

Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit

Section 1: Introduction

1. In 2018 the Scottish Government and the Scottish Parliament agreed a protocol setting out a shared understanding on the process for obtaining the approval of the Scottish Parliament to the Scottish Ministers consenting to the exercise by UK Ministers of certain regulation-making powers under the European Union (Withdrawal) Act 2018 (“EUWA”) in relation to proposals within the legislative competence of the Scottish Parliament. That protocol has been in place since August 2018.
2. The 2018 protocol included a statement that the Scottish Government and the Scottish Parliament recognised that it might be necessary to re-visit the protocol to consider whether its provisions should apply to other legislation arising from the UK’s withdrawal from the European Union.
3. The Parliament’s Finance and Constitution Committee has since carried out a cross-parliamentary consultation to explore the impact of Brexit on devolution and parliamentary scrutiny. The Convener of the Parliament’s Finance and Constitution Committee, Bruce Crawford MSP, wrote to the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, on 26 June 2019 summarising the outcome of that consultation.
4. That letter said there was a general view that the 2018 protocol had worked well, and that it should be used as a starting point for developing a similar protocol to apply to the exercise by UK Ministers of all powers to make secondary legislation in devolved areas that are currently within the competence of the EU. The letter also set out a number of suggestions for improvement from the 2018 protocol.
5. In his reply of 2 August 2019 to that letter Mr Russell agreed that the 2018 protocol should be used as a starting point for the development of a wider protocol. He noted that Scottish Government and Scottish Parliament officials were working together to consider the scope, structure and operation of such a wider protocol, and confirmed that this work would take into account the views expressed in response to the Finance and Constitution Committee’s consultation. The present protocol is the product of that joint work.
6. This protocol replaces the 2018 protocol for all instruments that fall within its scope apart from any that may already have been notified to the Parliament. Such instruments will continue to be dealt with in accordance with the 2018 protocol until that process has been completed for each such instrument.
7. The operation of this protocol will be kept under review as provided in Section 8 below.

Section 2: The need for a new protocol

8. The 2018 protocol applied only to proposed statutory instruments to be made by UK Ministers containing provisions under sections 8 or 9 of the EUWA that could be made by the Scottish Ministers exercising their equivalent powers under Schedule 2 of the EUWA. It therefore did not apply where the UK Government proposed to make instruments arising from the UK's withdrawal from the EU under any other statutory power that would include provisions that would be within the legislative competence of the Scottish Parliament.
9. It is envisaged that instruments containing provisions relating to devolved matters will continue to be made under the EUWA to fix deficiencies in retained EU law. However, it is also expected that the UK Government will increasingly make use of other statutory powers to make instruments arising from UK Withdrawal from the EU that would include provisions within the legislative competence of the Scottish Parliament. The Scottish Parliament and the Scottish Government agree that the Parliament should be able to exercise effective scrutiny in relation to consent by the Scottish Ministers to such provisions, which may make significant changes to the post-Brexit devolved legislative landscape. It follows that the scope of a new protocol should extend beyond that of the 2018 protocol to include all such provisions, not just those in instruments made under EUWA to fix legislative deficiencies.

Section 3: Principles

10. It is expected that UK Ministers will seek the consent of Scottish Ministers whenever they propose to make secondary legislation containing provisions within devolved competence in relation to matters within the competence of the EU until immediately before IP completion day (31 December 2020 at 11pm). This should apply irrespective of whether there is a statutory obligation on UK Ministers to obtain such consent.
11. It is recognised that Scottish Ministers will normally wish to give such consent where the policy objectives of UK and Scottish Ministers are aligned and there are no good reasons for having separate Scottish subordinate legislation.
12. However, it is also recognised that the Scottish Parliament should be able to scrutinise the giving of such consent by Scottish Ministers. Such scrutiny should be effective and proportionate. The Scottish Parliament should be given sufficient information and time to carry out its scrutiny function.
13. This protocol recognises that proportionality means that not all provisions proposed to be included in UK instruments, and thus consent decisions relating to those provisions, will require the same level of scrutiny. However, this does not detract from the basic principle that the Scottish Parliament should be able to hold the Scottish Ministers to account for their consent decisions, regardless of whether those decisions were taken before or after scrutiny by the Scottish Parliament. The protocol therefore provides for a differentiated approach to be taken, depending on the contents of the proposed instrument. In most cases, the Scottish Parliament will decide whether to approve the proposal by Scottish

Ministers to consent before Ministers consent to the UK Government's request. However, in technical cases, parliamentary scrutiny will occur after that consent has been given.

14. The Scottish Government will where possible consult the Parliament on significant policy developments that are expected to lead to a use of UK regulation-making powers on matters within devolved competence. The aim of such consultation will be to allow the Parliament an opportunity to influence policy development, and to ensure that when a notification of an SI is made under this protocol the Parliament should normally already be aware of the purpose for which that SI is proposed to be made.

Section 4: Scope

15. The scope of this protocol covers 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). A provision is within devolved competence if it would be within paragraph 17 of schedule 2 of EUWA.¹
16. Consequently, this protocol applies to provisions within devolved competence proposed to be included in instruments to be made by UK Ministers under:
 - (a) section 8 of EUWA, if the provisions could be included in regulations made by the Scottish Ministers exercising their equivalent powers in Schedule 2 of EUWA i.e. provisions that would have been within the scope of the 2018 protocol;
 - (b) other powers in EUWA listed in Part 1 of Annex A;
 - (c) powers contained in other EU-related UK primary legislation listed in Part 2 of Annex A;
 - (d) powers created or modified by legislation made under any of the powers identified above (for example under section 8 of EUWA); and
 - (e) powers contained in legislation not listed in Annex A in cases where the Scottish Parliament and the Scottish Government agree that this protocol should apply.
17. This protocol will apply regardless of whether there is a statutory requirement on UK Ministers to obtain the consent of the Scottish Ministers before making an instrument that contains provisions within devolved competence. In addition, Section 7 of this protocol will apply where Scottish Ministers consider that such consent should have been sought but UK Ministers have not done so. Further provision on scope is set out in Annex A.

¹ i.e. within the legislative competence of the Scottish Parliament if it were contained in an Act of the Scottish Parliament (ignoring section 29(2)(d) of the Scotland Act 1998 so far as relating to EU law and retained EU law); or it is provision which could be made in other subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting alone (ignoring section 57(2) of the Scotland Act 1998 so far as relating to EU law and section 57(4) of that Act).

18. Where there is agreement between the UK Government and the Scottish Government that proposals for secondary legislation should be subject to joint procedure (i.e. laid in both the UK Parliament and the Scottish Parliament), where this is available, this protocol does not apply.

Section 5: The scrutiny process

19. As mentioned in paragraph 13 above, this protocol recognises that not all consent decisions require the same level of scrutiny. It therefore provides that all proposals to give consent, except for those that have been assessed by the Scottish Government as meeting the criteria for Type 2 notifications (as defined in Annex B), will, as is the case currently in relation to the 2018 protocol, be scrutinised by the Scottish Parliament before the consent decision is communicated to the UK Government. For provisions which have been assessed by the Scottish Government as meeting the criteria for Type 2 notifications (as defined in Annex B), a consent decision can be given without prior scrutiny by the Scottish Parliament taking place but it will still be notified to the Parliament for its subsequent consideration.
20. Except in cases where Section 7 below applies, under both Type 1 and Type 2 procedures, the process will be triggered in each case by the Scottish Government receiving notice that the UK Government intends to make provisions that would fall within the scope of this Protocol.

Type 1 approval procedure

21. The Type 1 approval procedure requires the Scottish Government to seek the prior approval of the Scottish Parliament to any proposed decision to grant consent to UK Ministers. The criteria determining whether the Type 1 scrutiny procedure is engaged are set out in Annex B.
22. In all such cases, the Scottish Government will notify the Scottish Parliament that the Scottish Ministers propose to give their consent to the provision(s) covered by the notification.
23. Each notification will be accompanied by a letter from the relevant Scottish Minister to the relevant lead subject committee. The notification and letter will also be copied to the Convener of the Delegated Powers and Law Reform Committee.
24. A single notification may relate to a single instrument or a number of instruments. The latter will normally be appropriate where provisions proposed to be included in several instruments that all relate to similar subject matter are intended to be the subject of a single consent decision by the Scottish Ministers.
25. Each Type 1 notification will include:
 - 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).
26. Each Type 1 notification will also include, in respect of the provision(s) to which the Scottish Ministers have been asked to consent, the following information:
- 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).
27. Except in respect of urgent notifications (see Section 6 and Part 2 of Annex B), the Scottish Parliament will have a minimum of 28 days from the date of receipt of a notification and accompanying letter in which to consider and respond to the request for approval. The Scottish Government will endeavour to provide more than 28 days' notice where this is possible.
28. Where a shorter period is requested for reasons of urgency in accordance with Section 6, each notification will indicate the period within which the lead subject Committee is requested to respond and explain why this period is requested (including any time dependency associated with the proposal).
29. The lead committee is under no obligation to use the full period set out in a notification and may write to the Scottish Ministers to confirm its approval or otherwise earlier if it is in a position to do so. The Scottish Government will not respond to the UK Government's request for consent until the Parliament has responded to the notification or the period indicated in the notification has elapsed, whichever is earlier.

30. In responding to Scottish Ministers on the proposed consent decision, the lead committee may make one of four recommendations:
- (a) 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;
 - (b) 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);
 - (c) 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;
 - (d) 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.
31. The lead Committee will notify the Scottish Government in writing of the decision it makes in respect of a notification before the end of the period for its consideration set out in the notification. But if a committee makes a recommendation of the kind described in sub-paragraphs (b), (c) or (d), the Scottish Government should normally be given 14 days to respond. If the Scottish Government does not agree to the recommendation made then the Parliamentary Bureau should:
- by motion propose that the Scottish Parliament agrees to the committee's recommendation, and
 - schedule time in the chamber for debate on the motion.
32. That debate may take place after the period requested in the notification has expired, but should take place within 21 days following the expiry of that period.
33. If the Scottish Parliament agrees to the motion the Scottish Ministers would normally not consent to the provision(s) being included in a UK SI (or UK SIs) and would either request that the provision(s) be included in a UK SI (or UK SIs) to be made under the joint procedure (where available) or consider and formulate an alternative Scottish legislative solution, depending on what the committee recommended. In the event that the Scottish Ministers **consider that such an alternative solution is unavailable or unviable and** do consent to the provision(s) being included in a UK SI contrary to the motion agreed by the Scottish Parliament, the Scottish Ministers will explain the reasons for their chosen course of action to the Scottish Parliament.
34. Where the Scottish Ministers have consented to provision(s) being included in a UK SI (or UK SIs) to be made by UK Ministers the UK Government will proceed with drafting or finalising the UK SI (or UK SIs) in question. The Scottish Government will track which UK SI (or UK SIs) the provision(s) is (are) included in. Within 28 days of being advised by the UK Government that the UK SI has been made, the Scottish Government will do one of the following:

- Advise the Scottish Parliament that the UK SI has been made and that it is content that the made SI is consistent with the consent granted;
 - Advise the Scottish Parliament that there has been a variation in the approach taken to the provision(s) included in the UK SI from the terms of the consent, but that the variation is not so significant as to engage the need for a further process of obtaining the Parliament's approval. The letter will explain the Scottish Government's reasons;
 - Advise the Scottish Parliament that there has been a more substantive variation to the approach taken to the provision(s) included in the UK SI and that as such it no longer reflects what the Scottish Parliament approved. In such circumstances, the Scottish Government will advise what action it proposes to take in response.
35. The Scottish Government will notify the relevant lead subject committee of any instrument(s) containing provision(s) notified under Type 1 procedure and to which the Scottish Ministers have given their consent which are annulled or not approved by the UK Parliament within 14 days of being notified by the UK Government of that annulment or non-approval. Any such notification will include an explanation as to why the instrument was annulled or not approved and of any further proposed action (so far as that information is available).
36. In calculating the minimum period of 28 days set out in paragraph 27 above, no account shall be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than 4 days.

Type 2 scrutiny procedure

37. Type 2 scrutiny procedure enables Scottish Ministers to give consent to UK Ministers without prior approval by the Scottish Parliament. The criteria determining whether the Type 2 scrutiny procedure is engaged are set out in Annex B.
38. Where this procedure applies, the Scottish Government will notify each such case to the Scottish Parliament within 5 working days of its having advised the UK Government that they have consented to the proposed provisions.
39. Paragraphs 23-26 above will apply for the purposes of notifications under the Type 2 scrutiny procedure as they apply to notifications under the Type 1 approval procedure, subject to any necessary adjustments to reflect the fact that under Type 2 procedure the notification will be of consent having been given rather than its being proposed to be given.
40. Each Type 2 notification will also include an explanation of how the provision(s) covered by the notification meet(s) the criteria for Type 2 procedure.
41. Where a Type 2 notification is sent after the end of the period referred to in paragraph 38 above, it will be accompanied by an explanation of the reason(s) for the delay in providing the notification.

42. The Scottish Parliament will consider the Type 2 notification (whether alone or together with other Type 2 notifications) and decide whether to seek more information from the Scottish Government, such as a more detailed explanation of its reasons for granting consent. It will then be for the Scottish Parliament to decide what, if any, further action to take.
43. Where a consent decision has been considered under a Type 2 notification, the Scottish Government will notify the Scottish Parliament within 14 days of being notified by the UK Government that the instrument(s) that include the provision(s) covered by the notification has (have) been laid (if a negative SI) or made (if an affirmative SI). The terms of paragraph 35 above will apply where any instrument(s) containing provision(s) notified under Type 2 procedure are annulled or not approved by the UK Parliament.

Section 6: Urgent or immediate cases

44. The Scottish Parliament and the Scottish Government recognise that there may be exceptional cases in which the UK Government seeks Scottish Ministers' consent to provision(s) being included in an instrument for a Type 1 case as a matter of urgency.
45. Examples (not exhaustive) of issues for which the use of this urgent procedure could be appropriate would be:
 - A serious public health issue on which urgent action is needed, such as banning a potentially dangerous ingredient or contaminant from the food chain (e.g., BSE);
 - A major animal, marine or plant health issue, e.g., to add a new fish disease to the list of notifiable diseases or impose other obligations to help control an outbreak of a serious disease such as foot and mouth; or
 - Action to secure compliance with a court decision where failure to do so urgently would result in serious consequences.
46. In such cases, the notification letter from the Scottish Ministers to the Parliament should include a statement that Ministers propose to give their consent to the provision(s) in question as a matter of urgency and explain both the need for the provision(s) and the reason(s) for urgency. The letter should also specify the date by which Ministers propose to give their consent to the provision(s) and ask the Parliament to respond by that date. The other provisions of this Protocol relating to Type 1 scrutiny procedure will apply, with any necessary adjustments, in such cases.
47. In exceptional cases the Scottish Ministers may be asked by the UK Ministers to give their immediate consent to provision(s) being included in an instrument or instruments, i.e. without Ministers being able to give the Parliament any time to consider whether such consent should be given. Where Ministers decide to give such consent they will as soon as possible send a letter to the Parliament explaining why it was not possible to consult the Parliament before giving

consent. The other provisions of this Protocol relating to Type 2 scrutiny procedure will apply, with any necessary adjustments, in such cases.

Section 7: Failure to seek consent

48. The following paragraph applies where the Scottish Ministers believe that this protocol applies to provision(s) in a proposed UK instrument or instruments and therefore that the UK Government should seek their consent before making the instrument(s).
49. Where the UK Government has made the instrument(s) without seeking consent or has told the Scottish Government that it has decided to do so, the Scottish Government will advise the Parliament in writing within 14 days of this coming to its attention. It will then be for the Parliament to decide whether, and if so how, to consider the matter and respond.

Section 8: Review and revisions

50. This protocol will initially be reviewed informally on a monthly basis in accordance with arrangements to be agreed between the Scottish Government and the Scottish Parliament, and subject to a formal joint review within 6 months of its coming into force unless either party requests an earlier review. Either the Scottish Government or the Scottish Parliament may propose revisions to the protocol and both will need to agree to any revisions being made.
51. The review will consider, amongst other things, the line drawn between Type 1 and Type 2 notifications as set out in Annex B, and whether the criteria for each should be drawn differently to enable more effective and proportionate scrutiny.

ANNEX A – UPDATED 1 JUNE 2021

UK PRIMARY LEGISLATION WITHIN THE SCOPE OF THE PROTOCOL

Part 1: provisions of the European Withdrawal Act 2018

Section 6(5A):	power to make regulations to provide for when, and the extent to which, a relevant court or tribunal is not bound by retained EU law
Section 8:	power to make regulations to deal with deficiencies arising from withdrawal, including the power in section 8(3)(b) to describe or provide for different kinds of deficiencies
Section 8A:	supplementary power in connection with implementation period
Section 8B:	power in connection with certain other separation issues
Section 8C:	power in connection with Ireland/Northern Ireland Protocol in withdrawal agreement
Sections 23(1) and (6):	power to make consequential, transitional, transitory or saving provisions
Schedule 1, para. 1(2)(b):	power to make regulations relating to challenges to validity of retained EU law
Schedule 4, paras. 1(1), 4 and 7(2):	powers in connection with fees and charges
Schedule 5, para. 4(1):	power to make regulations about judicial notice and admissibility

Part 2: provisions in other legislation

Healthcare (European Economic Area and Switzerland Arrangements) Act 2019

Section 2:	power to make regulations relating to healthcare and healthcare arrangements
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European Union (Withdrawal Agreement) Act 2020

Section 12:	power in relation to recognition of professional qualifications
Section 13:	power in relation to co-ordination of social security systems

Section 14:	power in relation to non-discrimination, equal treatment and rights of workers etc.
Section 41:	power to make consequential and transitional provision etc.
Paragraph 39(1) of Schedule 2:	power in relation to transfer of Independent Monitoring Authority's (IMA) functions
Paragraph 40(1) of Schedule 2:	power in relation to removal of IMA's functions and abolition of IMA
Paragraph 1(3) of Schedule 5:	power to make exceptions / different provision to the rule that references to exit day are to be read as references to IP completion day

Direct Payments to Farmers (Legislative Continuity) Act 2020

Section 3:	power in connection with the retention of EU legislation under section 1
Section 6:	power to make consequential and transitional provision

Agriculture Act 2020

Section 29:	power to make regulations on fair dealing obligations of business purchasers of agricultural products
Sections 30 and 31	power to make provision related to producer organisations
Section 38:	power to make provision for certification of organic products
Section 43:	power to make provision for securing compliance with WTO Agreement on Agriculture.
Section 53(1)	Section 53(1): power to make consequential etc. provision.

Fisheries Act 2020

Section 14(3):	power to amend exceptions to requirement for licensing in section 14(2)
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Section 16(3):	power to amend exceptions to requirement for licensing in section 16(2)
Section 36:	power to make provision about fisheries, aquaculture etc
Section 38:	power to make provision about aquatic animal diseases
Schedule 3, para 7(1), 7(3) and 8	power to make provision about licensing of fishing boats
Schedule 3, para 7(5) and 8	power to make provision about the principles to be applied by the sea fish licensing authority

Natural Environment and Rural Communities Act 2006

Section 89A:	power to make order assigning functions regarding the identification and traceability of animals (inserted by section 34 of the Agriculture Act 2020)
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United Kingdom Internal Market Act 2020

Section 6(5):	power to add, vary or remove matters within the scope of the non-discrimination principle
Section 8(7):	power to add, vary or remove “legitimate aims” for the purposes of the non-discrimination principle: indirect discrimination
Section 10(2):	power to amend Schedule 1 (exclusions from market access principles - goods)
Section 18(2):	power to add, vary or remove entries in Schedule 2 (exclusions from market access principles – services)
Section 21:	power to add, vary or remove “legitimate aims” for the purposes of the non-discrimination principle: indirect discrimination (services).
Section 43(4) and (5)	powers to specify maximum penalties for failure to comply with CMA information-gathering requirements.

Trade (Disclosure of Information) Act 2020

Section 2(9)	power to specify a public authority, or remove a public authority from the list of specified public
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authorities, for the purposes of disclosure of information to facilitate exercise of ministerial functions relating to trade.

Private International Law (Implementation of Agreements) Act 2020

Section 2 power to make regulations implementing agreements

European Union (Future Relationship) Act 2020

Section 31: power to implement agreements

Section 32: power in relation to start of agreements

Section 33: power in relation to functioning of agreements

Section 39: power to make consequential and transitional provision etc.

Schedule 2, para 3(5): power to make regulations to designate a different authority as the Passenger Information Unit

Schedule 2, para 18(2) power to make regulations to implement a future UK-EU agreement on sea or rail travel.

Medicines and Medical Devices Act 2021

Section 19: power to make regulations about the establishment and operation of information systems

Trade Act 2021

Section 1(1): power to make regulations for the purpose of implementing the WTO Agreement on Government Procurement (GPA)

Section 2(1): power to make regulations for the purpose of implementing a “continuity” international trade agreement

Section 2(10)(b): power to make regulations extending the period for which the section 2(1) power can be used

Bills

Annex A will be updated when relevant Acts receive Royal Assent. There may be circumstances when an SI is prepared prior to a Bill receiving Royal Assent. If the

proposed power that is being used is one that will be added to Annex A when the Bill receives Royal Assent then this Protocol should apply. This means that on occasion SI notifications may be made in respect of powers that have not yet been enacted.

ANNEX B

CRITERIA FOR DETERMINING WHETHER NOTIFICATION SEEKING APPROVAL TO CONSENT REQUIRED

Type 1: Notification seeking approval to consent

Where any aspect of a proposed instrument does not fall within the criteria applying to Type 2 notifications (below), the Scottish Government will notify the relevant lead subject committee of the Scottish Parliament seeking its approval before granting consent to UK Ministers.

Type 2: Notification of consent given

Where all aspects of a proposed instrument fall within one or more of the following criteria, the Scottish Government may give consent to UK Ministers without seeking the prior approval of the relevant lead subject committee of the Scottish Parliament:

- 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”.

This list may be updated from time to time.