

IS THE CONSENT OF THE SCOTTISH PARLIAMENT REQUIRED FOR BREXIT?

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Legal Briefings - By **Gavin Williams, Partner** and **Dorothy Livingston, Partner**.

Westminster retains the right to legislate in relation to Scotland, in any matter – the Sewel Convention does not provide Scottish Parliament with a veto.

It has been suggested that because the laws of Scotland cannot be incompatible with EU law (Article 29(2) Scotland Act 1998), this means that if an Article 50 notice is served by the Prime Minister, or with only the consent of the Westminster Parliament, the notice would be invalid. Our analysis suggests that this is probably incorrect.

THERE ARE TWO REASONS:

THE ROYAL PREROGATIVE ARGUMENT

If the Article 50 notice can be served by the Prime Minister without Westminster Parliamentary approval, there is also no role for the Scottish Parliament. This is a debatable point: see our briefing on triggering Article 50.

THE UK CONSTITUTIONAL ARGUMENT

Even if the Westminster Parliament has a vote (in which case MPs for Scottish constituencies will have a vote), the Scottish Parliament itself has no role in the UK's conduct of foreign affairs (see further below). It therefore would not be able to prevent the Article 50 notice from being served by the Prime Minister under Royal Prerogative (if this were the route taken).

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ANALYSIS

Even if the consent of Westminster Parliament is required prior to service of the Article 50 notice, there is ultimately no binding obligation on Westminster to obtain the Scottish Parliament's consent, and indeed, it seems clear that negotiating with the EU does not fall within the competence of the Scottish Parliament under the Scotland Act.

(1) Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament. (...)

(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. [This subsection reflects the principles of the Sewel Convention.]

Westminster therefore retains ultimate power to legislate in relation to all matters. The requirement to consult with the Scottish Parliament only extends to devolved matters and is phrased as a matter of courtesy, Westminster "will not normally legislate" without seeking the consent of the Scottish Parliament.

The restriction on Scottish Parliament contravening EU law does not restrict Westminster.

The restriction at Article 29(2) of the Scotland Act 1998 contains a number of restrictions on the ability of the Scottish Parliament to pass effective legislation contrary to EU law. Two of these are relevant. Article 29 states:

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply— (...)

(b) it relates to reserved matters, [that is matters that are not "devolved"] (...)

(d) it is incompatible with any of the Convention rights or with EU law, (...)

Scottish law is in no way engaged, however, in questions of relations with the EU as Schedule 5 para 7(1) of the Scotland Act 1998 provides that 'reserved matters' includes "International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and cooperation..."

Therefore the UK's relations with the EU fall within the sole competence of the Westminster Parliament and Government.

The purpose of Article 29(2)(d) was to ensure that the Scottish Parliament in legislating on devolved matters could not put the UK in breach of EU law. This would become irrelevant if the UK as a whole ceased to be an EU Member.

For the amendment of s 29 of the Scotland Act 1998 in due course to remove the reference to EU law in s29(2)(d) would also be a matter for the Westminster Parliament, as the question of whether Scotland needs to be compliant with EU law is dependent on the relations of the UK as a whole with the EU. Nevertheless, the Scottish Parliament could voluntarily choose to maintain compliance with EU law when legislating in its devolved areas of competence.

CONCLUSIONS

It therefore seems clear that Westminster retains the right to legislate in relation to the UK's relationship with the EU, regardless of whether the consent of the Scottish Parliament is provided.

Whether a decision to issue an Article 50 notice without seeking the approval of the Scottish Parliament, even though the Sewel Convention does not apply to reserved matters, would be politically acceptable is a different question.

[< BACK TO THE BREXIT HUB](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



GAVIN WILLIAMS
GLOBAL CO-HEAD OF
INFRASTRUCTURE,
LONDON
+44 20 7466 2153
gavin.williams@hsf.com



**DOROTHY
LIVINGSTON**
CONSULTANT,
LONDON
+44 20 7466 2061
Dorothy.Livingston@hsf.com

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