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UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

Francesca McGrath and Iain McIver

This briefing provides a summary of the key provisions in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill which was introduced in the Scottish Parliament on 27 February 2018. The briefing also provides details of the key differences between this Bill and the UK Government's European Union (Withdrawal) Bill.



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Executive Summary

The Scottish Government introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill on 27 February 2018.

The purpose of the Bill is to ensure that when the UK leaves the European Union, Scots law continues to function seamlessly without any interruptions or gaps. To achieve this, the Bill does three main things:

- it retains in domestic law EU law currently operating in devolved areas
- it gives the Scottish Ministers the powers needed to ensure that devolved law continues to operate effectively after UK withdrawal
- it gives the Scottish Ministers the power to, where appropriate, ensure that Scotland's devolved laws keeps pace after UK withdrawal with developments in EU law.

The Bill has been introduced following disagreement between the UK and Scottish Governments over the content of the European Union (Withdrawal) Bill (EUWB). Discussions between the two Governments have continued over recent months in an effort to ensure that the EUWB is amended in a way which would allow the Scottish Government to recommend that the Scottish Parliament gives its consent to the Bill.

However, in the event that the Scottish Parliament does not give consent to the EUWB, it is possible the UK Government may wish to remove the devolution related clauses from the Bill or, alternatively, may proceed with the EUWB without consent. If the UK Government chose to remove the devolution related clauses, it could leave Scots law unprepared for the UK's departure from the EU. In order to address that eventuality, the Scottish Government has chosen to introduce the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.

The Bill is being considered by the Parliament using the emergency bill procedure. As a result, Parliament will consider the Bill as follows: stage 1 on Wednesday 7 March; stage 2 on Tuesday 13 March and stage 3 on Wednesday 21 March.

The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill largely mirrors the UK Government's European Union (Withdrawal) Bill. This is perhaps unsurprising since both Bills set out to achieve the same effect - providing continuity of law on the day the UK leaves the European Union. The Scottish Government has also argued that adopting a similar approach to the EUWB means there should be consistency between the way Scots devolved and reserved law is dealt with.

Part 2 of the Bill aims to ensure that EU law is saved in Scots law after the UK has left the EU. Sections 2 to 5 of the Bill seek to ensure that EU law currently incorporated in Scots law continues to apply after Brexit. It replicates the provisions in clauses 2 and 3 of the European Union (Withdrawal) Bill.

Sections 6 to 9 of the Bill provide for exceptions to the saving of EU law provided for in sections 2 to 5.

Section 10 of the Bill sets out how EU law retained by the Bill and copied into Scots law is to be interpreted after the UK has left the EU.

Part 3 of the Bill sets out the main powers in the Bill's provisions which relate to UK withdrawal, and which give Scottish Ministers powers to make secondary legislation.

Part 4 of the Bill contains delegated powers for Scottish Ministers.

There are, however, some differences in approach between the Scottish and UK Bills. These include:

- The Legal Continuity Bill gives powers to Scottish Ministers to make the necessary legislative preparations for UK withdrawal, including amending retained (devolved) direct EU legislation. This power is not available to Scottish Ministers in the EUWB
- Section 5 of the Legal Continuity Bill incorporates the Charter of Fundamental Rights into Scots law as it applies to devolved matters. The Charter is excepted from incorporation into domestic law by the EUWB.
- The Legal Continuity Bill provides for the continued availability of the general principles of EU law arising from the EU Treaties for a wider range of purposes than under the EUWB.
- The Legal Continuity Bill proposes that Francovich damages will continue to be available for failures arising before the UK's withdrawal from the EU, irrespective of whether the claim for damages began before exit day. In comparison, the proposals in the EUWB allow claims for Francovich damages only to continue if they are initiated before the UK has left the European Union.
- Powers for Scottish Ministers in the Legal Continuity Bill are to be subject to a necessity test, whilst in the EUWB powers are proposed for Ministers to make such provision "as the Minister considers appropriate"
- Section 13 of the Legal Continuity Bill provides powers to Scottish Ministers to make regulations to ensure that, where appropriate Scots law in devolved areas can continue to keep pace with EU law after the UK has left the European Union. There is currently no comparable clause in the EUWB.
- Under proposals in the EUWB, UK Ministers' powers extend to devolved competencies. This means UK Ministers would have the power to make changes to law in devolved areas without any formal mechanism for accountability to the Scottish Parliament. Section 17 of the Legal Continuity Bill provides for a default procedural requirement under which UK Ministers must obtain the consent of the Scottish Ministers before they make, confirm or approve secondary legislation relating to devolved matters which modifies, or would modify, any retained (devolved) EU law.

Introduction

The Scottish Government introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill ¹ (hereinafter the Bill) on 27 February 2018. It is the first Government Bill to be introduced in the Parliament which has not received a positive statement of legislative competence from the Presiding Officer (PO) ² .

The Bill consists of 6 parts and 3 Schedules. According to the Government's Explanatory Notes, the Bill's aim is to ensure continuity of law is maintained on UK withdrawal from the European Union. To achieve this the Bill does three main things ³ :

- it retains in domestic law EU law currently operating in devolved areas
- it gives the Scottish Ministers the powers needed to ensure that devolved law continues to operate effectively after UK withdrawal
- it gives the Scottish Ministers the power to, where appropriate, ensure that Scotland's devolved laws keep pace after UK withdrawal with developments in EU law.

Context

On 13 July 2017, the UK Government introduced the European Union (Withdrawal) Bill (EUWB) in the UK Parliament. The EUWB sets out proposals to facilitate the UK's departure from the European Union (EU) by ⁴ :

- repealing the European Communities Act
- converting existing EU law into UK law on the date of the UK's exit from the EU (scheduled for March 2019). These laws are referred to in the Bill as "retained EU law"
- creating temporary powers to allow UK (and devolved) Ministers to deal with any deficiencies, so that the legal system continues to function effectively.

Clause 11 of the EUWB proposes maintaining the EU law limitation on the Scottish Parliament's legislative competence by providing that the Scottish Parliament may not legislate in a way which modifies 'retained EU law'. This means that initially, EU powers will return to the UK but will not devolve further until there is agreement on transfer of powers. The UK Government has said that this will be a transitional arrangement to provide certainty after exit and to allow discussion and consultation with the devolved administrations on where lasting common frameworks are or are not needed.

The EUWB also includes a power to remove the limitation on devolved competence in any policy area when it is deemed that a common approach is not required.

The explanatory notes to the EUWB stated that the UK Government would seek the legislative consent of the Scottish Parliament (and other devolved legislatures) in relation to certain provisions of the Bill.

Given the UK Government's decision to seek the legislative consent of the Scottish Parliament, the Scottish Government tabled a Legislative Consent Memorandum (LC Memorandum) in the Scottish Parliament in September 2017. In its LC Memorandum, the Scottish Government indicated it would not recommend giving consent to the European Union (Withdrawal) Bill as currently drafted. The Memorandum set out the reasons for the Scottish Government's decision not to recommend consent:

“ The Scottish Government's key objections to the Bill as introduced relate to the provisions on the competence of the Scottish Parliament and Government (Clause 11 and Schedule 3) and those on powers for UK and Scottish Ministers to alter domestic law (Clauses 7-9, Clause 10 and Schedule 2). The Scottish Government also has objections to and observations on other aspects of the Bill, particularly on the repeal of the Charter of Fundamental Rights (Clause 5). ”

Scottish Parliament, 2017⁵

During consideration of the EUWB in the House of Commons, no amendments to address the principal concerns of the Scottish Government were agreed. Discussions between the UK Government and Scottish Government have continued over recent months in an effort to ensure that the EUWB is amended in a way which would allow the Scottish Government to recommend that the Scottish Parliament gives its consent to the Bill.

Both the Scottish Parliament's Finance and Constitution Committee and the Delegated Powers and Law Reform Committee produced reports on the LC Memorandum in relation

to the EUWB. The Finance and Constitution Committee concluded that it was not in a position to recommend granting legislative consent to the EUWB as currently drafted ⁶ .

In the event that the Scottish Parliament does not give consent to the EUWB, it is possible the UK Government may wish to remove the devolution related clauses from the Bill, or alternatively, may proceed with the EUWB without consent . If the UK Government chose to remove the devolution related clauses, it could leave Scots law unprepared for the UK's departure from the EU. In order to address that eventuality, the Scottish Government chooses to introduce the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill in the Scottish Parliament. The approach was outlined by the Minister for UK Negotiations on Scotland's Place in Europe when he introduced the Bill on 27 February 2017:

“ However, as a Government, we recognise the reality of the position in which we find ourselves. If the UK Government does not change its position, we will be faced with legislation to which we cannot recommend that the Scottish Parliament gives consent. In that situation, we believe that the constitutionally correct position, consistent with the devolution settlement, would be for the UK Government to remove from the European Union (Withdrawal) Bill matters that are not consented to, and for this Parliament to make its own provisions in those matters. That is why we believe that it is incumbent on the Scottish Government to provide an alternative means of ensuring legal certainty and continuity in areas of policy that are within the competence of this Parliament, in the event that the UK leaves the European Union. That is what the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, which we have introduced today, will do... ..The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill has been introduced today to ensure that it can be put in place prior to the final passage of the European Union (Withdrawal) Bill. That will be essential if this Parliament decides not to give the Westminster bill legislative consent. ”

Scottish Parliament Official Report, 2018⁷

Parliamentary Consideration of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.

Given the fact that the European Union (Withdrawal) Bill has reached the House of Lords without amendment to Clause 11 or Schedule 3, and is expected to complete its Committee stage in the House of Lords on 26 March, the Scottish Government's European Union (Legal Continuity) (Scotland) Bill has limited time in which to be considered in the Scottish Parliament, if it is to meet the Scottish Government's aim, subject to Parliamentary approval, of it becoming law before the EUWB does.

The Scottish Government, therefore, decided to ask the Scottish Parliament to agree to use the Emergency Bill procedure. The Minister for UK Negotiations on Scotland's Place in Europe explained the reason for this approach to the Parliament on 1 March 2018:

“ It is essential that the continuity bills in Wales and Scotland become law before the withdrawal bill does. In the absence of an agreement about a common UK approach, and in defence of devolution, this Parliament must prepare itself to assert—if it has to—the right to legislate on the consequences for devolution of withdrawal from the EU. To do so, we must put in place the necessary safeguards and stopgaps, and our continuity bill is at the heart of that process. Without it, we will be defenceless and our negotiating position as a Government will be severely weakened. We must not only have options and choices; we must be seen to have options and choices. I hope that all parties in the Parliament will back the position that I am laying out, so that there is a united Scottish voice. [...]. In addition, the timetable that we propose is necessary, because if no agreement can be reached on the withdrawal bill—I hope that that does not come to pass—and our Parliament chooses not to consent to it, the UK Government and Parliament must be given the time to do what they have to do in response to that decision. They must amend the withdrawal bill to remove the provisions that are not consented to; they must also amend it so that it can work with two continuity bills. If we get to that stage, that would be a constructive alternative way forward. It would not be the best way forward, but it would be a possible and workable way forward.”

Scottish Parliament Official Report, 2018⁸

What is an Emergency Bill?

An Emergency Bill is a Government Bill that needs to be enacted more rapidly than the normal timetable for scrutiny of proposed legislation allows. Such a Bill must first be introduced as a Government Bill and becomes an Emergency Bill if the Parliament, on a motion lodged by a Scottish Government Minister, agrees to treat it as such. Unless the Parliament agrees to waive the requirement, an Emergency Bill must be introduced with the same accompanying documents as any other Government Bill.

Rule 9.21.2 of the Standing Orders provides that Stages 1 to 3 of an Emergency Bill are taken on the same day unless the Parliament agrees to a Parliamentary Bureau motion proposing an alternative timescale. The Bureau is required to propose, by motion, a timetable for the various stages.

The Bill is referred immediately to the Parliament to consider the general principles. There is no requirement for committee consideration of, or report on, the general principles, although there is nothing to prevent such consideration. Stage 2 of an Emergency Bill must be taken by a Committee of the Whole Parliament (i.e. all MSPs meeting in the Chamber) The session operates under committee procedure with the Presiding Officer acting as the convener.

A Bill containing provisions conferring power to make subordinate legislation, or conferring power on the Scottish Ministers to issue any directions, guidance or code of practice, or which is amended at Stage 2 to insert or substantially alter such powers, is not required to be considered by the Delegated Powers and Law Reform Committee. Again, however, there is nothing to prevent it being considered by that Committee.

Emergency Bills may be amended. The Presiding Officer may determine a time by which amendments must be lodged. If no determination about the deadline for lodging is made by the Presiding Officer, the normal notice periods apply.

Previous emergency bills in the Scottish Parliament

Since 1999 the Scottish Parliament has considered a total of 8 bills under the emergency procedure. These are shown in the table below^{9 10 11 12} :

Emergency Bills in the Scottish Parliament

Session	Title of Bill
One (1999-2003)	Mental Health (Public Safety and Appeals)(Scotland) Bill
One (1999-2003)	Erskine Bridge Tolls Bill
One (1999-2003)	Criminal Procedure (Amendment) (Scotland) Bill
Two (2003-2007)	Senior Judiciary (Vacancies and Incapacity) (Scotland) Bill
Three (2007-2011)	Budget (Scotland) (No 3) Bill
Three (2007-2011)	Convention Rights Proceedings (Amendment) (Scotland) Bill
Three (2007-2011)	Criminal Procedure (Legal Assistance, Detention and Appeals) Scotland Bill
Four (2011-2016)	Offensive Behaviour Bill - which was initially considered as an emergency bill but then given an extended timescale

There had been no emergency bills during Session 5 of the Scottish Parliament until it was agreed to treat the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill as an emergency Bill.

Motion on agreeing emergency timetable

The Government lodged its motion, S5M-10735¹³ on 28 February in the name of the Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell. This motion asked:

“ That the Parliament agrees that the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill be treated as an Emergency Bill.”

The Parliament debated the motion on 1 March.⁸

In his opening statement Mr Russell told the Parliament that the Government proposed extending the usual emergency bill timetable:

“ I am proposing to Parliament today that we should consider the bill as an emergency measure over the next three weeks, starting with the stage 1 debate next Wednesday, then stage 2 the week after that and stage 3 the following week.”

This timetable was set out in the Parliamentary Bureau motion S5M-10745⁸ :

“ That, subject to the Parliament’s agreement to treat the Bill as an Emergency Bill, the Parliament agrees to consider the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill as follows: stage 1 on Wednesday 7 March; stage 2 on Tuesday 13 March and stage 3 on Wednesday 21 March.”

Concerns about the use of the emergency procedure were raised during the 1 March debate by Conservative, Labour and Liberal Democrat Members. A particular area of concern surrounded the proposal that Stage 2 of the Bill will be taken by a Committee of the whole Parliament, rather than being considered by Scottish Parliament Committee(s). For example, Tavish Scott MSP suggested that the Bill would be better scrutinised in Committees than by a Committee of the Whole Parliament:

“ I am grateful to the minister for setting out the process that he plans to follow. Does he accept that one of the main arguments is about adequate scrutiny of the measures that we are considering? Particularly in relation to stage 2, would it not be better that those deliberations were heard in committee rather than in a plenary session of the whole Parliament? ”⁸

At decision time the Parliament did agree, without division, the Parliamentary Bureau motion S5M-10746¹⁴ that:

“ the Finance and Constitution Committee be designated as the lead committee, and that the Culture, Tourism, Europe and External Relations Committee be designated as a secondary committee, in consideration of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.”

Patrick Harvie, the Scottish Green MSP, raised a point of order with the PO over the timing of the lodging of amendments. He was concerned that:

“ deadlines for amendments may precede the debates, so the stage 2 deadline might precede the stage 1 debate. ”⁸

In response, the Presiding Officer, Ken Macintosh, thanked Mr Harvie for his point of order:

“ which does indeed give me an opportunity to make the chamber aware of an issue that was discussed at the most recent meeting of the bureau. The rules on emergency bill procedures allow me, as Presiding Officer, to make a determination on the deadlines for amendments at stage 2 and stage 3, and I will make any such determination having consulted business managers on the Parliamentary Bureau. I hope that that reassures the member. ⁸ ”

Motions S5M-10735 and S5M-10745 were agreed to after division.

Legislative Consent and the European Union Withdrawal Bill

The Scottish Government's approach of introducing its Bill as a contingency for the event that legislative consent is not granted for the EUWB, also assumes that the UK Government will remove clauses related to Scottish devolved competences in the EUWB. However, the UK Parliament continues to retain the power to legislate in devolved areas, with the Miller case having determined that the principle of legislative consent cannot be decided by a court. As a result, it is possible that the UK Government could choose to proceed with the EUWB without the Legislative Consent of the Scottish Parliament.

Legislative Consent

The principle of legislative consent was first embodied in the Memorandum of Understanding between the UK Government and the devolved governments in December 2001 and has remained in each revised Memorandum of Understanding. The most recent Memorandum of Understanding was agreed in October 2013. In relation to legislative consent it states:

“ The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government. ¹⁵ ”

The Scotland Act 2016 amended Section 28 of the Scotland Act 1998 to provide "that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

This amendment put the Sewel Convention on a statutory footing, although, as discussed later on in this briefing, the Convention cannot be enforced legally through the courts.

It should be noted that the requirement for legislative consent refers to primary legislation and does not extend to secondary legislation made by the UK Government which affects devolved competences.

Writing shortly before the EUWB was introduced in the UK Parliament, Dr Tobias Lock from the University of Edinburgh, speculated as to what might happen if consent was refused and how different Continuity Bills for different parts of the UK would be unlikely to lead to the orderly transparent and workable statute book upon exiting the EU that the UK Government is aiming for.

Dr Lock suggested that, if legislative consent is refused, Westminster might choose to ignore the refusal. According to Dr Lock this would be possible for two reasons:

“ First, the Sewel Convention only applies ‘normally’ and the UK government could argue that the Brexit process and the Repeal Bill pose unique challenges that cannot be considered normal. Second, even if this view is not shared by the devolved administrations and legislatures, the convention remains not justiciable. As confirmed by the UK Supreme Court in the Miller case concerning the need for parliamentary approval for the Article 50 notification, judges ‘cannot give legal rulings on [a convention’s] operation or scope, because those matters are determined within the political world.’ This quote shows on the one hand that the Sewel Convention is not legally binding; on the other hand it suggests that there are political consequences of ignoring it, which in the case of Brexit might amount to a constitutional crisis.”

Lock, 2017¹⁶

The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

The Bill consists of 6 parts and 3 Schedules. According to the Government's Explanatory Notes ³, the Bill's aim is to ensure that continuity of law is maintained on UK withdrawal from the European Union.

To achieve this, the Bill does three main things:

- it retains in domestic law EU law currently operating in devolved areas
- it gives the Scottish Ministers the powers needed to ensure that devolved law continues to operate effectively after UK withdrawal
- it gives the Scottish Ministers the power to, where appropriate, ensure that Scotland's devolved laws keep pace with developments in EU law after UK withdrawal.

In his statement to the Scottish Parliament on the legislative competence of the Bill, the Lord Advocate stated that:

“ It is the Scottish Government's view that if the Scottish Parliament is unable to consent to the European Union (Withdrawal) Bill, the constitutionally correct position would be for the UK Government to remove devolved matters from that bill and for the Scottish Parliament to pass its own provision to deal with legal continuity. The skilled parliamentary draftsmen who draft Scottish Government legislation have worked hard to seek to align the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, so far as is consistent with certain policy differences, with the provisions of the United Kingdom Government's bill. ¹⁷ ”

The Policy Memorandum ¹⁸ states that the Bill provides Scotland with three possible routes for preparing its devolved laws for UK withdrawal from the EU:

1. Relying on an amended EUWB with the consent of the Scottish Parliament - this would require amendments to the EUWB to be made to allow the Scottish Government to recommend to the Scottish Parliament that Legislative Consent be given to the EUWB.
2. A combination of the Bill and the EUWB following the qualified withholding of legislative consent. If the Scottish Parliament choose not to give Legislative Consent to all the relevant clauses of the EUWB, the Policy Memorandum suggests that the EUWB would need to be amended on that basis. If this happened, the Scottish Government could agree that changes to devolved law by UK Ministers could only be made with Scottish Ministers' agreement. This is covered by Section 17 of the Bill.
3. Relying on the Bill alone, following the withholding of legislative consent. If the Scottish Parliament were to withhold consent to all the relevant clauses of the EUWB in their entirety then, according to the Policy Memorandum, the EUWB would have to be amended so that the provisions requiring legislative consent did not extend to Scotland. The Scottish Government considers that powers given to UK Ministers in

the EUWB would have to be modified so that they could not be exercised within devolved competence.

According to the Policy Memorandum for the Bill, pursuing option 3 would have the result that:

“ every change necessary to devolved laws in anticipation of UK withdrawal would have to be made using the powers in this Bill. Even where the changes required were technical or where identical changes were necessary across the UK’s jurisdictions, separate instruments would be required in the UK and Scottish Parliaments to ensure an operating body of law after UK withdrawal. ¹⁸ ”

Speaking in the Parliament on 27 February 2018, the Minister for UK Negotiations on Scotland’s Place in Europe said the Scottish Government will continue to seek agreement for a UK wide Bill, with the Scottish Government Bill providing a contingency:

“ The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill is contingency planning. It provides a sensible scheme for preparing devolved law for withdrawal from the EU. However, if the UK Government’s European Union (Withdrawal) Bill can be agreed, and if this Parliament consents to it, our continuity bill will be withdrawn. Even if the continuity bill is passed by this Parliament, it contains provisions for its own repeal. If a deal can be reached with the UK Government, we would be able to come to Parliament with a proposal to give consent to the European Union (Withdrawal) Bill, and to repeal this one. ⁷ ”

The Policy Memorandum sets out the views of the Scottish Government as to what would happen to the Scottish Government’s Bill in the event an agreement is reached on the terms of the EUWB:

“ If the EUWB were amended to respect the principles of devolution, the Scottish Government could lodge a legislative consent motion which, if passed by the Scottish Parliament, would mean that the Bill would no longer be necessary. Standing Orders provide for the withdrawal of a Bill at any point before the conclusion of Stage 1. After that, withdrawal requires the agreement of the Scottish Parliament. Should the Bill be passed, it contains provision for its own repeal, meaning that it could be effectively withdrawn even after completing its parliamentary passage. ¹⁸ ”

Legislative competence

In his statement on legislative competence² the Presiding Officer concluded that:

“provisions of the Bill whose effect is postponed by section 1(2) to ensure compatibility with EU law as required under section 29(2)(d) of the Scotland Act 1998 would not be within the legislative competence of the Parliament”

The nature of the Presiding Officer's function and the context in which the statement is given are fully explained in the Presiding Officer's statement, along with the reasons for reaching that conclusion.

In particular, the Presiding Officer states:

“In my view the fundamental question at issue is whether the provisions of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill would be compatible with European Union Law when enacted as required by section 29(2)(d). This issue is relevant to a number of sections of the Bill. Section 1(2) of the Bill seeks to address this by stating that the effect of provisions of the Bill that would be incompatible with EU law is to be suspended until such time as EU law ceases to have effect. The Supreme Court recognised in the case of *R (Miller) v Secretary of State for Exiting the European Union* that the constraint upon the Parliament in the Scotland Act to act compatibly with EU law would cease to operate upon the UK's withdrawal from the EU Treaties. The Court also recognised that alternative constraints may be introduced at that point subject to the necessary legal and political processes having taken place. Whether there may be such future limitations on the Parliament's competence at that point is not yet decided. In short, the Bill anticipates the impact of the withdrawal of the United Kingdom from the European Union and the removal of the obligations of the UK under the EU Treaties which the EU law restriction in section 29(2)(d) imposes on the Parliament. It assumes that the Parliament can make provision now for the exercise of powers which it is possible the Parliament will acquire in the future. The European Union (Notification of Withdrawal) Act 2017 takes a step towards the constitutional change the Miller case identified. I recognise that there may be different views as to the impact that may have on the powers of the Parliament. I am not persuaded, however, that anticipation of prospective effect is the correct interpretation of the impact of the 2017 Act on the Scotland Act 1998. To date, the courts have taken a strict approach to interpretation of the Scotland Act and specifically rejected the proposition that the UK's internal constitutional arrangements should be interpreted differently to other statutes. In my view the Scotland Act provides that the legislative competence of the Parliament is to be assessed at the point at which legislation is passed. The Parliament and the Scottish Ministers will remain bound to act compatibly with EU law until such point as the Treaties cease to apply. In my view this prevents the Parliament from exercising legislative power now, even though it assumes it will be legally able to act in the future.”

Scottish Parliament, 2018²

The Scotland Act 1998¹⁹, which established the Scottish Parliament, gave it the power to legislate on certain matters. Section 28(1) of the 1998 Act provides that:

“ subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament”

The limit on that power to legislate, set out in section 29, is the limit of the Parliament’s legislative competence.

The Parliament’s legislative competence is defined according to five criteria (set out in section 29(2)):

- the Parliament can only legislate for or in relation to Scotland;
- it cannot legislate in relation to the “reserved matters” set out in Schedule 5 to the 1998 Act. Only the UK Parliament can legislate on those reserved matters;
- it cannot modify certain enactments set out in Schedule 4 to the Scotland Act 1998 (which include the Human Rights Act 1998 and certain provisions of the Acts of Union, the European Communities Act 1972 and the Scotland Act 1998), or modify the law on “reserved matters”);
- its legislation must be compatible with the European Convention on Human Rights and with European Union law; and
- it cannot remove the Lord Advocate from his or her position as head of the system for criminal prosecutions and the investigation of deaths.

The 1998 Act requires that separate statements on the legislative competence of any Bill are made by the Presiding Officer and by the member in charge of the Bill before it is introduced in the Parliament.

The Scottish Government’s Statement on legislative competence was made by the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney, on 27 February 2018, and was published alongside the Presiding Officer’s statement. Mr Swinney wrote:

“ In my view, the provisions of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

As this was the first time that a Government Bill had not received a positive statement of legislative competence from the PO, on 28 February ¹⁷, James Wolffe, the Lord Advocate, and chief legal officer of the Scottish Government, came to the Scottish Parliament Chamber to make a statement on the Scottish Government’s decision relating to the legislative competence of the Bill.

Mr Wolffe confirmed that:

“ The Government cannot introduce a bill unless it is accompanied by a statement that, in the view of the responsible minister, the bill is within competence, and the ministerial code requires such a statement to be cleared by law officers. I can confirm that I cleared the certificate of competence in relation to this bill.”

Mr Wolffe focussed on the PO’s concern, raised in his assessment of competence, over the fundamental question of whether the Bill would, if enacted in its present form, be

incompatible with European Union law. Mr Wolffe make the following observations about the provisions of the bill:

“ The legal obligation on ministers to comply with EU law will endure until the UK leaves the EU. The bill does not change that obligation. Ministers will continue to be subject to legal requirements to transpose, implement and otherwise abide by EU law so long as the UK remains a member of the EU. The bill does not alter those requirements. The bill does nothing that will alter EU law or undermine the scheme of EU law while the UK remains a member of the EU.”

He also confirmed the Scottish Government's view that:

“ The terms of the bill ensure that its provisions will not come into effect, and those powers cannot be exercised, so as to alter or affect the law before the United Kingdom leaves the European Union if to do that would be incompatible with EU law, so the grant of those powers and their exercise in accordance with the bill is not and cannot be incompatible with EU law.”

Mr Wolffe acknowledged that the PO, in his assessment, had highlighted the central point of the Bill:

“ that it contains provisions and empowers ministers to make provisions by regulations that, if they were to come into force before the UK leaves the EU, would be incompatible with EU law. You characterise that as involving an exercise of competence before the competence has been transferred, but the Scottish Government's view is that the bill is framed to ensure that any provisions that would have that effect can come into force only when the UK leaves the EU.”

Legal challenge

In his statement to the Parliament, the Lord Advocate noted that:

“ a Presiding Officer's negative certificate does not prevent Parliament from debating and, if so advised, passing a bill. Ultimately, the only authoritative view on the questions of law that arise in the context of legislative competence comes from the court.”

The Scotland Act 1998 provides an opportunity for the legislative competence of a Bill to be challenged after it is passed, but before it receives Royal Assent.

Following the passing of a bill by the Parliament there is a four week period during which the bill can be challenged by Law Officers on the issue of whether or not the Parliament had the power to make law on the subjects covered by the bill.

During this period, the Lord Advocate (a Scottish Government's Law Officer), the Advocate General for Scotland or the Attorney General (UK Government Law Officers) may refer a question about legislative competence to the Supreme Court. The Secretary of State has a separate power to make an order prohibiting the PO from submitting a bill for Royal Assent, but that is not a challenge to the legislative competence of the bill.

If a Bill is challenged by one of the Law Officers, it is up to the Supreme Court to decide if the Bill was within the competence of the Parliament and whether it can receive Royal Assent and become an Act of the Scottish Parliament.

Even if a Bill does gain Royal Assent, it can still face a legal challenge on its legislative competence. This can arise where an Act of the Scottish Parliament is challenged in the course of legal proceedings by someone other than a Law Officer.

For example, *AXA General Insurance v The Lord Advocate and others* [2011] when insurance companies challenged the legality of the Damages (Asbestos - related Conditions) (Scotland) Act 2009. The legality of the Bill had not been challenged by any of the Law Officers prior to it receiving Royal Assent. The case reached the Supreme Court on appeal against the judgment of the Court of Session (12 April 2011) ruling that the 2009 Act was within the competence of the Scottish Parliament. A panel of seven justices of the Supreme Court all agreed that the 2009 Act was within competence, and therefore the insurance companies' arguments failed.

Purpose and Effect of the Act

Part 1 of the Bill sets out the purpose and effect of the proposed legislation. Section 1 states:

“ (1) The purpose of this Act is to make provision— (a) in connection with the prospective withdrawal of the United Kingdom from the EU in consequence of the notification given under section 1 of the European Union (Notification of Withdrawal) Act 2017 (“UK withdrawal”), and (b) for ensuring the effective operation of Scots law (so far as within devolved legislative competence) upon and after UK withdrawal. ²⁰ ”

According to the Scottish Government, the purpose of the Bill is to ensure that, when the UK leaves the European Union, Scots law continues to function seamlessly without any interruptions or gaps.

Saving EU law into Scots law

Part 2 of the Bill aims to ensure that EU law is 'saved' in Scots law after the UK has left the EU.

Sections 2 to 5 of the Bill seek to ensure that EU law currently incorporated in Scots law continues to apply after Brexit. It replicates the provisions in clauses 2 and 3 of the European Union (Withdrawal) Bill (EUWB).

Forms of EU Legislation

There are five types or forms of EU legislation (Article 288 of the Treaty on the Functioning of the European Union) ²¹ :

Regulations – these are binding and directly applicable in all Member States

Directives – these are binding as to the result to be achieved but leave Member States to decide on the method of achieving that result. The method is decided by member states when they transpose the Directive into their own domestic legislation.

Decisions – these are binding upon those to whom they are addressed

Recommendations – these have no binding force

Opinions – these have no binding force

As part of the process of leaving the European Union, the United Kingdom Government has proposed in the EUWB that it will repeal the European Communities Act 1972 [ECA]. The European Communities Act 1972 provides for the incorporation of EU law into UK law and requires UK courts to follow the rulings of the Court of Justice of the European Union. The conversion into UK law applies both to (currently directly applicable) EU regulations (given effect in the UK by section 2(1) of the ECA) and UK laws which have been made to implement EU obligations (often under Section 2(2) of the ECA).

Section 29 of the Scotland Act 1998 requires the Scottish Parliament to ensure that any legislation it passes is compatible with EU law. Section 53 of the Scotland Act transfers functions to Scottish Ministers in relation to observing and implementing EU law. As a result of these functions, the Scottish Parliament is currently responsible for implementing EU legislation in devolved areas, such as environmental and agricultural policy.

Section 2

Section 2 of the Bill replicates Clause 2 of the EUWB. It creates a new category of law called devolved 'EU-derived domestic legislation'. It seeks to ensure that domestic devolved legislation made under the enabling powers provided by section 2(2) of the European Communities Act 1972 (ECA) remains on the statute book after the UK has left the EU and when the UK Government has repealed the ECA.

Section 2(2) of the Bill sets out what legislation is covered by the term devolved EU-derived domestic legislation. It includes any devolved instruments (secondary legislation)

made under Section 2(2) of the European Communities Act, or paragraph 1A of Schedule 2 of the European Communities Act and where introduced to implement the UK's obligations under EU law.

Subsection 2(b) addresses the situation where an Act of Parliament has been used to implement an EU obligation, rather than secondary legislation under Section 2(2) of the European Communities Act. Subsection 2(b) ensures that where Acts of the Scottish Parliament have been used to implement EU obligations, these are recognised as EU-derived domestic legislation.

Subsection 2(c) ensures that any legislation which is connected to, but does not fall within the definitions of, the legislation preserved by subsections 2(a) and 2(b), is copied over into Scots law. According to the Bill's Explanatory Notes, this ensures:

“ that provisions which are tied in some way to EU law, or to domestic law which implements EU law, can continue to operate properly post exit. For example, it will ensure that a provision that goes beyond the minimum needed to comply with requirements under EU law (known as gold plating¹), is not excluded. This will allow these provisions to be amended by the powers in the Bill so that they still work effectively after UK withdrawal.”

Scottish Parliament, 2018³

Subsection 3 defines EU derived domestic legislation as devolved if "it is or would be within the legislative competence of the Scottish Parliament".

Section 3

Section 3 of the Bill replicates Clause 3 of the EUWB. It makes provision for including directly applicable EU legislation, where it relates to devolved competences, into Scots law after the UK has left the EU. Directly applicable EU legislation does not need to be implemented into member state law and, as such, has direct effect. Section 3 ensures that this legislation continues to apply after the UK has left the EU by converting devolved direct EU legislation into Scots law on exit day.

Subsection 1 sets out that the text of any devolved direct EU legislation will form part of Scots law after the UK has left the EU.

Subsection 2 provides a definition of direct EU legislation. It includes within the definition, any EU regulation; any EU decision addressed wholly or in part to the UK; and any EU tertiary legislation¹. Subsection 2(a) also sets out the EU instruments which are exempt from this provision. These include the following:

- EU legislation which does not apply to the UK as a result of its terms of EU membership. Examples of this are legislation relating to the Euro or areas of the Union *acquis* in the field of freedom, security and justice. (More details are provided in Section 29 of the Bill).
- Where an EU decision is not addressed to the UK as the member state.

¹ EU tertiary legislation consists of delegated acts and implementing acts made under powers contained in EU legislation (such as regulations or directives). It can be used to supplement or amend certain elements of the parent legislation.

- Any EU-derived domestic legislation under section 2 that reproduces the effect of an EU regulation, decision or tertiary legislation. According to the Bill's Explanatory Notes, this is to avoid duplication on the statute book after exit.

Section 3 subsections 2(b) and 2(c) ensure that provisions arising from EU legislation that apply to the European Economic Area (EEA) Agreement and are relevant to devolved competences will continue to apply. According to the Explanatory Notes:

“ This covers the European Economic Area Act 1993 which makes the EEA Agreement one of the EU Treaties for the purposes of the ECA and section 2(1) and (2) ECA apply to provisions of the EEA Agreement. This means that direct EU legislation applies to the EEA by virtue of its inclusion in the Annexes to the EEA Agreement with any adaptations that are necessary for it to apply in the EEA context. This direct legislation, as adapted, then flows into Scots law as a result of ECA section 2(1).”

Scottish Parliament, 2018³

In addition, subsection 2(b) also converts any annex to the EEA Agreement where it relates to EU instruments which have been converted by subsection 2(a). This brings into devolved Scots law, EU Regulations, decisions and tertiary legislation as they apply and are adapted for the EEA context.

Subsection 3 mirrors subsection (3) under Section 2 in that it defines direct EU legislation as devolved if "it is within the legislative competence of the Scottish Parliament".

Subsection 4 ensures that only direct EU legislation which is in force on the day before the UK leaves the EU is converted. As a result if the date of application of any provision falls after exit day, the provision is not converted.

Subsection 5 ensures that only the English language version of direct EU legislation is copied over into Scots law after the UK has left the EU. If there is no English language version of the legislation then the legislation is not transferred into Scots law, though, other language versions can be used to help interpret the meaning of the direct EU legislation, for instance, by the courts.

Subsection 6 provides that the conversion of devolved direct EU legislation is subject to the exceptions set out in sections 6 to 9 of the Bill.

Section 4

Section 4 of the Bill mirrors clause 4 of the EUWB. It ensures that any devolved rights available in Scots Law as a result of the EU Treaties will continue to be available after the UK has left the EU.

Sections 2 and 3 of the Bill only cover EU law that has been made into legislation. Section 4 ensures that the rights of individuals, which are derived from the EU Treaties rather than EU legislation, will continue to apply after the UK has left the EU.

It is not immediately clear which devolved rights derived from the EU Treaties will be captured under Section 4 of the Bill. The Explanatory Notes for the European Union (Withdrawal) Bill provided a list of Treaty on the Functioning of the European Union articles

which the UK Government considers contain directly effective rights which would be converted into domestic law as a result of clause 4 of the EUWB.

The Explanatory Notes to the UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill do not provide explicit examples from the Treaties but state:

“ This section provides for these other rights, etc., to be retained as part of Scots law on UK withdrawal, despite withdrawal and despite the repeal of the ECA. Other rights which are retained in Scots law as a result of this section include multilateral agreements to which the EU is a party and which confer directly effective rights, such as the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, in relation to cross-border child cases and the enforcement of judgments relating to children.”

Scottish Parliament, 2018³

A further question raised by Section 4 of the Bill is the wording that rights continue to apply where they are currently "recognised and available in Scots law by virtue of Section 2(1) of the 1972 Act". This wording mirrors the wording of the EUWB and the House of Commons Library briefing on the EUWB questions to what extent the phrase "recognised and available", in this case in Scots law, will act as a filter on what is carried over into post Brexit Scots law ²² .

Section 5

Section 5 of the Bill saves into Scots law the general principles of EU law and the Charter of Fundamental Rights as they apply to devolved matters. There is no equivalent of Section 5 in the EUWB.

The applicable general principles of EU law which the Bill proposes saving relate to anything to which sections 2, 3 and 4 of the Bill apply. According to the Explanatory Notes to the Bill, the general principles are part of EU law which member states must comply with, but which often have no express basis in the Treaties and instead are as a result of rulings of the Court of Justice of the European Union. The Explanatory Notes provide examples of some of the relevant principles based on Court of Justice judgments:

- proportionality
- non-retroactivity
- fundamental rights
- equivalence, or non-discrimination against EU law
- effectiveness

The general principles are considered by both the Court of Justice and domestic courts in determining:

“ the lawfulness of legislative and administrative measures within the scope of EU law and are also an aid to the interpretation of EU law. Domestic law that is within the scope of EU law and EU legislation (such as Directives) that do not comply with the general principles can be challenged and disapplied. Administrative action taken under EU law must also comply with the general principles.”

Scottish Parliament, 2018³

Section 5 of the Bill also incorporates the Charter of Fundamental Rights (the Charter) into Scots law, as it applies to devolved matters, after the UK has left the EU. This is in contrast to the EUWB in which the UK Government has chosen to exempt the Charter from being converted into domestic law.

The Charter of Fundamental Rights

The Charter of Fundamental Rights sets out ‘EU fundamental rights’, which are general principles of EU law that have been recognised over time through the case law of the CJEU and which have been codified in the Charter. In 2009 the Charter was given the same legal status as the EU Treaties. The Charter sets out fifty rights and principles, many of which replicate guarantees in the European Convention on Human Rights and other international treaties.

The Charter of Fundamental Rights brings together all the personal, civic, political, economic and social rights enjoyed by people within the EU in a single text ²³ .

It covers

- all the rights found in the case law of the Court of Justice of the EU
- the rights and freedoms enshrined in the European Convention on Human Rights
- other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments

The charter contains rights and freedoms under six titles

- dignity
- freedoms
- equality
- solidarity
- citizens' rights
- justice

The UK Government has chosen not to convert the Charter upon leaving the EU because it considers the Charter only applies when acting within the scope of EU law, which will cease to apply in the UK after exit day. The UK Government has also stated that no substantive rights will be lost as a result of not transferring the Charter into UK law ²⁴ .

In contrast, the Scottish Government has chosen to ensure the Charter is retained as part of Scots law. Section 5(1) retains the Charter along with the general principles of EU law as they had effect in EU law on the day immediately before exit day.

The House of Commons Library briefing on the EUWB suggested that it was not clear how incorporating the Charter into domestic law would work in practice:

“ The Charter could be retained to apply to retained EU law and any future modifications to it. But this would mean some parts of UK law continuing to be subject to a different human rights regime from the rest. And would it also cover any legislation required to implement the withdrawal agreement.”

UK Parliament, 2017²²

If the Charter is incorporated into Scots law, whilst it is exempted in the EUWB, it could mean that Scotland's human rights regime would be different from other parts of the United Kingdom.

Exceptions to the saving of EU law

Sections 6 to 9 of the Bill provide for exceptions to the saving of EU law provided for in Sections 2 to 5. The equivalent provisions in the EUWB are in Clauses 5 and 6 and Schedule 1.

Section 6

Section 6 of the Bill corresponds to Clause 5(1) to (3) of the EUWB.

The ECA, which gives effect to EU law in the UK, gives EU law supremacy over UK domestic law. This means that when domestic legislation is inconsistent with EU law it must be quashed or disapplied. For Scottish Parliament legislation, there is the further requirement set out in Section 57 of the Scotland Act 1998 that Scottish Ministers have no power to legislate in a way incompatible with EU law, along with provisions of Section 29 of the 1998 Act which ensures that an Act of the Scottish Parliament is not law in so far as it is incompatible with EU law.

Section 6 of the Continuity Bill provides that the principle of supremacy of EU law will cease to apply to legislation made after the UK has left the European Union whilst at the same time, ensuring the supremacy of EU law remains for legislation made before the UK leaves the EU. According to the Bill's Explanatory Notes this means:

“ That legislation made after exit day which is inconsistent with EU law retained by the Bill will take precedence over earlier legislation. But where a conflict exists between pre-exit Scots law and retained EU law, then the retained EU law is to be preferred. The principle is not however relevant to provision that is made under the Bill in preparation for the UK's exit from the EU unless subsection (3) applies. ”

Scottish Parliament, 2018³

Subsection 3 provides that the supremacy of EU law should continue to apply to modifications of legislation in force on the day before the UK left the European Union, so long as the principle is consistent with the modification.

Section 7

Section 7 mirrors Schedule 1 paragraph 1 of the European Union (Withdrawal) Bill on the power to challenge the validity of retained EU law.

Under the current arrangements, EU law can be declared invalid by the Court of Justice of the European Union. Section 7 of the Bill provides that EU retained law cannot be challenged after the UK has left the EU on the basis that the underlying EU legislation was invalid.

Section 7(2) provides for two exceptions to this rule. These are where the Court of Justice of the European Union decides before the UK leaves the EU (exit day) that the instrument is invalid and:

“ the challenge is of a kind described, or provided for, in regulations made by the Scottish Ministers.”

Scottish Parliament, 2018²⁰

Subsection 3 ensures that action in progress ahead of exit day is unaffected by the provisions of this Section.

Section 8

Section 8 of the Bill corresponds to Schedule 1 paragraph 4 of the European Union (Withdrawal) Bill and excepts the rule in Francovich in Scots law after the UK has left the European Union.

The House of Commons Library Briefing , EU (Withdrawal) Bill: the Charter, general principles of EU law, and 'Francovich' damages, provided details of Francovich which are reproduced below ²⁴ :

The Francovich rule

In the Francovich case in 1991 the CJEU (then the ECJ) held that in some circumstances, states have to compensate individuals or businesses for damage they suffer because the state has failed to transpose a directive, or done so late or poorly.

The Court in that case held that the Italian Government had breached its EU obligations by not implementing the Insolvency Directive on time, and was liable to compensate the workers' loss resulting from the breach. The Court further held that the damages for such breaches should be available before national courts, and that to establish state liability on the basis of the failure to implement a directive, claimants had to prove that:

- the law infringed was intended to confer rights on individuals;
- the breach was “sufficiently serious”, i.e. the Member State had manifestly and gravely disregarded the limits of its discretion
- there was a direct causal link between State's failure to implement the directive and the loss suffered

The principle of State liability for damage caused to individuals by breaches of EC law was clarified five years later in the judgments in Brasserie du Pêcheur and in Factortame (1996), when Francovich was extended beyond a failure to implement a Directive to any State action incompatible with Treaty provisions or other EU laws which grant rights to individuals.

Under Section 8 of the Bill, Francovich will no longer apply after the UK has left the European Union. However, the right is retained for "a right of action that existed before exit day". This means Francovich damages will continue to be available for failures arising before the UK's withdrawal from the EU, irrespective of whether the claim for damages began before exit day. The proposals in the Bill differ from the proposals in the EUWB

which allows claims for Francovich damages only to continue if they are initiated before the UK has left the European Union.

Section 9

Section 9 of the Bill provides that the provisions in sections 6 to 8 of the Bill (supremacy of EU law and the rule in Francovich) in Scots law are considered references to both as they stand at exit day, and not as they might operate in the EU after the UK has left the European Union.

Section 10 - Interpretation of retained (devolved) EU law

Section 10 of the Bill sets out how EU law retained by the Bill and copied into Scots law is to be interpreted after the UK has left the EU. This section mirrors clause 6 of the EUWB.

Section 10 proposes a continuing relationship between case law of the Court of Justice of the European Union (CJEU) and retained (devolved) EU law in Scotland.

Subsection 1 sets out that decisions of the CJEU made after the UK has left the EU will not be binding on Scottish courts. In addition, it states that Scottish courts will no longer be able to refer cases to the CJEU following the UK's departure from the EU.

Subsection 2 proposes that Scottish courts, if they choose to do so, may have regard to anything done on or after exit day by the CJEU or another EU institution, if they consider it appropriate to do so.

Subsection 3 sets out how retained EU law should be interpreted by Scottish courts after the UK has left the EU. It provides that any question as to the meaning of retained EU law will be determined in Scottish courts in accordance with relevant pre-exit CJEU case law and general principles. It also provides that, even where retained EU law is modified using the powers in this Bill, that law can be interpreted using relevant pre-exit CJEU case law.

Subsection 4 provides that subsection (3) is subject to section 11(7), which enables Scottish Ministers to make regulations to disapply this interpretive rule if it is appropriate. The Explanatory Notes to the Bill suggest this could happen "where the application of the case law would no longer be relevant".

The approach in subsections (3) and (4) differs from the approach in the EUWB under which once retained EU law has been modified it cannot then be interpreted using pre-exit CJEU case law.

As a result of section 10, subsections (5) to (7), Scotland's two highest courts in relation to devolved matters, the UK Supreme Court and the High Court of Justiciary (Scotland's supreme criminal court) are not bound by retained EU (devolved) case law. In addition, following the UK's departure from the EU, CJEU case law relating to retained EU law will have the same binding, or precedent status in Scottish courts as existing decisions of the UK Supreme Court and the High Court of Justiciary.

Delegated Powers

Part 3 of the Bill (sections 11 to 17) sets out the main powers in the Bill's provisions which relate to UK withdrawal, and which give Scottish Ministers powers to make secondary legislation.

Part 4 of the Bill (sections 18 to 22) contains delegated powers for Scottish Ministers relating to fees and charges.

Section 11

Section 11 sets out how Scottish Ministers would deal with deficiencies arising from UK withdrawal and corresponds to clause 7 of the EUWB. This section gives Scottish Ministers the powers to make sure that retained (devolved) EU law continues to operate effectively after UK withdrawal. The deficiencies may be in either primary or secondary domestic legislation, or direct EU legislation.

Subsection 2 provides some examples of possible deficiencies, including that retained (devolved) EU law:

- contains anything which has no practical application in relation to Scotland or is otherwise redundant or substantially redundant
- makes provision for, or in connection with, reciprocal arrangements, which no longer exist or are no longer appropriate, between the United Kingdom or Scotland or a public authority in the United Kingdom, and the EU, an EU entity, a member State or a public authority in a member State.

Subsections 8 and 9 set out limits on the use of this power, including that they:

- cannot be used to implement the UK withdrawal agreement
- cannot modify the Scotland Act 1998, the Equality Act 2006 or the Equality Act 2010
- cannot confer any function on public authorities in Scotland unless they are broadly consistent with the purpose of the authority.

Subsection 10 is a sunset clause, which will ensure that the power in Section 11 expires, and will no longer be available to Scottish Ministers, two years after exit day.

Section 12

Section 12 relates to complying with international obligations and corresponds to clause 8 of the EUWB. It gives Scottish Ministers powers to make sure that devolved law in Scotland continues to comply with the UK's international obligations after UK withdrawal. Section 12 has the same restrictions on use as Section 11.

Section 13

Section 13 of the Bill provides Scottish Ministers with powers to make regulations to ensure that where appropriate Scots law in devolved areas can continue to comply with EU law after the UK has left the European Union. There is currently no corresponding Clause in the UK Government's EUWB.

Scottish Ministers will have such powers for up to five years after exit day due to a sunset clause at subsection 7, though the powers can be extended for further five year periods (subsection 8). Any extension to these powers requires Scottish Ministers to bring forward regulations which are subject to the affirmative procedure in the Scottish Parliament.

The Policy Memorandum to the Bill outlines the purpose of the "Keeping pace with EU law" section, stating:

“ The Scottish Government considers that there are likely to be fields where its policy will be, at least immediately following UK withdrawal, voluntarily to maintain regulatory alignment with EU rules. This will mean choosing to keep pace with developments in a particular field of regulation after UK withdrawal, for example continuing to apply new and developing rules about food safety. Particularly where there is no other power to regulate in an area, a power to keep pace with post-withdrawal developments in EU law would help the Scottish Government maintain, as appropriate, continuity of law in certain areas extending after exit day. In many cases, existing legislation will not provide a sufficient range of regulatory powers, since it was designed in the expectation that section 2 of the ECA would provide the principal or only power needed to regulate in a field covered by EU law”

Scottish Parliament, 2018¹⁸

The Policy Memorandum provides one example of a policy area in which the Scottish Government considers it may be beneficial for Scottish devolved law to keep pace with EU law - the regulation of food.

“ An example of an area where the Scottish Government might use a keeping pace power is the regulation of food. A substantial amount of food regulation is made using section 2(2) of the ECA. This is done to implement, and to ensure enforcement and execution of, EU food law in Scotland. It includes a wide range of important risk-management policies such as provisions governing the pre-market authorisation of the safety of novel foods and food processes, the list of permitted additives allowed to be added to foods and animal feeding-stuff placed on the market in the EU, and the list of approved claims which can be made about the nutritional and health properties of products. ”

The Scottish Government argues that, in not keeping pace with EU law provision, Scottish Ministers would lose the ability to update food law in appropriate areas when the European Communities Act is repealed. In addition, where a reference to an EU instrument which automatically updates when that instrument is amended (an ambulatory reference), is at present used under section 2(2) and paragraph 1A of Schedule 2 of the ECA, the law would no longer automatically update (after the ECA has been repealed in the UK) when certain changes were made at EU level.

The Scottish Government argues in the Policy Memorandum that, at least in the short term, it will be beneficial to have a keeping pace provision to ensure continuity of law, and also that it:

“ will help maintain the current levels of public health protection afforded to Scottish consumers and also help maintain the regulatory equivalence likely to be necessary to allow Scottish companies to continue to trade with the EU member states. ”

Scottish Parliament, 2018¹⁸

Secondary legislation procedure

Secondary legislation, Scottish Statutory Instruments (SSIs), can be made by executive bodies or individuals, usually a Minister, via three different methods which actively involve the Parliament: negative, affirmative and super affirmative. The primary legislation under which the statutory instruments can be made will specify which procedure has to be used. As such, it is not ‘made’ by the Parliament in the sense that primary legislation is made. The Parliament, however, has an important role in scrutinising secondary legislation (as it would other actions or decisions of the Government) and, where applicable, approve or reject it.

The current types of secondary legislation, which can be made under Acts of the Scottish Parliament, and the parliamentary procedures which they have to follow, are set out in the UK Legislative and Regulatory Reform Act 2006²⁵ and the Scottish Interpretation and Legislative Reform (Scotland) Act 2010²⁶.

Some of the instruments made under Parts 3 and 4 of the Bill will be subject to the affirmative or super affirmative procedure.

Affirmative and super affirmative procedures

Affirmative instruments are subject to approval by resolution of the Parliament. A lead committee must report to the Parliament on the instrument no later than 40 days after the instrument has been laid before the Parliament. The lead committee will have decided whether to recommend to the Parliament that the instrument or draft instrument be approved.

The super affirmative procedure involves a consultation being held on a draft instrument, prior to it being laid for approval in the Parliament. It is required to be laid before the Parliament for 60 days, along with an Explanatory Document. After the 60 day period has elapsed, the instrument, which Ministers may have amended based on the consultation responses received, is laid in draft for approval by the Parliament.

The idea behind the super affirmative procedures is to allow the Parliament and stakeholders to comment on the content of the instrument as, once laid, affirmative instruments cannot be amended, they can only be approved or rejected by the Parliament.

To require the affirmative procedure, instruments made under the Bill will have to do one of the following:

- establish a Scottish public authority

- provide for any function of an EU entity or public authority in a member state to be exercisable instead by a Scottish public authority established by regulations under section 11(1), 12 or 13(1)
- abolish a function of an EU entity or public authority in a member state without providing for an equivalent function to be exercisable by any person
- provide for any function of an EU entity or public authority in a member state of making an instrument of a legislative character to be exercisable instead by a Scottish public authority
- impose, or otherwise relate to, a fee or charge in respect of a function exercisable by a public authority in the United Kingdom
- create, or widen the scope of, a criminal offence
- create or amend a power to legislate.

If an instrument intends to do any of the first three activities in the list above then Scottish Ministers must consult about their proposals such persons as they consider appropriate.

When consulting, Scottish Ministers must lay before the Scottish Parliament a document setting out their proposals, send a copy of the document to any person to be consulted and consider any representations about the proposals that are made to them. This is the super-affirmative procedure, which provides the Scottish Parliament with extra time to scrutinise the regulations - 60 days instead of the 40 days necessary for the affirmative procedure. The Scottish Government must report to the Scottish Parliament on its consultation at the same time as they lay the regulations.

All other instruments made under Parts 3 and 4 of the Bill will be subject to the negative procedure.

Negative procedure

Instruments subject to the negative procedure will be made on the date specified in the SSI, unless a resolution to annul it is agreed by the Parliament.

The process for annulment is normally triggered if a motion to annul the SSI is put before the lead committee. Any MSP can put down such a motion provided it is done within 40 days of the instrument being laid.

In the Bill's Policy Memorandum, the Scottish Government argues that the Bill provides for "a higher level of parliamentary scrutiny of the use of the main powers than the EUWB". This is because the Scottish Parliament assigns a lead committee to scrutinise the policy of both affirmative and negative instruments laid before it, whereas at Westminster the only Committee which has a remit to consider the policy implications of SIs is the House of Lords Secondary Legislation Scrutiny Committee²⁷, and this Committee does not scrutinise all laid SIs.

The main powers highlighted by the Scottish Government in its Policy Memorandum are those used to establish new public bodies in order to discharge existing EU law functions

or when it would abolish an existing EU law function without providing for an equivalent replacement function.

Section 17

Section 17 relates to the requirement for Scottish Ministers' consent to certain UK secondary legislation, which may be made, confirmed or approved by a UK Minister or any other person, other than a Scottish Minister.

This requirement would need to be used if:

- the instrument contains devolved provision
- the devolved provision modifies or otherwise affects the operation of retained (devolved) EU law, or anything that would be, on or after exit day, retained (devolved) EU law.

A devolved provision is defined, in subsection 4, as provision that would, if it were contained in an Act of the Scottish Parliament, be within the legislative competence of the Scottish Parliament.

Sections 19, 20 and 21

Section 19 deals with fees and charges which may be required for a Scottish public authority to carry out its functions as a result of any regulations made under Sections 11(1), 12 or 13(1) of this Bill. This corresponds to Paragraph 1 of Schedule 4 of the EUWB.

Section 20 corresponds to Paragraph 6 of Schedule 4 of the EUWB and would give Scottish Ministers powers to modify any secondary legislation relating to fees and other charges created before the UK withdrawal. The instruments would be made using powers in the European Communities Act 1972 or section 56 of the Finance Act 1973. The 1973 Act powers relate to fees or other charges connected to EU obligations.

As set out in Section 21, any instruments made under Part 4 will be subject to the affirmative procedure if they:

- impose a fee or charge in respect of a function exercisable by a Scottish public authority (unless it is modifying a fee or charge already payable in respect of that function)
- confer power on the Scottish public authority to make, by subordinate legislation, any provision that the Scottish Ministers may make under section 19 in relation to the relevant function.

All other regulations made under Part 4 will be subject to the negative procedure.

Scrutiny of regulations in urgent cases

Section 31 of the Bill deals with the circumstances in which Scottish Ministers believe that they would need to ignore the usual affirmative procedures. In urgent cases the Scottish Government proposes making such instruments before they have been laid before the Scottish Parliament. This resembles the provisional affirmative procedure which is already available in the Scottish Parliament.

Provisional affirmative

Instruments which deal with emergency situations – and which can be made and come into force straight away but which require subsequent approval by the Parliament to remain in force are known as provisional affirmative SSIs and are infrequently used.

In such circumstances, the instrument would contain a declaration by the Minister that, due to the urgency, it was necessary to make the instrument without it being subject to the affirmative procedure. There would be a sunset clause in such an instrument and any such urgent instrument would cease to have effect at the end of 28 days, beginning with the day on which they are made, unless, during that period, the instrument was approved by the Scottish Parliament.

The provisions in the Bill (subsection 6) also ensure that, even if the instrument ceases to have effect after 28 days, this would not affect the validity of anything done under the instrument during those 28 days, or prevent the Scottish Ministers making a new instrument.

Other Provisions

The other provisions in the Bill include:

- Part 5, which deals with publication of retained (devolved) direct EU legislation:
 - Section 23 corresponds to Paragraph 1 of Schedule 5 of the EUWB and requires the Queen's Printer for Scotland to publish certain retained (devolved) EU law and certain treaties.
- Part 5 also deals with rules of evidence:
 - Section 25 corresponds to Paragraph 2 of Schedule 5 of the EUWB and allows that judges in Scottish courts should continue, when necessary in court, to determine the meaning and effect of EU law in relation the interpretation of retained (devolved) EU law.
 - Section 26 corresponds to Paragraph 5 of Schedule 5 of the EUWB, it gives Scottish Ministers the power to make rules, after the UK withdrawal, for judicial notice and admissibility of Treaties, the Official Journal of the European Union and of decisions of the Court of Justice. This means that they would need to be proved in court.
- Part 6, which as well as including Section 31, discussed above, also includes:
 - Section 28, which gives Scottish Minsters the power to appoint the exit day, it would appear that any instrument made under this power would be subject to the negative procedure. There is no requirement on the face of the Bill to make exit day the same day as the day designated by the UK Government as exit day.
 - Section 37, which give Scottish Ministers the power, using the affirmative procedure, to make instruments to repeal the Act, or any provision of the Act, which results from the successful passing of the Bill.

Comparison with the European Union (Withdrawal) Bill

The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill largely mirrors the UK Government's EUWB. This is perhaps unsurprising given both Bills set out to achieve the same effect - providing continuity of law on the day the UK leaves the European Union.

The Scottish Government has also argued that adopting a similar approach to the EUWB means there should be consistency between the way Scots devolved and reserved law is dealt with.

There are, however, a number of differences in the two Bills. The differences between the two Bills were highlighted in the Policy Memorandum to the Scottish Government's Bill:

- The EUWB contains restrictions on Scottish Ministers ability to prepare devolved laws for UK Withdrawal, principally in respect of only UK Ministers being able to use the EUWB powers to amend devolved direct legislation. In contrast, Sections 11 and 12 of the Scottish Government's Bill give powers to Scottish Ministers to make the necessary legislative preparations for UK withdrawal, including amending retained (devolved) direct EU legislation.
- Whilst the EUWB excepts the Charter of Fundamental Rights from being incorporated into domestic law, Section 5 of the Scottish Government's Bill incorporates the Charter into Scots law as it applies to devolved matters.
- Whilst both the EUWB and the Scottish Government's Bill incorporate the general principles in EU law arising from the EU Treaties, the Scottish Government's Bill provides for the continued availability of the general principles of EU law for a wider range of purposes than under the EUWB. The Scottish Government states that "the general principles are an important aspect of EU law and should have the same status after exit day as they did before".
- Both the EUWB and the Scottish Government's Bill provide that Francovich will no longer apply after the UK has left the European Union. In the Scottish Bill, the right is retained for "a right of action that existed before exit day". This means that Francovich damages will continue to be available for failures arising before the UK's withdrawal from the EU, irrespective of whether the claim for damages began before exit day. In comparison, the proposals in the EUWB allow claims for Francovich damages only to continue if they are initiated before the UK has left the European Union.
- The EUWB provides broad powers to Ministers to make such provision "as the Minister considers appropriate". According to the Policy Memorandum, the Scottish Government considers that the powers should be "no broader than is required for the task". As a result, the Scottish Government's Bill includes a test of necessity before either of the main powers in connection with UK withdrawal from the EU can be used.
- The EUWB contains some limits on the use of the main powers. For example, the power to correct deficiencies cannot be used to impose or increase taxation, or to amend the Human Rights Act 1998. The Scottish Government's Bill protects the

Equality Act 2006 and the Equality Act 2010 from modification, as well as the Scotland Act 1998. This means that these Acts can only be amended by primary legislation.

- Section 13 of the Bill provides powers to Scottish Ministers to make regulations to ensure that, where appropriate, Scots law in devolved areas can continue to keep pace with EU law after the UK has left the European Union. There is currently no comparable clause in the EUWB.
- Unlike the provisions in the EUWB, the Scottish Government's Bill does not provide powers for Ministers to implement the UK's withdrawal agreement with the EU. This is because "the Scottish Government considers that it is inappropriate to take a power to implement an agreement in advance of knowing the terms of that agreement, and that the powers in the forthcoming Withdrawal Agreement and Implementation Bill ought to be the preferred mechanism for adapting Scotland's and the UK's laws to the agreement negotiated with the EU".
- The EUWB provides powers for UK Ministers to make secondary legislation that corrects deficiencies in retained EU law either in primary or secondary domestic legislation, or direct EU legislation. The EUWB also provides UK Ministers with the power to make regulations to implement the withdrawal agreement between the EU and the UK. In both cases, UK Ministers' powers extend to devolved competencies. This means that UK Ministers would have the power to make changes to law in devolved areas without any formal mechanism for accountability to the Scottish Parliament, or consent from the Scottish Ministers. Section 17 of the Scottish Government's Bill provides for a default procedural requirement under which UK Ministers must obtain the consent of the Scottish Ministers before they make, confirm or approve secondary legislation relating to devolved matters which modifies, or would modify, any retained (devolved) EU law.

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