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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



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Introduction

1. At its meeting on 18 December 2018, the Justice Committee considered a Notification from the Scottish Government on a UK Statutory Instrument (SI) relating to the European Union (Withdrawal) Act 2018. This report summarises the Justice Committee's consideration of:
 - The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018.
2. The Official Report for this session, which contains the full discussion of the instrument, is available on the Justice Committee webpage. ¹

Background

3. The European Union (Withdrawal) Act 2018 (the 2018 Act), passed by the UK Parliament, allows the UK and Scottish parliaments to begin considering regulations to convert non-domestic European Union (EU) law into UK law.
4. As part of the process by which the UK leaves the EU, consideration must be given as to whether current UK law needs to be amended to the UK's new status as a non-EU member. For example, there are currently many references in regulations to EU bodies and the EU itself that will no longer be applicable after the UK has left the EU.
5. Some of the necessary changes to the statute book will be done through Scottish Statutory Instruments (SSIs) in the usual way. However, a number will be done through Statutory Instruments (SIs) passed in the UK Parliament with the consent of the Scottish Parliament which itself is based on the recommendation of the Scottish Government (these are called SI notifications). Consent will be sought as these SIs will make changes to devolved powers and/or executive competences. Such changes should be broadly technical in nature. Protocols governing arrangements for both of these processes have been agreed to with the Scottish Government (see below).

Protocol agreement between the Scottish Government and the Scottish Parliament

6. In order to prepare devolved legislation for UK withdrawal from the EU, Scottish Government and Scottish Parliament officials developed a protocol governing UK Statutory Instruments. The protocol is intended to ensure the Scottish Parliament can scrutinise the Scottish Government's approach to instruments it considers are better dealt with by the UK Government.
7. In a letter ² to the Conveners of the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee, Michael Russell MSP, Cabinet Secretary Government Business and Constitutional Relations wrote that, "This [process] is not about the question of where devolved powers will be exercised after

EU withdrawal. Instead it is about the technical task of ensuring that important schemes and regulations can continue to operate despite withdrawal."

8. He continued, "Where the policy outcome being sought is consistent across administrations, then it could be appropriate and in Scotland's interests to agree a UK-wide approach to statutory instruments (for example, to avoid duplication of effort, or where only technical or minor amendments are required). Where a different way of dealing with EU withdrawal, or a different policy outcome, is required in Scotland, we will pursue our own statutory instruments in the Scottish Parliament."
9. Under terms of the protocol, Scottish Ministers will notify the Scottish Parliament of any proposal to consent to the UK Government using its powers in devolved areas. Lead committees are then be invited to scrutinise the proposal to consent, and report to Parliament with a recommendation as to whether consent should be given to the consideration of instrument in question taking place at the UK Parliament.

The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018

10. The SI Notification ³ for the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018 (the proposed Regulations), was laid before the Scottish Parliament on 29 November 2018. The UK Government published the proposed Regulations on 10 December 2018. ⁴
11. The proposed Regulations and are designed to address deficiencies in retained EU law relating to private international law applicable to contractual and non-contractual obligations so that the rules which determine the applicable law continue to operate effectively after the UK's exit from the EU.
12. The proposed Regulations are to be made using the powers in section 8 of the 2018 Act to address deficiencies in retained EU law arising from the withdrawal of the UK from the EU. The 2018 Act incorporates the EU Regulations on the Rome Convention into domestic UK law from the point the UK's leaves the EU.
13. The timing of this SI Notification allows for fewer than the agreed 28 days within which the Parliament can consider such Notifications. The Scottish Government stated that "late emerging drafting issues" ⁵ in relation to this SI were responsible for this delay. This is the fourth occasion since September 2018 that the Justice Committee has received a SI Notification with less than 28 days for parliamentary consideration, based on this justification.

Rome I and II

14. The UK is a party to the 1980 Rome Convention on the law applicable to contractual obligations between EU members states. ⁶ The Convention entered into force in the UK in 1991.
15. In 2008, Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (referred to as Rome I), and Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (referred to as Rome II). These entered into force in the UK on 31 December 2009. These Regulations set out the rules, applicable by EU Member States (except Denmark), for determining, where there is conflict, which law applies to respectively: contractual obligations; and non-contractual obligations.
16. This provides uniformity across the EU on which law applies where there is a cross-border element to a contractual obligation. For example, where the parties to a contractual obligation live in different member states and an alleged delict takes place in a third member state. The objective of the Rome I and II rules is to increase

legal certainty within the EU by ensuring that the same national law applies to cross-border cases across the EU.

17. In the UK, the operation of Rome I and Rome II is supported by provisions in various pieces of primary and secondary legislation, as set out in the SI Notification.⁷ The Notification indicated that, in the main, these rules are capable of continuing to be applied in the UK after it leaves the EU, as they do not depend on membership of the EU. The stated policy behind the proposal is to retain the status quo as far as possible with amendments limited to those required to make that work effectively in the context of the UK not being an EU Member State.
18. The proposed Regulations from the UK Government amend the retained EU law to correct provisions which are being retained but no longer work correctly in the context of the UK ceasing to be an EU Member State. They will also omit those provisions which relate to those aspects of the EU Regulations which are no longer relevant to the UK after it has left the EU.⁸

Views from officials and external bodies

19. The clerks approached other parliamentary officials to seek their views, if any, on the proposals. In addition, the notification has been placed on the Committee's website for public awareness.
20. Parliamentary officials were of the view that the proposal for this SI does not present any problems, as the rules on choice of law in the Rome I and II Regulations also apply to non-EU Member States and so would continue to apply to the UK after it leaves the EU.
21. The views of the Law Society of Scotland were also sought on the SI Notification, however the Society informed the Committee they has no comment to make in the Notification.⁹
22. Additionally, evidence to the Justice Committee in January 2018 from Prof Paul Beaumont of the University of Aberdeen, addressed the issue of Rome I and II regulation, after the UK leaves the EU-
 - ” The Rome I and II Regulations regulate the application of foreign law (i.e. a law other than the law of the forum) to cases heard in an EU court concerning contractual and non-contractual obligations respectively. Both Regulations have universal application so the courts in EU Member States will continue to apply Scots law when it is the law identified by the rules in those Regulations post-Brexit without any deal being required. The UK intends to continue to apply Rome I and II as part of UK law post-Brexit so for the foreseeable future nothing will change.¹⁰

Clarification on retrospective effect

23. The SI Notification from the Scottish Government makes reference to some retrospective effect¹¹ in relation to the operation of the Rome I regulations. However, the Scottish Government provided updated information stating that, after

further consideration, the Scottish Governments view is that there is no retrospective effect to these regulations.¹²

24. Given that the notification proposes to replicate the rules of the Rome Convention as far as possible in domestic legislation, and given that (unlike most other areas of EU law in this field) Member States will continue to apply the same rules to the UK after EU withdrawal, it appears that even if there were any retrospective effect, it would be minor and unavoidable in the circumstances. The Committee notes the clarification in relation to possible retrospective effect.

Justice Committee consideration

25. On 18 December 2018, the Committee considered its consent to the Scottish Government's proposal that the instrument be considered by the UK Parliament. Members were content with the proposal of the Scottish Government in the SI Notification.
26. Members noted the breach of the provision of allowing for 28 days for parliamentary consideration of the SI Notification, and Scottish Government's statement that this breach was as a result of "late emerging drafting issues" with the Notification. The Committee asked the clerk to write to the Scottish Government to seek further details on the specifics of the drafting issues, and why this caused a delay in the SI Notification.

Recommendation

27. The Committee is content for the Scottish Government to give its consent for the UK Ministers to lay a Statutory Instrument in the UK Parliament on the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018.

- 1 Justice Committee, Official Report of the 33rd Meeting 2018, Tuesday 18 December 2018: <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/99796.aspx>
- 2 Letter from the Cabinet Secretary for Government Business and Constitutional Relations to the Convener of the Convener of the Finance and Constitution Committee 11 Sept 2018: http://www.parliament.scot/S5_Delegated_Powers/20180911CabSec.pdf
- 3 SI Notification Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018: http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/Law_Applicable_to_Contractual_and_Non_Contractual_Obs_Regs_2018.pdf
- 4 Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018: <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-law-applicable-to-contractual-obligations-and-non-contractual-obligations-amendment-etc-eu-exit-regulations-2018>
- 5 SI Notification letter, page 2: http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/Law_Applicable_to_Contractual_and_Non_Contractual_Obs_Regs_2018.pdf
- 6 1980 Rome Convention on the law applicable to contractual obligations: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.C_.1998.027.01.0034.01.ENG
- 7 SI Notification (page 4): http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/Law_Applicable_to_Contractual_and_Non_Contractual_Obs_Regs_2018.pdf
- 8 1980 Rome Convention on the law applicable to contractual obligations: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.C_.1998.027.01.0034.01.ENG
- 9 Email from the Law Society of Scotland, 17 December 2018: http://www.parliament.scot/S5_JusticeCommittee/Inquiries/SI_Notification_-_Response_from_the_Law_Society_of_Scotland_20181217.pdf
- 10 Professor Paul Beaumont written submission 24 January 2018, page 3: http://www.parliament.scot/S5_JusticeCommittee/Inquiries/Brexit-Beaumont.pdf
- 11 Letter from the Cabinet Secretary for Justice, 29 November 2018: http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/Law_Applicable_to_Contractual_and_Non_Contractual_Obs_Regs_2018.pdf
- 12 Email from the Scottish Government on retrospective effect 5 December 2018: http://www.parliament.scot/S5_JusticeCommittee/Inquiries/Email_from_the_Scottish_Government_on_SI_Retrospective_effect_20181205.pdf

