ministers have a policy choice but with limited implications, e.g. only one obvious policy option as to which body may provide an opinion or provide a report; • Transfer of functions – providing for a function of an EU entity to be exercised by a public authority in the UK, where a choice as to whether that should be amended to be the Secretary of State for Scotland, Scottish Ministers or somebody else is consistent with the devolution settlement or replicates what happens in practice now; • Updating references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states”[.]	• Proposals where a more significant policy decision is being made by Scottish Ministers[;] • Proposals predominantly concerned with technical detail but which include some more significant provisions that may warrant subject committee scrutiny; • Transfer of functions – providing for a function of an EU entity to be exercised by a public authority in the UK where there is a policy choice with significant implications about which public authority it should be e.g. a regulatory function exercisable by either SEPA [i.e. the Scottish Environment Protection Agency] or Scottish Water where Parliament may have an interest in the policy choice made by Scottish Ministers[;] • Replacement, abolition, or modification of certain EU functions that have significant implications e.g. reporting (both receiving and making reports), monitoring, compliance and enforcement; • Sub-delegation – creating or amending a power to legislate, for example transferring EU legislative powers to a UK public authority; • Provision which materially increases or otherwise relates to a fee in respect of a function exercisable by a UK public authority. This could include changes to the group of bodies or individuals required to pay such fees; • Provision which creates, or widens the scope of, a criminal offence, or which increases the penalty which may be imposed in respect of a criminal offence; • Provision which involves a significant financial impact on individuals, business, public sector or the economy (this could be automatically elevated to category C if it met a particular financial threshold); • Provision which creates, widens the scope of, or increases the level of a fine for a fixed penalty.

Scottish Parliament, 2018[4]

The process at the UK Parliament to which Protocol 1 runs parallel

The Protocol 1 process ran in parallel to, but did not intersect with, the UK Exit SI process at the UK Parliament. Protocol 1 was a political rather than a legal process, designed to enable the Scottish Parliament to scrutinise and make recommendations on Scottish Government consent decisions. UK Exit SIs were principally subject to an enhanced scrutiny process at the UK Parliament under the terms of the 2018 Act, as shown in Figure 2 below.

Figure 3 - UK Parliament EU Exit SI process



SIs made by the UK Government can be made subject to either the negative procedure or the affirmative procedure in the UK Parliament. UK Exit SIs made under section 8 are subject to standard negative or affirmative laying procedures but also have additional requirements for sifting [1] .

Under the negative procedure, SIs have legal effect from the date stated in the SI and become law once 'made' (signed) by the relevant UK Minister before they are laid. However, they will cease to be law if a motion is tabled and supported in either House to reject or annul the SI within a period of 40 sitting days after laying. Should the motion fail, or no motion is tabled at all, then the SI will continue as law thereafter. The SI will normally be subject to scrutiny by the Joint Committee on Statutory Instruments (JCSI) on technical grounds (or by the Select Committee on Statutory Instruments (SCSI) where a Commons-only SI), and by the Secondary Legislation Scrutiny Committee (SLSC) on its merits in the House of Lords, in particular its policy implications.

By contrast, under the affirmative procedure, an SI does not come into force until the draft SI has been approved by a resolution of either: (a) both Houses of Parliament, or (b) in some limited circumstances, the House of Commons acting alone. In urgent cases, an SI under the made affirmative procedure can be made and become law prior to approval, but will only continue as law once it has been approved by both Houses of Parliament within

28 sitting days (sometimes 40 sitting days). Affirmative SIs will be subject to scrutiny on technical grounds by the JCSI (or the SCSI if a Commons-only SI). Scrutiny of the SI will normally be undertaken by a Delegated Legislation Committee (DLC) in the House of Commons and by the SLSC in the House of Lords, again on substantive grounds. [5]

However, under the 2018 Act, any UK Exit SI made subject to the negative procedure is also subject to enhanced scrutiny in the form of a new sifting stage which takes place prior to the initiation of the negative procedure outlined above [1] . This additional sifting stage does not apply to UK Exit SIs which are required to be laid via the affirmative procedure, under paragraphs 1(1) and 1(2) of Schedule 7 [6] .

Sifting involves committees in both Houses of Parliament scrutinising the proposed negative UK Exit SI for no more than 10 sitting days to decide whether it should be subject to the affirmative procedure instead. Scrutiny in the House of Commons is done by the newly-created European Statutory Instruments Committee and in the House of Lords by the long-established SLSC.

Should both Committees either agree that the negative procedure is appropriate, or fail to make a recommendation either way, the UK Exit SI will be formally laid at the UK Parliament subject to the negative procedure. Should either Committee recommend the affirmative procedure is used instead, then the UK Minister can either accept or reject that recommendation. Where it is accepted, the UK Exit SI is then formally laid at the UK Parliament subject to the affirmative procedure. Where the recommendation is rejected, the Minister must explain the basis for that decision in a written statement, and then formally lay the UK Exit SI at the UK Parliament subject to the negative procedure. [7]

UK Exit SIs: Protocol 2

Protocol 1 was subject to review and potential revision. [4] On 26 June 2019, the Convenor of the Finance and Constitution Committee (FCC) wrote to the Cabinet Secretary for Government Business and Constitutional Relations, summarising the outcome of their cross-parliamentary consultation on the impact of Brexit on devolution and parliamentary scrutiny. [8]

The first part of the letter dealt with the Protocol 1 process. On this, it was noted that the committees of the Scottish Parliament agreed in general with the principle that the Scottish Parliament should be consulted prior to Scottish Ministers giving their consent to UK Ministers making secondary legislation in devolved areas presently subject to EU law. While committees were also generally of the view that Protocol 1 had worked well and should be used as the starting point for the development of a new protocol with a wider scope, it was nevertheless noted that a number of concerns had been raised by committees regarding the operation of Protocol 1.

These concerns related mostly ‘to the levels and timing of the information provided to the Scottish Parliament’, with some committees highlighting that ‘in some cases there has been much less than 28 days to carry out scrutiny and that the level of information provided was variable’. Additional concerns and suggestions for improvement were also noted in the letter, and some of these will be examined as part of the third paper in this series.

The final part of the letter considered common frameworks, those formerly EU policy areas where a UK-wide approach was thought to be required post-Brexit. It was noted that one suggestion made by the committees was that ‘[i]nitial scrutiny of Brexit-related SIs and SSIs should not be viewed as agreement to common frameworks in these areas’. The relationship between UK Exit SIs and common frameworks is discussed in the second paper in this series.

The Cabinet Secretary for Government Business and Constitutional Relations responded by letter to the FCC Convenor on 2 August 2019 [9] . The Cabinet Secretary agreed that Protocol 1 should be used as ‘the starting point for the development of a similar protocol to apply to the exercise of all powers by UK Ministers to legislate in devolved areas that are currently within the competence of the EU’. He also provided assurances that the Scottish Government and Scottish Parliament officials working on the new protocol ‘will take into account the views of the subject committees on where improvements could be made to the operation of the current protocol’.

Following this, a new, updated Protocol (hereafter Protocol 2) was agreed in late 2020 [10] . It came into effect from 1 January 2021, replacing Protocol 1 after IP Completion Day. The process outlined above at the UK Parliament continues to apply unchanged.

Protocol 2 is subject to both informal monthly review during its initial implementation, and, crucially, a formal review within 6 months of its implementation. [11] The Scottish Government and Scottish Parliament will therefore have the opportunity to revisit the scrutiny process for UK Exit SIs and make additional improvements early in Session 6.

Scope of Protocol 2

Protocol 1 explicitly applied only to those UK Exit SIs made under sections 8 and 9 of the 2018 Act, although it was also used for proposed UK SIs made under powers granted in other Brexit-related primary legislation. For example, the Rules for Direct Payments to Farmers (Amendment) Regulations 2020 and the Financing, Management and Monitoring of Direct Payments to Farmers (Amendment) Regulations 2020 (notified together 23 January 2020) were notified under Protocol 1 but were to be made under the Direct Payments to Farmers (Legislative Continuity) Act 2020. The former was made under that Act; the latter was made under that Act and the European Union (Withdrawal Agreement) Act 2020.

The scope of Protocol 2 is explicitly much wider, extending to:

> “ 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).”
>
> Scottish Parliament Delegated Powers and Law Reform Committee, 2021[11]

As with Protocol 1, Protocol 2 applies to those circumstances where relevant secondary legislation is to be laid only at the UK Parliament, and does not apply where a joint procedure is used. [11]

In a situation where the Scottish Ministers believe that the UK Government should be seeking their consent in relation to a UK SI, but has not done so, Protocol 2 stipulates that the Scottish Government will inform the Scottish Parliament by letter ‘within 14 days of this coming to its attention’. It will be for the Scottish Parliament ‘to decide whether, and if so how, to consider the matter and respond’ [11] .

New categorisation

Protocol 2 introduced a new system of categorising proposed UK SIs on devolved matters. Under Protocol 2, notifications can be categorised by the Scottish Government as either Type 1 or Type 2, with each category having its own approval procedure. Type 1 is the residual category, and thus covers any proposed UK SI which does not fall within the specific criteria identified for a Type 2 notification. Type 2 notifications would be required for any proposed UK SIs which meet one or more of the following criteria. This list is also capable of being updated. [11]

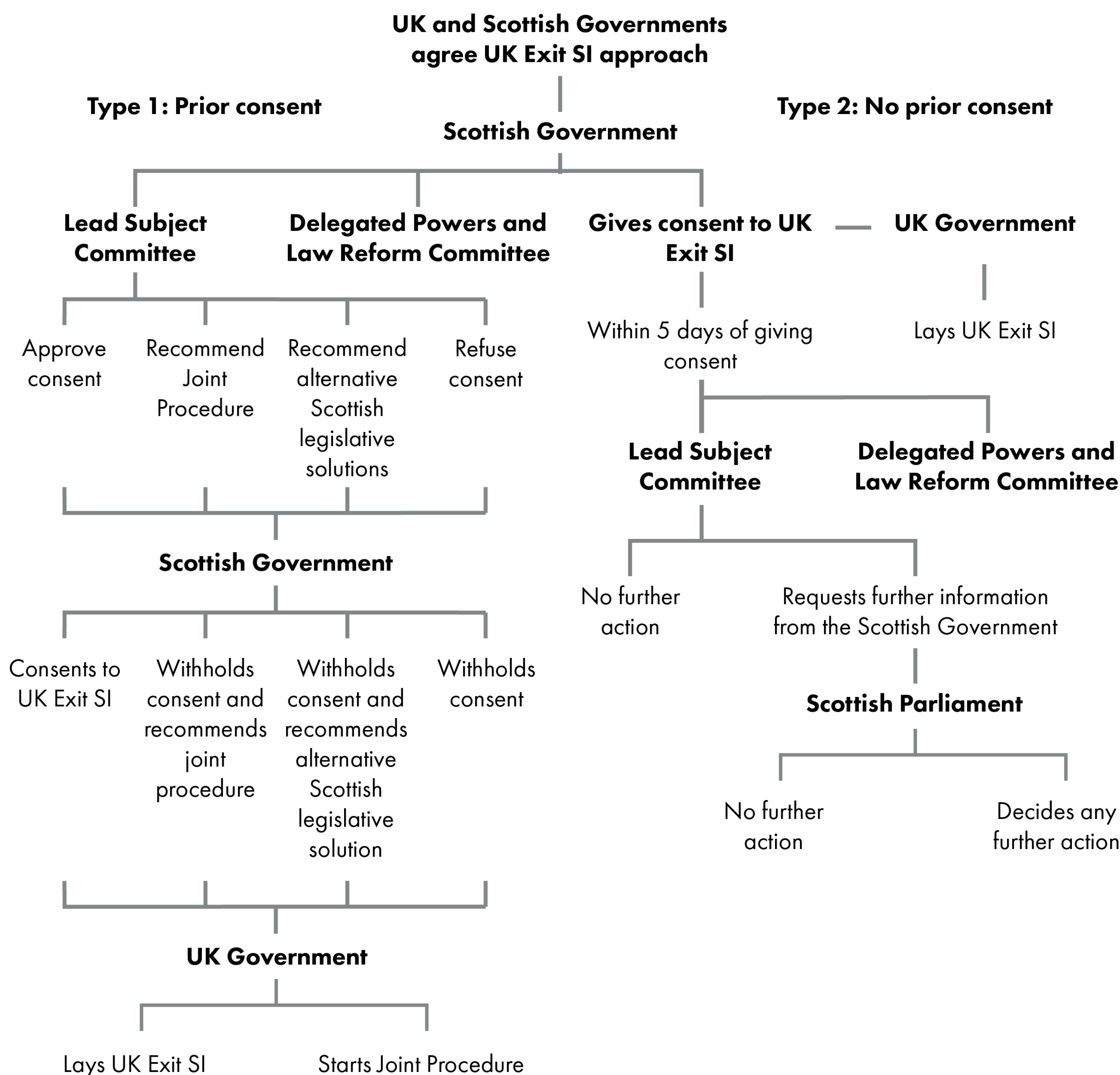
- Proposal contains provision which is clearly technical;
- Proposal does not involve a policy decision (or the implementation of such a decision) made by UK or Scottish Ministers;
- Proposal is being made to update references in legislation that are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom”.

The residual category in Protocol 2 therefore includes UK SIs which are likely to be more significant in nature, rather than those which are designated as technical, as it was in

Protocol 1.

New differential scrutiny process

Figure 4: Protocol 2 process



The difference between the two Types of UK SI notifications has a new significance in Protocol 2. As with Protocol 1, the purpose of the categorisation is to affect the level of scrutiny given to particular notifications. However, under Protocol 2, the categorisation of a proposed UK SI will also affect whether the Scottish Parliament will have the opportunity to scrutinise and approve a proposal to consent prior to the Scottish Government giving consent to the legislation being made by the UK Government, as shown in Figure 3 [11] .

In relation to Type 1 notifications, Scottish Ministers will notify the relevant lead subject committee and the DPLRC that they intend to give consent to the UK Government to make

a UK SI on a devolved issue [11]. There will then be 'a minimum of 28 days from the date of receipt of a notification and accompanying letter' for the Scottish Parliament to scrutinise the notification and decide whether to approve the proposal to consent [11]. Where possible, the Scottish Government will try to provide more than 28 days. However, Protocol 2 does recognise that this timescale may not be feasible in '[u]rgent or immediate' cases [11].

However, Type 2 notifications, because they are technical in nature, will not be subject to prior scrutiny and approval by the relevant lead subject committee of the Scottish Parliament before Scottish Ministers give their consent to UK Ministers. Instead, Scottish Ministers must notify the Scottish Parliament within 5 working days after consent has already been given to UK Ministers [11]. This notification is made in the same manner as with Type 1 notifications, 'subject to any necessary adjustments to reflect the fact that under Type 2 procedure the notification will be of consent having been given' [11]. When considering a Type 2 notification, the Scottish Parliament may request 'a more detailed explanation of its reasons for granting consent' and can decide what further action to take, if necessary [11].

Updated notification content

Reflecting that difference in procedure, Protocol 2 requires that different details or information be included in the notification of a proposed UK SI depending on its categorisation. Again, this represents a departure from Protocol 1, which did not associate the content of notifications with their categorisation.

Under Protocol 2, a Type 1 notification must include the information listed below [11]. This information also has to be provided in Type 2 notifications, 'subject to any necessary adjustments' required by the notification being sent after consent has been made [11].

- the name of the instrument(s) in question (if known) or a description of the policy area;
- a draft of the instrument, if available;
- a summary of the proposed instrument(s), including a brief explanation of the law being amended and an explanation of its (their) purpose and effect, in particular in relation to those aspects of it which relate to devolved matters; and
- the dates at which the proposed instrument(s) is/are expected to be laid before the UK Parliament and to come into force (if known).

Type 1 and Type 2 notifications will also include the following [11]:

- an explanation of the purpose and effect of the provision(s);
- why the Scottish Ministers propose to give their consent to the provision(s) being included in the proposed instrument(s), both in terms of its (their) policy impact and the choice of delivery through UK SI(s);
- where relevant, whether the provision(s) would confer powers to legislate on UK and/ or Scottish Ministers;

- where relevant, any significant financial implications of the provision(s);
- where relevant, a description of the relationship of the proposed provision(s) to any actual or proposed common frameworks or other planned legislation or regulatory scheme;
- details of any proposed governance arrangements and of any differences with existing EU governance arrangements, including in relation to: reporting or other requirements to provide information; complaints processes; the process for making changes to technical standards or best available techniques; consultation requirements, including requirements to follow or have regard to advice from e.g., expert committees (if available);
- a summary of any changes to EU technical standards or best available techniques (if available);
- details of any consultation or stakeholder engagement (if available); and
- a note of other impact assessments (if available).

Type 2 notifications should also be accompanied with an explanation of how the relevant provisions meet the criteria for a Type 2 notification [11] .

Committee recommendations and Scottish Government responses

After completing its scrutiny of a Type 1 notification, the lead subject committee can make one of four recommendations [11] :

1. That the Scottish Ministers should proceed to notify the UK Government of their decision to consent to the provision(s) being included in a UK SI (or UK SIs) to be made by UK Ministers;
2. That the Scottish Ministers should not consent to the provision(s) being included in a UK SI (or UK SIs) to be laid solely in the UK Parliament and instead request that the provision(s) be included in a UK SI (or UK SIs) to be made under joint procedure (where that procedure is available);
3. That the Scottish Ministers should not consent to the provision(s)being included in a UK SI (or UK SIs) to be made by UK Ministers and instead should consider and formulate an alternative Scottish legislative solution;
4. That the Scottish Ministers should not consent to the provision(s) being included in a UK SI (or UK SIs) to be made by UK Ministers and also that they should not take forward an alternative Scottish legislative solution.

The Scottish Government should be informed of the committee’s decision in writing within the timescale identified in the notification. During that period, the Scottish Government will not send a response to the UK Government unless it has heard back from the Scottish Parliament, but may do so if ‘the period indicated in the notification has elapsed’ [11] . The only exception to this general rule would be where the immediate consent of Scottish

Ministers is required by the UK Government, in which case the procedure for Type 2 notifications would apply instead to provide the lead subject committee with the opportunity to consider the notification after consent had been given [11] .

In relation to a recommendation that the Scottish Government should not consent, under options (b), (c) or (d) above, the Scottish Government should be given 14 days to respond. Should the Scottish Government disagree with the recommendation, a motion supporting the committee's recommendation should be tabled and debated within the Scottish Parliament. The debate may be held within 21 days of the response deadline within the notification having expired [11] .

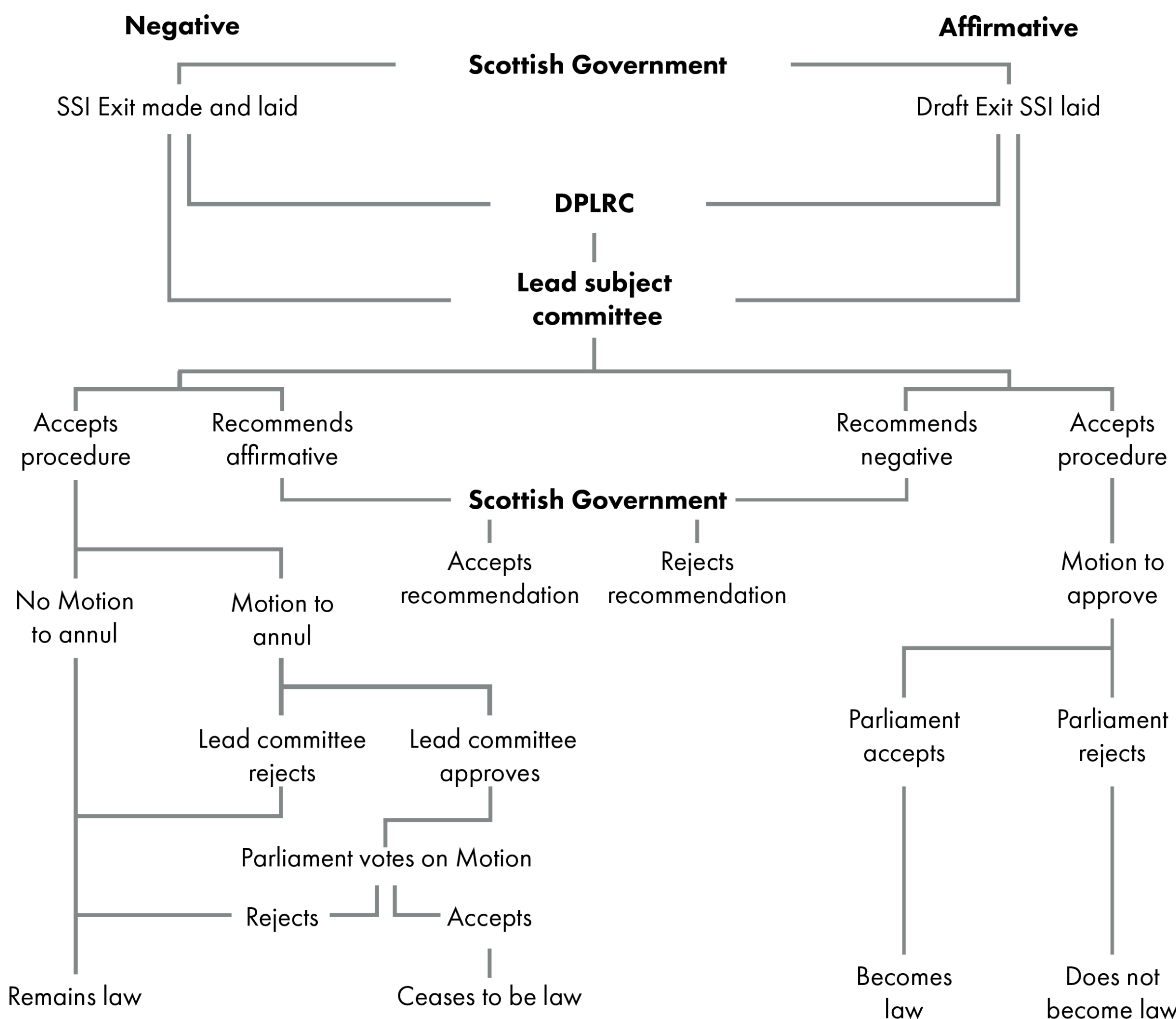
However, according to Protocol 2, Scottish Ministers 'will normally wish to give such consent [to UK Ministers] where the policy objectives of UK and Scottish Ministers are aligned and there are no good reasons for having separate Scottish subordinate legislation'. Although recognising the need for the Scottish Parliament to hold the Scottish Government to account 'for their consent decisions', the Scottish Government does not have to abide by the recommendation of the lead subject committee to refuse consent, even where the Scottish Parliament supports a motion agreeing with the committee's recommendation. Although Scottish Ministers would 'normally not consent' following such a motion, they can nevertheless give their consent should they consider the alternative solution (joint laying or an SSI) to be 'unavailable or unviable', although they should explain their reasoning to the Scottish Parliament.[11]

Where the Scottish Government gives consent to the UK SI being made, either with or without the approval of the Scottish Parliament, Scottish Ministers are under an obligation to report to the Scottish Parliament on the SI's progress through the UK Parliament within 28 days of the SI being made. As with Protocol 1, this letter should confirm whether the Scottish Government remains content that the made UK SI reflects what was consented to. This reporting obligation extends to any annulment or non-approval of a laid UK SI by the UK Parliament. [11]

Exit Scottish Statutory Instruments (SSIs)

As explained above, Schedule 2 of the 2018 Act empowered the devolved administrations to correct retained EU law in areas within their competence through secondary legislation. In Scotland, such legislation is made by Scottish Statutory Instruments (SSIs) under a new procedure introduced for Exit SSIs.

Figure 5 - Scottish Parliament EU Exit SSI process



As at the UK Parliament, SSIs can be made via either a negative procedure or an affirmative procedure, as shown in Figure 4 above. Regardless of which procedure is used, the DPLRC will scrutinise the technical aspects of the SSI, reporting its findings to the relevant lead subject committee within 22 days of the SSI being laid. The lead subject committee will then scrutinise the policy implications of the SSI.

Under the negative procedure, an SSI normally has to be laid by the relevant Scottish Minister at least 28 days before it comes into force. However, such an SSI is subject to annulment within a period of 40 days from the date on which it was laid. The SSI ceases to have any legal force if the lead subject committee and the Scottish Parliament both vote to annul. Should a motion to annul be rejected by the lead subject committee or subsequently

by the Scottish Parliament, or if no motion is tabled at all, then the SSI will continue as law after the 40 days has expired.

Under the affirmative procedure, an SSI does not normally become law until it has been approved by the Scottish Parliament. The lead subject committee will make a recommendation as to whether the SSI should be approved within 40 days of it being laid, before the Scottish Parliament has the opportunity to vote. However, a provisional affirmative SSI can be made and come into force before approval in urgent circumstances, but it will only remain in force if approved by the Scottish Parliament in a subsequent vote [12].

Furthermore, the Scottish Government and the Scottish Parliament agreed a new Exit SSI Protocol in January 2019, which makes provision for Exit SSIs to be both categorised by the Scottish Government and sifted by the Scottish Parliament [13].

In terms of categorisation, the Exit SSI Protocol states that Exit SSIs will be classified ‘based on the significance of the SSI’, as ‘Low’, ‘Medium’ or ‘High’. The aim of the categorisation is to guide the lead subject committees in their scrutiny by identifying those Exit SSIs which are the most significant and thus should be prioritised for scrutiny [13].

Sifting applies to any proposed Exit SSIs made under the 2018 Act where the Scottish Ministers have discretion as to whether to lay the Exit SSI by negative or affirmative procedure. Sifting therefore does not apply to those Exit SSIs which must be subject to the affirmative procedure under the terms of the 2018 Act. Sifting can also be bypassed where a Scottish Minister is of the view that an Exit SSI needs to be made urgently [13].

Unlike at the UK Parliament, therefore, sifting at the Scottish Parliament applies to both negative and affirmative proposed Exit secondary legislation. When a proposed Exit SSI is laid by the Scottish Government, it will first be considered by the DPLRC. The DPLRC will consider the appropriateness of the procedure and categorisation given to the Exit SSI. Should it take the view that the lead subject committee should recommend a different procedure, or that the categorisation was inappropriate, it will report this to the lead subject committee. It may communicate this finding either in a separate report or as part of its normal report on the Exit SSI. Where possible, the DPLRC will undertake its normal technical scrutiny [13].

The lead subject committee will then also consider the appropriateness of the procedure applied to the Exit SSI. Should the lead subject committee agree with the assigned procedure, it can report this to the Scottish Parliament should it wish and then conduct its normal scrutiny. Should it wish to recommend a different procedure, it will report this to the Scottish Parliament. In such a situation, the Scottish Government is ‘expected to meet that recommendation and to do so as soon as possible’ [13]. If a change from the negative to the affirmative procedure is recommended by the sifting process, then the Scottish Government will revoke the Exit SSI already laid and then lay a new affirmative Exit SSI. If the opposite is recommended, namely a change from the affirmative to the negative procedure, the Scottish Government will withdraw the Exit SSI and lay a negative instrument. In either case, the DPLRC will examine the Exit SSI again and the lead subject committee will then conduct its normal scrutiny. [13]

Conclusion

This briefing paper has explained the relevant powers and the previous and current procedures by which retained EU law on devolved issues has been amended, both through UK Exit SIs and Exit SSIs. This first paper in this three-paper series on Brexit Statutory Instruments has explained the following:

- the powers under the European Union (Withdrawal) Act 2018 used to make changes to retained EU law;
- the Protocol 1 process by which the Scottish Parliament approved the Scottish Government consenting to the UK Government making UK Exit SIs which involved devolved issues prior to IP Completion Day;
- the processes by which UK Exit SIs are laid and made at the UK Parliament;
- the subsequent Protocol 2 process which replaced Protocol 1 after IP Completion Day and remains in effect; and
- the process for making Exit SSIs at the Scottish Parliament.

In explaining these processes, this briefing paper provides a foundation of understanding for the following two papers in this briefing paper series. The second briefing paper examines: the implementation of Protocol 1, the impact of UK Exit SIs on the devolution settlement, and who will set the future policy direction in Scotland in devolved areas. The third briefing paper highlights some of the challenges encountered in the implementation of Protocol 1.

Bibliography

1 legislation.gov.uk. (2018). European Union (Withdrawal) Act. Retrieved from https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted [accessed 6 August 2021]

2 UK Government Department for Exiting the European Union. (2017, July 13). European Union (Withdrawal) Bill Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee. Retrieved from https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf [accessed 6 August 2021]

3 UK Government Cabinet Office. (2018). Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf [accessed 6 August 2021]

4 Scottish Parliament. (2018, September 11). 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. Retrieved from https://archive2021.parliament.scot/S5_Delegated_Powers/20180911CabSec.pdf [accessed 6 August 2021]

5 House of Lords . (2019, March 29). Brexit and Delegated Legislation. Retrieved from https://researchbriefings.files.parliament.uk/documents/LLN-2019-0040/LLN-2019-0040.pdf [accessed 6 August 2021]

6 UK Parliament. (2020, February 25). Sifting of proposed negative instruments under the EU Withdrawal Act. Retrieved from https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/content/111553/sifting-of-proposed-negative-instruments-under-the-eu-withdrawal-act/ [accessed 6 August 2020]

7 UK Parliament. (2021). Statutory instruments relating to Brexit. Retrieved from https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-relating-to-brexit/ [accessed 6 August 2021]

8 Scottish Parliament. (2019, June 26). Letter from the Finance and Constitution Committee to the Scottish Government on the outcome recent parliamentary exercise to explore the impact of Brexit,. Retrieved from https://archive2021.parliament.scot/S5_Finance/General%20Documents/2019.6.27.Convener_to__Mike_Russell.pdf [accessed 6 August 2021]

9 Scottish Government. (2019, August 2). Letter from the Cabinet Secretary for Government Business and Constitutional Relations to the COnvener of the Scottish Parliament Finance and Constitution Committee. Retrieved from https://archive2021.parliament.scot/S5_Finance/General%20Documents/Mr_Russell_letter_to_Bruce_Crawford_-_2_August_2019.pdf [accessed 6 August 2021]

10 Scottish Government. (2020, November 4). Letter from the Cabinet Secretary for Government Business and Constitutional Relations to the Convener of the Scottish Parliament Finance and Constitution Committee. Retrieved from https://archive2021.parliament.scot/S5_Delegated_Powers/General%20Documents/Letter_from_the_CSCEaEA_-_Protocol_2_-_Convener_FCC.pdf [accessed 6 August 2021]

11 Scottish Parliament Delegated Powers and Law Reform Committee. (2021). Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit. Retrieved from https://archive2021.parliament.scot/S5_Delegated_Powers/General%20Documents/SI_Notifications_Protcol_2.pdf [accessed 6 August 2021]

12 Scottish Parliament. (2021, June 30). Standing Orders of the Scottish Parliament. Retrieved from https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders [accessed 6 August 2021]

13 Scottish Parliament. (2019, January 8). Protocol on the scrutiny of SSIs made using powers under the European Union (Withdrawal) Act. Retrieved from https://archive2021.parliament.scot/S5_Delegated_Powers/20190108MRtoConveners.pdf [accessed 8 August 2021]

SPICe The Information Centre
An t-Ionad Fiosrachaidh

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Iain McIver on telephone number 85294 or Iain.McIver@scottish.parliament.uk.
Members of the public or external organisations may comment on this briefing by emailing us at SPICe@parliament.scot. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at sp.info@parliament.scot.
Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.