



Law Society  
of Scotland

# The European Union (Withdrawal) Bill

## SECOND READING BRIEFING BY THE LAW SOCIETY OF SCOTLAND

January 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the European Union (Withdrawal) bill. The Sub-committee has the following comments to put forward for consideration at Second Reading in the House of Lords on 30 and 31 January 2018.

## General Comment

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The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. The UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and it has as much potential to affect people living in the EU in some ways which are known and understood and in other ways which are currently unpredictable. The impact of the change however will also have a breadth, depth and far reaching effect for the immediate future and for several years to come.

Accordingly the European Union (Withdrawal) Bill is perhaps the most constitutionally significant measure to come before Parliament for many years. The long title of the bill implies that the bill is relatively simple. It states that the bill is to *Repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU*. This is however no short or easily understood bill. In our view it is very complex, often difficult to interpret, and sometimes lacking in clarity. This bill will deconstruct the supranational legal order to which the UK has belonged since 1972 and reconstruct in the domestic legal order many aspects of that accumulated body of EU law. Parliament will have a difficult task in properly scrutinising the bill in the time allowed. The Government should be generous and permissive with suggestions to improve or clarify the bills clauses as it passes through Parliament.

We also recommend that the Government immediately commence a programme of consultation on the draft subordinate legislation which will be needed under the bill. The large number of orders and the relatively short period for scrutiny means that early consultation will be crucial in ensuring that the transposition of EU law into UK law can be as efficient as possible.

## Specific Comment

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### Clause 1 - Repeal of the European Communities Act 1972

Clause 1 of the bill repeals the European Communities Act (ECA) 1972 on exit day which is 29 March 2019 at 11 pm subject to the Withdrawal Agreement and Implementation bill announced on 13 November 2017. Under Article 50 of the TEU the Treaties cease to have effect upon the expiry of two years from the notification of withdrawal date unless the Withdrawal Agreement is completed or the period of negotiation is extended. If there is an extension of the Article 50 that will need to be reflected in this bill.

The ECA's repeal will remove the legal method for reception and implementation of the EU Treaties, the mechanisms for referring matters to the CJEU, the provisions for repeal and amendment of the law and a number of other specific provisions concerning the Common Agricultural Policy, EU Offences, Furnishing of Information to the EU and the adoption of pre-accession treaties including the European Coal and Steel Community Treaty, the European Economic Community Treaty, the Euratom Treaty and a number of other Agreements relating to institutions such as the Council and the Commission. The explanatory notes state this will have the effect of “removing the mechanism for the automatic flow of EU law into UK law... and removing the power to implement EU obligations (paragraph 19)”. The UK will therefore “cease to have obligations under EU law” going forward.

### Our Comment

1.1 This will achieve the Government's objective of repealing the ECA on exit day.

### Clause 2 - Saving for EU – derived domestic legislation

Clause 2 is the saving provision for EU-derived domestic legislation and provides that:

*(1) EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day*

Clause 2(2) defines EU derived domestic legislation as meaning any enactments, so far as:

*(a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,*

*(b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act...*”

Enactment is defined in clause 14(1) as meaning “*an enactment whenever passed or made*” and includes:

*(a) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament....”*

### Our Comment

2.1 This will achieve the Government's objective of retaining the EU-derived domestic legislation and maintaining its effect after the exit day, subject to the exceptions in clause 5 and Schedule 1. However

there are some issues about the meaning and effect of this provision.

2.2 The intention would appear to be to include any enactment which has effect in domestic law immediately before exit day (i.e. any pre exit enactment) but, in view of the reference in clause 2(2)(b) to any enactment “passed or made”, what happens about:

- i. any bill for an Act of the Scottish Parliament (ASP) which has been passed but not yet enacted (i.e. received the Royal Assent before exit day)? It is assumed that it is only intended to refer to enactments which are enacted or made but this provision appears to assume that Acts are enacted as soon as they are passed. This is the case with UK Acts but it is not the case with ASPs –see the comment at 5.2 below. It is therefore suggested that the reference to “passed” in clause 2(2)(b) needs clarification.
- ii. an enactment which has been enacted or made before that day but not yet commenced? In view of the fact that clause 2(1) refers to “*EU-derived legislation as it has effect in domestic law immediately before the exit day*”, it is assumed that it may only be intended to refer to enactments which have been commenced and taken effect but this should also be clarified; and,
- iii. an enactment which is in force before exit day but which is stated to apply after that day? Clause 2(1) suggests that it may only be intended to refer to an enactment as it is operative before exit day. However, in view of the fact that this is expressly spelt out in the definition of “direct EU legislation” in clause 3(3)(a) and not in clause 2, this should be clarified.

### Clause 3 - Incorporation of direct EU legislation

Clause 3 provides that “direct EU legislation” so far as “operative” immediately before exit day forms part of UK law on and after exit day.

#### Our Comment

3.1 This will achieve the Government’s objective of converting direct EU legislation into domestic law on and after exit day, subject to the exceptions in clause 5 and schedule 1. However it is recognised that some of this legislation will need to be amended in order to operate effectively using the powers in clause 7. There are also issues about the status of retained direct EU legislation which were not resolved during the bill’s passage in the House of Commons. In responding to the Clause 3 stand part debate, the Solicitor General Robert Buckland QC MP, stated in replying to the issue raised by Dominic Grieve QC MP:

*“Converted law will become domestic legislation. It will not automatically have the status of either primary or secondary legislation. Indeed, as has already been referenced, paragraph 19 of schedule 8 sets this out:*

*“For the purposes of the Human Rights Act 1998, any retained direct EU legislation is to be treated as primary legislation”.*

*“Where there are existing pre-exit powers to make subordinate legislation, which is capable of amending retained direct EU legislation such as converted regulations, the converted legislation is to be treated as secondary legislation for the purposes of scrutiny procedures under those pre-exit powers. In other words,*

*we might bring something down to this place and transpose it. In effect, that will be treated as secondary legislation—no change, really, because the House already had those powers with regard to scrutiny.*

*It follows, then, that where there are not pre-exit powers to make subordinate legislation, we will look case by case at the converted law and determine how it is to be treated. How are we to determine what is what?”*

If the Solicitor General meant that the mechanism for determining how converted law is to be treated is the sifting mechanism in Schedule 7 paragraphs 3 and 13 that may be sufficient regarding the method of scrutiny but it does not answer the question about the nature of the legislation.

#### **Clause 4 - Saving for rights etc. under section 2(1) of the ECA**

Clause 4 provides that any rights, powers, liabilities, obligations, restrictions, remedies and procedures which are recognised, available and enforced before exit day will continue on and after that day to be recognised, available and enforced in domestic law.

This is also subject to clause 5 and Schedule 1.

#### **Our Comment**

4.1 This will achieve the Government’s objective of ensuring that remaining EU rights and obligations which are not specifically dealt with in clauses 2 or 3 will continue on and after exit day to be recognised, available and enforced in domestic law.

4.2 Clause 4 is a general sweep up clause which ensures that any remaining right not covered by clauses 2 or 3 will continue to be recognised and available in domestic UK Law. The explanatory notes clarify that these include rights related to the four freedoms such as non-discrimination on the ground of nationality, citizenship rights, rights of movement and residence deriving from EU citizenship, Customs Union, free movement of workers, freedom of establishment and the freedom to provide services, free movement of capital, competition law, internal taxation, economic co-operation and equal pay and the European Investment Bank. Such directly effective rights will also include those arising under other treaties such as the EEA Agreement, Euratom and International Agreements made by the EU with third countries and multilateral agreements to which both the EU and the UK are a party (paragraph 94).

4.3 We question how this clause will apply to directly effective rights such as those relating to free movement of persons, goods, capital and services as expressed in the treaties. The explanatory notes state that it is “the right itself that is converted not the text of the article itself.” (paragraph 92). In our view it is very difficult to divorce the right from the text which creates it. Ministers should explain how this will actually work in practice.

4.4 We also question how effective the continued enforcement of these rights will be in view of paragraph 3 of Schedule 1 which provides:

- “3 (1) *There is no right of action in domestic law on or after exit day based on a failure to comply with any of general principles of EU law.*
- (2) *No court or tribunal or other public authority may, on or after exit day—*
- (a) disapply or quash any enactment or other rule of law, or*
- (b) quash any conduct or otherwise decide that it is unlawful,*
- because it is incompatible with any of the general principles of EU law.”*

Ministers should explain how the rights which are referred to in clause 4 relate to the general principles of EU law and, to the extent that they consist of, or fall within, those general principles, how it is envisaged that those rights will be available and able to be enforced in domestic law.

### **Clause 5 - Exceptions to savings and incorporation**

Clause 5 details two exceptions to the saving and incorporation provisions in clause 2 and 3. These are that:-

- (a) The principle of the supremacy of EU law will not apply to any enactment or rule of law passed or made on or after exit day but will apply to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.
- (b) The Charter of Fundamental Rights is not part of domestic law on or after exit day.

### **Our Comment**

#### **Principle of supremacy of EU law**

5.1 We are concerned about the approach taken in Clause 5(1) which states that: *The principle of the supremacy of EU Law does not apply to any enactment or rule of law passed or made on or after exit day.* What is the actual intended effect of this provision? Is it merely a declaratory sub-section or does it simply pave the way for the retention of the principle in Clause 5(2).

In our view there is a particular difficulty with the application of this principle to retained EU law because it is difficult to interpret to what law the principle in fact applies. Clause 5(2) states that *the principle of the supremacy of EU law continues to apply.....to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.* The relationship between the supremacy of EU law and retained EU law under the bill is not clear: as Professor Mark Elliott has identified, if “retained EU law” is domestic law, is it supposed to inherit the “supremacy” of the “EU law”<sup>1</sup>? Questions may also be

<sup>1</sup> <https://publiclawforeveryone.com/2017/08/14/the-devil-in-the-detail-twenty-questions-about-the-eu-withdrawal-bill/>

asked as to whether it applies to all retained EU law or only some retained EU law. How does this supremacy principle apply to EU derived domestic legislation under Clause 2(2) when that domestic legislation has not benefited from supremacy? Does retained EU law under Clauses 3 and 4 benefit from the supremacy of EU law as provided for in Clause 5(2)?

5.2 Clause 5(2) refers to “an enactment passed or made before exit day”. This appears to be intended to refer to enactments which are enacted or made before exit day. Paragraph 100 of the explanatory notes states that an Act is passed when it receives the Royal Assent. However this is not the case for ASPs. An ASP is passed by the Scottish Parliament if it is approved at the end of its final stage but then normally 4 weeks have to elapse before it can be submitted by the Presiding Officer for Royal Assent during which time the bill can be referred by the Advocate General, the Lord Advocate or the Attorney General to the Supreme Court and to the European Court. It is only enacted when it receives Royal Assent – see sections 32, 33, 34 and 36(1)(c) of the Scotland Act 1998. As worded it is therefore suggested that it should be clarified whether it is intended only to apply to ASPs which have been enacted before the exit day and not just passed before that day. This raises a similar point as in comment 2.2 above.

5.3 Clause 5(2) only refers to “an enactment... passed or made before exit day”. It is not necessary for the enactment to be in force or operative before that day. This is therefore different from the scope of EU derived domestic legislation in clause 2(1). Clause 2(1) provides that *EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day*. As clause 5(2) is meant to be an exception to the saving of the provisions in, inter alia, clause 2, should it not match the scope of the saving itself? Otherwise the effect of clause 5(2) would appear to be to apply the principle of the supremacy of EU law to enactments which do not fall within the scope of the saving for EU derived legislation.

### **Charter of Fundamental Rights**

5.4 Clause 5(4) provides that the Charter of Fundamental Rights is not part of domestic law on and after exit day. Paragraphs 103 and 104 of the explanatory notes argue that it is unnecessary to include it as part of retained EU law because the Charter merely codifies rights and principles already inherent in EU law and would therefore form part of that law when it becomes retained EU law. However even if this was the case (and this is arguable), it would then make no difference if the Charter did form part of the retained EU law. This does not, therefore, appear to be a sufficient reason for excluding the Charter from forming part of retained EU law in the same way as other pre exit EU law.

5.5 It makes sense for the Charter to form part of retained EU law because it only applies in areas to which EU law applies. It is therefore suggested that the Government should reconsider its decision not to include the Charter as part of retained EU law which would then form part of domestic law on and after exit day. It would at least be helpful to our domestic courts to rely upon its terms when determining the validity, meaning and effect of retained EU law.

5.6 Although some might argue for the Charter to form part of domestic law for all purposes and be quite separate from retained EU law, this might create complications with its relationship to the rights under the ECHR and the Human Rights Act 1998.

## General principles of EU law

5.7 Clause 5(5) provides that clause 5(4) does not affect the retention in domestic law of any EU fundamental rights or principles which exist irrespective of the Charter. These fundamental rights or principles are not defined nor identified.

We believe it would be helpful if the Government could identify what fundamental rights or principles it considers are retained in domestic law and whether, or to what extent, they are included in the definition of “retained general principles of EU law” in clause 6(7). We welcome the analysis of the sources of rights which was published on 5 December:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/664891/05122017\\_Charter\\_Analysis\\_FINAL\\_VERSION.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf)

This is a useful explanation of the relationship between the rights identified in the Charter and the sources of those rights. We welcome the commitment of the Government to “look again at the technical detail about how the bill deals with the general principles of EU law” and look forward to seeing the proposals which the Government intend to make.

## Defining “Fundamental rights and principles”

The fundamental rights and principles which exist “irrespective of the Charter” should be set out in the bill.

Clause 5 of the bill provides exceptions to the savings and incorporation which are set out in Clauses 2, 3 and 4. The first exception deals with the principle of supremacy of the EU Law and the second exception is the Charter of Fundamental Rights.

Clause 5(4) provides “The Charter of Fundamental Rights is not part of domestic law on or after exit day.” Clause 5(5) goes on to state “Sub section (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter...”

There is no definition of fundamental rights and principles in the interpretation provisions in clauses 6(7) or 14(1). It appears therefore that “fundamental rights or principles” comprise all those rights or principles which exist notwithstanding the Charter.

Clause 6(7) defines “retained general principles of EU Law” as meaning “the general principles of EU law, as they have effect in EU law immediately before exit day and so far as they –

*(a) relate to anything to which section 2, 3 or 4 applies, and*

*(b) are not excluded by section 5 or schedule 1*

*(as those principles are modified by or under this Act or by other domestic law from time to time).”*

Schedule 1 paragraph 5 provides an interpretation which reflects on both clause 5 and Schedule 1:

*“(1) references in section 5 and this Schedule to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in Francovich are to be read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after exit day in accordance with this Act”.*

Therefore there is no definition of fundamental rights and principles in the bill and the Explanatory Notes paragraphs 103 and 104 provide only some information to assist in the interpretation of clause 5.

## **EU Fundamental Principles which are provided for under EU Law.**

The following Fundamental Principles in EU law are generally recognised:

### **Proportionality**

Like the principle of subsidiarity, the principle of proportionality regulates the exercise of powers by the European Union (EU). It seeks to set actions taken by EU institutions within specified bounds. Under this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued.

The principle of proportionality is laid down in Article 5 of the Treaty on European Union. The criteria for applying it are set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

*Laboratoires Pharmaceutiques Bergaderm SA v Commission of the European Communities Case C-352/98 P. (2000)*

This case determined that for contractual or non-contractual damages claims under Articles 268 and 340 TFEU, there must be an infringement of rights, which is sufficiently serious, and causes loss.

*Heidi Hautala v. Council of the European Union Case T 14/98 [1999] ECR II-2463 (Court of First Instance)*

The applicant contended that the Council had illegitimately refused to grant access to documents that were not covered by the exemption on public interest. The Court held that the principle of proportionality required the Council to consider partial disclosure. Derogation from the right of access must be limited to what is appropriate and necessary.

### **Subsidiarity**

The principle of subsidiarity is defined in Article 5 of the Treaty on European Union. It aims to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of the possibilities available at national, regional or local level.

Specifically, it is the principle whereby the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level.

*Federal Republic of Germany v European Parliament and Council of the European Union*

Compliance with the principle of subsidiarity was one of the conditions covered by the requirement to state the reasons for Union acts, under Article 296 TFEU.

*Philip Morris Brands SARL and Others v Secretary of State for Health*

Judicial review of compliance with the principle of subsidiarity requires a determination of whether the Union legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at Union level.

### **Legal certainty**

The concept of legal certainty has been recognised as one of the general principles of European Union law by the European Court of Justice since the 1960s. It is an important general principle of international and public law, which predates European Union law. The principle enforces the requirement that the law must be certain, clear and precise. The legal implications of a particular law must be foreseeable, especially when applied to financial obligations. Laws adopted within the EU must have a proper legal basis. Legislation in member states must be worded so that it is clearly understandable by those who are subject to the law.

*Regina (Drax Power Ltd and another) v HM Treasury and another*

The claimant's request for judicial review was dismissed on the grounds that the exemption in question fell within the scope of European Union law, its removal was justified in the public interest and came within the appropriate margin of discretion.

*Bank Austria Creditanstalt AG v Commission of the European Communities Case T-198/03*

Secondary legislation which prohibits disclosure of information to the public must be regarded as covered by professional secrecy. Conversely, where the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by professional secrecy.

### **Equality before the law**

Article 19 TFEU confers power to the EU institutions in order to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Additionally, Article 20 of the EU Charter of Fundamental Rights states that 'everyone is equal before the law.' Further provisions and directives set out that equality must be ensured in specific areas, such as equal treatment of men and women in the workplace. Gender equality has been a key principle of the EU ever since the Treaty of Rome introduced the principle of equal pay for men and women in 1957. Using the legal basis provided by the Treaties, the Union has adopted thirteen directives on gender equality since the 1970s.

*Franz Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung*  
Case C-313/04

The case considered the validity of a Commission regulation with regards to the duty not to discriminate between producers or consumers within the Community.

*'Private Equity Insurance Group' SIA v Swedbank AS* Case C 156/15

The principle of equality before the law requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion.

It should be noted that most of these cases relate to actions against the EU institutions and the validity of secondary legislation.

### **Status of Fundamental Rights and Principles**

In our view the “fundamental rights and principles” will be part of “retained EU Law” following exit.

However as we have noted Clause 6(7) provides that “retained general principles of EU Law” means the general principles of EU Law as they have effect in the EU Law immediately before exit day and so far as they –

*(a) relate to anything to which Section 2, 3 or 4 applies and*

*(b) are not excluded by Section 5 or Schedule 1,*

*(as those principles are modified by or under this Act or by other domestic law from time to time)”.*

The intention of the bill appears to provide that fundamental rights and principles are part of retained EU Law however the principle of the supremacy of EU Law applies on or after exit date to the interpretation, disapplication or quashing of any “enactment or rule of law passed or made before exit day”. There is therefore an implicit assumption that a general principle of EU Law is a “rule of law” as provided in Clause 5(2).

### **Justiciability of Fundamental Rights and Principles**

Identifying the “fundamental rights and principles” which will be justiciable in domestic law post-exit is neither clear nor easy. Clause 5(5) states that removal of the Charter from domestic law does “not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter”. Therefore to ascertain which rights or principles will be justiciable one must identify what the fundamental rights and principles are which exist irrespective of the Charter. This involves reflection on the content of the Charter.

The EU Charter of Fundamental Rights is a single document that sets out all the fundamental rights protected in the EU. It draws on the ECHR, European Social Charter and other international human rights conventions. It is worded to take into account all previous ECJ case law, however it enjoys a higher degree of legitimacy, as it has been ratified by all Member States on behalf of their citizens. The Charter contains six categories including: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. It has been binding in the EU since 2009 under the Treaty of Lisbon.

It would be helpful if the Government could confirm what are the fundamental rights or principles it considers are retained in domestic law and whether, or to what extent, they are included in the definition of “retained general principles of EU law” in clause 6(7). Clause 6(7) defines the “retained general principles of EU law” as -

*the general principles of EU law, as they have effect in EU law immediately before exit day and so far as they –*

*(a) relate to anything to which section 2, 3 or 4 applies, and*

*(b) are not excluded by section 5 or Schedule 1,*

This is not a clear or helpful definition. The fundamental rights and principles which exist “irrespective of the Charter” should be set out in the bill.

5.8 However, to the extent that the fundamental rights or principles of EU law which are saved in clause 5(5) fall within the general principles of EU law, the saving appears to have limited effect because of paragraph 3 of Schedule 1 which provides:

*3 (1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.*

*(2) No court or tribunal or other public authority may, on or after exit day—*

*(a) disapply or quash any enactment or other rule of law, or*

*(b) quash any conduct or otherwise decide that it is unlawful,*

*because it is incompatible with any of the general principles of EU law.*

These general principles can, however, be used to interpret the meaning of any EU retained law.

We recommend that the Government should reconsider the removal of the Charter of Fundamental Rights and take stock of concerns which are held by many about the potential for erosion of human rights which may occur as the result of the removal of the Charter and the creation of difficulties for the UK Courts interpreting retained EU law in the absence of the Charter.

## Clause 6 - Interpretation of retained EU law

Clause 6(1) provides that a Court or Tribunal is not bound by European Court principles or decisions made on or after exit day and cannot refer a matter to the European Court on or after exit day.

Clause 6(2) provides that a Court or Tribunal whilst it need not have regard to anything done after exit day by the European Court may have regard to it if it considers it appropriate so to do.

Clause 6(3) provides that questions as to the validity, meaning or effect of retained EU law are to be decided (so far as it is unmodified on or after exit day) in accordance with any retained case law and any retained general principles of EU law whilst having regard to EU competencies and their limits immediately before the exit day.

Clause 6(4) qualifies clause 6(3) by providing that neither the Supreme Court nor the High Court of Justiciary sitting as the Court of Appeal (other than in relation to compatibility issues or devolution issues) is bound by any retained EU case law.

### Our Comment

6.1 Clause 6(1) does not currently reflect what was agreed between the EU/UK negotiators December 2017 joint agreement, which confirms that the CJEU will have jurisdiction over referrals from UK Courts and Tribunals regarding citizens' rights (paragraph 38).

*"...the Agreement establishes rights for citizens following on from those established in Union law during the UK's membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part".*

It is important that this agreement is reflected in the bill.

6.2 We agree with the provisions of clause 6(2) (in so far as it retains judicial discretion) and 6(4) and welcome the recognition by the Government that the High Court of Justiciary is the highest criminal court in Scotland from which there is no right of further appeal in criminal matters to the UK Supreme Court (although there can be applications to the UK Supreme Court concerning ECHR compatibility and devolution matters referred to in clause 6(4)(b)(i) or (ii)).

6.3 We believe however that Clause 6 could also be made clearer. Lord Neuberger, the former president of the UK Supreme Court, in an interview with the BBC, said that *"If [the Government] doesn't express clearly what the judges should do about decisions of the European Court of Justice after Brexit, or indeed any*

*other topic after Brexit, then the judges will simply have to do their best.*” It would be “*unfair*”, he said, “*to blame judges for making the law when Parliament has failed to do so*”. The judiciary would “*hope and expect Parliament to spell out how the judges would approach that sort of issue after Brexit, and to spell it out in a statute*”. Lord Neuberger seemed to focus on Clause 6(2), as this is the Clause on which the status of future ECJ case law depends.

We believe that it would provide better guidance for the courts were they to consider CJEU decisions as persuasive.

That is because ‘persuasive authority’ is a recognised aspect of the doctrine of *stare decisis* or precedent. Persuasive decisions are not technically binding but the courts can pay special attention to them. Legal sources that currently have persuasive authority include:

- (a) Decisions of the Judicial Committee of the Privy Council.
- (b) Decisions of higher level foreign courts especially in Commonwealth and other similar jurisdictions;
- (c) Decisions of the European Court of Human Rights which under the Human Rights Act 1998 must be taken into account by a UK court.

### **Clause 7 - Dealing with deficiencies arising from withdrawal**

Clause 7(1) empowers a Minister of the Crown, by regulations, to make such provision as the Minister thinks appropriate: *to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively or (b) any other deficiency in the retained EU law arising from the withdrawal of the UK from the EU.*

Clause 7(2) provides examples of those deficiencies such as that the retained provisions have no practical application after the UK has left the EU or that the EU law confers functions on EU entities which no longer have functions in relation to the UK or makes provision for reciprocal arrangements between any part of the UK or a public authority in the UK and the EU, an EU entity, a member state or a public in a member state or other arrangements which follow the same pattern and EU references which are no longer appropriate.

Clause 7(4) provides that regulations may make any provision that could be made by an Act of Parliament. This would enable the regulations to amend or repeal provisions in Acts of Parliament (and ASPs or devolved orders) or to sub-delegate powers, including the power to make regulations, to a public authority. Clause 7(5) further clarifies that the regulations may provide for functions of EU entities to be exercisable by a public authority in the UK and for the establishment of new public authorities in the UK.

These powers are, however, subject to the restrictions in Clause 7(6) which provides that the regulations cannot impose or increase taxation, make retrospective provision, create criminal offences, be made to implement the withdrawal agreement, or amend, repeal or revoke the Human Rights Act 1998 or the Northern Ireland Act 1998.

Clause 7(7) puts a time limit of two years after exit day on the making of regulations under this provision.

Part 1 of Schedule 7 contains provisions relating to the scrutiny of regulations made under clause 7.

### Our Comment

7.1 We recognise that it is necessary (a) to adapt retained EU law to enable it to work appropriately in the UK on and after exit day and (b) given the scale of the amendments required and the limited time in which to do it, to confer wide ranging powers, including Henry VIII powers to amend Primary Legislation by regulations on the UK Government and devolved Governments.

7.2 However, as the House of Lords Select Committee on the Constitution pointed out, in its Report on “the Great Repeal bill and Delegated Powers” (9th Report, Session 2016-17), the challenge is how to grant such:

*relatively wide delegated powers for the purpose of converting EU law into UK law, while ensuring that they cannot also be used simply to implement new policies desired by the Government in areas which were formerly within EU competence .... We consider that Parliament should address this challenge in two distinct ways. First, by limiting the scope of the delegated powers granted under the Great Repeal bill, and second, by putting in place processes to ensure that Parliament has on-going control over the exercise of those powers...*

7.3 We endorse this approach by commenting, firstly, upon the scope of the regulation making powers in clause 7 and, then upon the provisions for the scrutiny of those regulations in Part 1 of Schedule 7 below.

7.4 So far as the scope of the regulation making powers is concerned, the House of Lords Committee considered there should be an express provision that the powers should be used only “so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework”. The bill does not contain any such express provision and the powers conferred are not as restricted as the Committee suggested.

7.5 The powers conferred by clause 7 are limited to make provision: to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively or (b) any other deficiency in the retained EU law arising from the withdrawal of the UK from the EU but

- what constitutes a failure in the retained EU law to operate effectively is not clear and could be open to argument or subjective opinion (despite the examples of deficiencies in clause 7(2)) because the deficiencies in Clause 7 (2) are not exhaustive nor limited to deficiencies of the same kind.
- what provision is made “to prevent, remedy or mitigate” such deficiencies would be whatever the Minister considered appropriate which could be quite wide ranging.

The Government should consider limiting these powers by amending the bill in line with the suggestions by the House of Lords Select Committee, such as to doing only what is necessary to ensure that the retained EU law can operate in the domestic law.

7.6 Clause 7(6)(f) provides that the regulations made under clause 7 cannot amend or repeal the Northern Ireland Act 1998. Should this exception should also include a reference to the Scotland Act 1998 and the

Wales Act 2017?

### **Clause 8 - Complying with international obligations**

Ministers of the Crown can make regulations to prevent or remedy any breach of the UK's international obligations which occurs as a result of the UK's withdrawal from the EU.

Similar to clause 7, provisions under regulations arising from this section can make any provision that could be made by an Act of Parliament but the regulation making power cannot be used to make retrospective provision, create a criminal offence, implement the withdrawal agreement or amend, repeal or revoke the Human Rights Act 1998.

There is a similar limitation period of that which applies to regulations made under clause 7: two years from the exit date.

#### **Our Comment**

8.1 We have no comments upon the scope of clause 8 but comment upon the scrutiny provisions which apply to these regulations in paragraph 5 in Part 2 of Schedule 7 below. We also believe that the exercise of the order making power should be on the basis that the Minister believes the order is necessary as recommended by the House of Lords Constitution Committee.

### **Clause 9 - Implementing the withdrawal agreement**

Clause 9(1) empowers a Minister of the Crown, by regulations, to make such provision as the Minister considers appropriate for the purpose of implementing the prospective withdrawal agreement and Implementation if the Minister considers that such provision should be in force on or before the exit day. This Clause was amended during the Committee stage in the House of Commons by making this Ministerial order making power subject to the enactment of a statute approving the final terms of withdrawal.

The regulations may make any provision which could be made by an Act of Parliament including the amendment of the European Union (Withdrawal) Act and presumably this will include the prospective withdrawal agreement and implementation Act.

Regulations under clause 9 are subject to similar limitations as those made under clauses 7 or 8.

Clause 9(4) provides that regulations under clause 9 cannot be made after exit day.

#### **Our Comment**

9.1 It is noted that this power to implement the withdrawal agreement by regulations is restricted to where (a) the regulations are made on or before exit day and (b) the Minister considers that they should be in force on or before exit day. We agree with this restriction. We also note that the exercise of the power is subject to the enactment of the proposed Withdrawal Agreement and Implementation bill.

9.2 We comment upon the scrutiny provisions which apply to these regulations in paragraph 6 in Part 2 of Schedule 7 below.

### **Clause 10 - Corresponding powers involving devolved authorities**

We have no comment to make.

### **Clause 11 - Retaining EU restrictions in devolution legislation etc.**

Clause 11 amends the legislative competence provisions in section 29 of the Scotland Act 1998 by deleting the provision of section 29(2)(d) which provides that the Scottish Parliament has no competence to legislate incompatibly with EU law by deleting “with EU law” and substituting “a breach of the restriction in subsection (4A)”. Subsection (4A) is provided for in clause 11(1) (b) which inserts the following into section 29 of the Scotland Act 1998:

*(4A) Subject to subsections 4(B) and 4(C) an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law.*

*(4B) Subsection (4A) does not apply so far as the modification would, immediately before exit day, have been within the legislative competence of the Scottish Parliament.*

*(4C) Subsection (4A) also does not apply so far as Her Majesty may by Order in Council provide.*

Similar provisions are made for the National Assembly for Wales (clause 11(2)) and the Northern Assembly (clause 11(3)).

Clause 11 also imports parts 1 and 2 of schedule 3 making corresponding provisions in respect of executive competence and other amendments to devolution legislation. The explanatory notes state that “The amendments will replace the former requirement with the provision which means that it is outside the competence of the Scottish Parliament to modify retained law in a way which would not have been compatible with EU law immediately before exit. This legislative competence test is subject to any exceptions which may be prescribed by an order in Council (paragraph 137)”.

### **Our Comment**

11.1 These ‘exceptions’ will introduce conferred powers into the structure of devolution in Scotland. This risks adding additional complexity in ascertaining what exactly the law in Scotland is.

11.2 At present, section 29(2)(b) of the Scotland Act 1998 provides that a provision in an Act of Scottish Parliament (ASP) is “not law” if it is incompatible with EU law. Clause 11 does not simply replace the reference to EU law with a reference to retained EU law so that the Scottish Parliament would be required to legislate in conformity with retained EU law. What it does is to remove the current constraint on the Parliament’s competence to legislate in conformity with EU law and to prohibit the Scottish Parliament from modifying or conferring power by delegated legislation to modify retained EU law.

11.3 In our view, both repealing the requirement to legislate compatibly with EU law and legislating to prevent the Scottish Parliament from modifying that law are significant changes to the competence of the Parliament. Such changes in our view engage the legislative consent (or Sewel) convention.

11.4 It is not clear what the ASPs are to which this new provision will apply. It appears that it is not intended to be retrospective and that it will only apply to post exit ASPs but what is a post exit ASP? Arguably it is an ASP which is enacted on and after exit day which, subject to Parliamentary approval, will be 29 March 2019. But this would mean that the bill for such an ASP would require to comply with this restriction. This would apply even if it had been introduced months before exit day, and before the EU (Withdrawal) bill has been enacted, and even if it may have been passed by the Scottish Parliament before exit day. There is an argument that such legislation might be regarded as having retrospective effect. It should be made clear in the bill which ASPs are affected by clause 11.

11.5 Schedule 8 paragraph 29 provides that the amendments made by section 11 and by Part 1 of Schedule 3 (which apply the same legislation to Scottish Ministers) do not affect the validity of:

- (a) any provision of an Act of the Scottish Parliament made and in force before exit day or;
- (b) any subordinate legislation made, confirmed or approved and in force before exit day.

But paragraph 3 of Schedule 1 would not appear to allow any challenge to be made on and after exit day, or allow any court or tribunal or other public authority to quash any ASP, on the grounds that it does not comply with the general principles of EU law. Schedule 8 paragraph 29(2) provides that the validity of anything falling within paragraph 1(a) or (b) is to be decided by reference to the law before exit day.

The effect of the proposed section 29(4A) is to remove from the Scottish Parliament's legislative competence any matter in retained EU law even although that matter, as such, would not have fallen within a reserved matter under schedule 5 of the Scotland Act 1998 e.g. agriculture, fisheries, environmental protection and the other areas contained in the list of 111 policy areas where EU law intersects with devolution referred to later in this paper.

11.6 There are a number of alternative options in addition to the one in the bill for dealing with the complexities of retained EU law and the competence of the devolved jurisdictions. This is an area of political debate and we offer these options for consideration without endorsing any particular one:

- (a) Adopt the provisions in the bill on a transitional basis only and subject to a specific cut-off date. At the expiry of the transitional period, powers in devolved areas would revert to the devolved legislatures, unless specific alternatives had been put in place. This would allow the UK Government the opportunity to work out what has to be done in light of the UK's future relationship with the EU, but acknowledge that the devolved legislatures will obtain the additional powers within a defined timescale.
- (b) Repeal the EU law constraint leaving EU competences to fall as determined by schedule 5, and any new common frameworks to be established by agreement between the UK Government and the devolved administrations.

- (c) Replace the cross-cutting EU constraint with new cross-cutting constraints, for example to protect the UK single market and/or to comply with international obligations. These might be more or less extensive than the EU law constraint in practice, but would have the benefit of (a) an underpinning principle and (b) catering for unforeseen cases
- (d) Repeal the EU law constraint and amend schedule 5 to re-reserve specific competences to the UK level to enable UK Government to establish common frameworks.

## The Sewel Convention

11.7 The Sewel convention was named after Lord Sewel, then a Scottish Office Minister of State in response to a proposed amendment to the Scotland bill 1998 moved by Lord Mackay of Drumadoon - a former Lord Advocate.

Lord Sewel in responding to debate said

*“we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament”* (Lords Hansard 21 July 1998, vol 592 col 791).

Devolution Guidance Note 10 (DGN10) notes that the House of Commons Procedure Committee has indicated its support for the convention.

DGN10 provides that where a bill

“any submission to the legislative Programme Committee for the inclusion of a Bill in a future programme should state clearly that the proposed Bill:

“contains provisions applying to Scotland and which are for devolved purposes, or which after the legislative competence of the Parliament or the executive competence of the Scottish Ministers”.

that bill is affected by the convention and thereafter requires the consent of the Scottish Parliament”. Although a bill may be directed at reserved matters it could contain some provisions in this category.

The convention has been placed on a statutory footing in the Scotland Act 1998 section 28(8). Under section 2 of the Scotland Act 2016 which amended the 1998 Act however only the exact phraseology used by Lord Sewel has been stated in the bill rather than the interpretation as provided by DGN10.

Furthermore as we know from *Miller and Dos Santos v Secretary of State for Exiting the European Union [2017] UKSC 5*, the convention is not considered to be justiciable but is instead a political matter.

We consider that the Bill provisions will alter the competence of the Scottish Parliament and would therefore trigger the Sewel convention. We also note that, although the Scottish Government considers that the Bill would normally require the consent of the Scottish Parliament, they do not intend to lodge a legislative consent motion.

Whilst there may be other views, in our view the Bill's provisions will also increase the complexity and uncertainty as to what is within the competence of the Scottish Parliament because it will be necessary to determine, in each case, what is meant by EU retained law and what matters would have been within that competence before the exit day. As we have explained above it is uncertain what the bills and the ASPs are to which new provisions will apply and whether the provisions might be regarded as retrospective; and it is uncertain whether, or to what extent, any ASP which infringes the provisions in the Bill be invalid.

Under the Sewel Convention, the UK Parliament will not normally pass bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a legislative consent motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee, in the case of the European Union (Withdrawal) bill by the Finance and Constitution Committee on the basis of a memorandum. The motion must normally be decided on before the bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced. On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

The absence of the consent of the Scottish Parliament does not prevent the UK Parliament from passing the Bill. The consequences of not obtaining consent would be political in nature rather than legal.

### **Powers of the Scottish Parliament**

11.8 A question arises as to whether EU law which is repatriated at the point of the UK's leaving the EU falls into the reserved, devolved, protected or shared competence and what mechanisms if any should be applied to properly transition EU law in devolved areas to the respective legislatures and executive arrangements throughout the UK.

The Scottish Government's White Paper *Scotland's Place in Europe* identified the following areas currently under EU competence which are not specifically reserved under the Scotland Act 1998.

- (a) Agriculture, food and drink, in areas covered by the EU Common Agricultural Policy and EU law on food and drink, animal health and welfare, plant health, seeds, potatoes, pesticides and genetically modified organisms.
- (b) Fisheries, aquaculture and the marine environment, which are subject to the EU Common Fisheries Policy and marine environment and planning laws
- (c) Environmental protection, including laws on pollution, waste and recycling.
- (d) Civil law.
- (e) Criminal law and law enforcement.
- (f) Health, where for example protections afforded under the European Health Insurance Card scheme are at risk.

- (g) Higher education and research, where Scotland has benefited from EU mechanisms for collaboration and funding.

In a letter dated 17 September 2017 from Michael Russell MSP, the Scottish Government Minister for UK negotiations on Scotland's place in Europe to Bruce Crawford MSP, Convener provided a list of 111 powers returning from the EU that intersect with the devolution settlement in Scotland.

Some of these powers (where there is for example some aspect of reciprocity) may be dealt with in the context of the withdrawal agreement between the UK and the EU such as civil law and criminal law enforcement, but others will be effectively repatriated at the point of leaving the EU. The Prime Minister has stressed that "no decisions currently taken by the devolved administrations will be removed from them", but that devolution of repatriated powers would need to be managed in such a way as to ensure no new barriers within the UK are created.

The UK Government's Brexit White Paper indicates that "As the powers to make these rules are repatriated to the UK from the EU we have the opportunity to determine the level best placed to make new laws and policies on these issues..."

What powers are devolved as a result of leaving the EU is a matter of political negotiation between the UK Government and the devolved administrations taking into account legal and stakeholder views.

We note the JMC(EN) communique <https://beta.gov.scot/publications/joint-ministerial-committee-communique-october-2017/> which indicated that the UK and Scottish Governments had reached agreement regarding the creation of frameworks for the discussion of a number of areas at the intersection of EU and devolved powers. This type of political agreement enhanced by the amendment of clause 11 to reflect the agreement and by the views of stakeholders could lead to an approach to the withdrawal which achieves certainty in the law and an effective legal structure for all the jurisdictions in the UK.

There are a number of past and current arrangements which could advise the UK Government and the devolved administrations on how to achieve the distribution of powers in the most efficient and effective way. For example:

- (a) The Standing Advisory Committee on Industrial Property which brought together industry, technical advisers and interested parties to advise Government on industrial property issues.
- (b) The Farm Animal Genetic Resources Committee which gives advice to the government on the conservation and sustainable use of farm animal genetic resources.

In coming to a decision concerning the distribution of powers the frameworks should reflect the principles of devolution and of subsidiarity, proportionality, legality, transparency and clarity. It will be necessary for the agreement between the Governments to take place within a reasonable timescale (amendments which the Society promoted during Committee Stages in the House of Commons suggested a two year period) and for there to be good cooperation between the UK Government and the Devolved Administrations and broad consultation with stakeholders. We suggest the agreement be formalised in a Memorandum of Understanding between the UK Government and the Devolved Administrations.

We take note of the interim report on the European Union (Withdrawal) Bill LCM published by the Scottish Parliament Finance and Constitution Committee on 9 January 2018 SP Paper 255. This report details a number of issues concerning legislative consent for the bill and concludes that the Committee is not in a position to recommend legislative consent on the bill as currently drafted.

The method chosen in the Bill has been the focus for political contentions between the UK and Scottish Governments. We have indicated before that withdrawal from the EU should be completed on a Whole of Governance basis with the UK Government and the devolved administrations acting in concert to ensure that the legislative structure post withdrawal is effective and functional.

This is essentially a political issue however for Scotland, however there are particular issues about our legal system and constitutional arrangements, such as legislative competency and how EU laws are dealt with once they are repatriated.

The discussions need to be carried out to achieve certainty and clarity in the law and should be subject to proper parliamentary accountability in each legislature in the UK

#### **Clause 12 - Financial provision**

We have no comment to make.

#### **Clause 13 - Publication and rules of evidence**

We agree with the terms of Schedule 5, Paragraph 1 that the Queen's Printer must make arrangements for the publication of each relevant instrument that has been published before exit day by an EU entity and a relevant international agreement and the decisions of the European Court or any other document published by European entity.

In our response to the White Paper Legislating for the United Kingdom's withdrawal from the European Union we had recommended that once the process of identifying EU derived UK law is complete that body of law should be collected in an easily identifiable and accessible collection. We believe that Schedule 5 Paragraph 1 is a significant step forward in this direction and will be of significant assistance to those to whom this body of law will apply and to their advisers.

In connection with Schedule 5, Part 2, containing the Rules of Evidence, we agree with paragraph 3 that it is important that where it is necessary in legal proceedings to decide a question as to the meaning or effect in EU law of any of the EU treaties or any other treaty relating to the EU, or the validity, meaning or effect in EU law of any EU instrument, that question will be treated as a question of law rather than as a question of fact. This is a sensible provision which will save time and money and the expenses of clients in litigation concerning the EU or the validity or meaning of EU instruments.

We question whether it is necessary to simply empower Ministers of the Crown by regulations to make provision enabling or requiring judicial knowledge to be taken of the relevant matter as stated in Paragraph 4 of Schedule 5, it would appear to be unnecessary to make this provision which could easily be made in the Statute itself.

### **Clause 14 - Interpretation**

We have no comment to make.

### **Clause 15 – Index of defined expressions**

We have no comment to make.

### **Clause 16 - Regulation**

We have no comment to make.

### **Clause 17 - Consequential and transitional provisions**

#### **Our comment**

17.1 The powers given to Ministers under clause 17(1) to make “such provision as the Minister considers appropriate in consequence of this Act” are very wide and apply to any legislation passed before the EU (Withdrawal) bill is passed. This clause requires amendment to restrain such sweeping powers.

It should be noted that the sifting arrangements in Schedule 7 do not apply to orders made under Clause 17 but see Schedule 7 paragraph 18 and Schedule 8 Part 1.

17.2 The same comments apply to parts 3 and 4 of Schedule 8.

### **Clause 18 - Extent**

We have no comment to make.

### **Clause 19 - Commencement and short title**

We have no comment to make.

### **Schedule 1 - Further provision about exception to saving and incorporation**

Schedule 1, paragraph 1(3) provides that Regulations may provide for a challenge which would otherwise have been against an EU institution to be against a public authority in the UK. We believe that provision for such challenges should, for clarity’s sake be on the face of the bill.

Schedule 1, paragraph 3(1) would not allow any challenge to be made on and after exit day, or allow any court to quash, any enactment or rule of law on the grounds that it does not comply with the general principles of EU law. In view of our comments upon the effect of this provision in paragraphs above, it would be helpful if the Government could explain and clarify:

i. the reasons for this provision;

ii. whether this provision is intended to apply to any pre-exit enactment and, if so, whether this provision would prevent any challenge being made to any pre-exit Act of the Scottish Parliament on the grounds that it is outwith the legislative competence of the Scottish Parliament because it is incompatible with those general principles but not on the grounds that it is incompatible with any other pre-exit EU law.

## **Schedule 2 - Corresponding powers involving devolved authorities**

Parts 1, 2 and 3 of Schedule 2 confers upon a devolved authority similar powers to make regulations as are conferred upon a Minister of the Crown by clauses 7, 8 and 9.

Schedule 2 applies to all the devolved jurisdictions but for the purposes of this Briefing, we will concentrate upon the position under Part 1 of Schedule 2 in Scotland though similar comments apply in relation to the other Parts.

### **Our Comment**

Schedule 2 Paragraph 1(1) confers upon Scottish Ministers powers to make regulations to prevent, remedy or mitigate deficiencies in retained EU law and paragraph 1(2) confers those powers upon Scottish Ministers acting jointly with a Minister of the Crown. Paragraph 7(1) specifies certain circumstances where there is a requirement for the joint exercise of these powers, but it is not clear what are the other circumstances in which Scottish Ministers have to make the regulations jointly with a Minister of the Crown. If the regulations have to be made jointly only when the regulations would otherwise be outside devolved competence, it is suggested that this should be expressly stated. Otherwise the position is not clear.

Schedule 2 Paragraph 1(3) applies certain provisions in clause 7, including clause 7(4) which would empower Scottish Ministers to make any provision which could be made by an Act of Parliament. However, this is subject to paragraph 1(4).

Schedule 2 Paragraph 1(4)(b) provides that regulations made by Scottish Ministers cannot confer a power to legislate. There is no such provision in clause 7. No explanation is given or known as to why there is this difference and it is suggested that it should be omitted.

Schedule 2 Paragraph 2(2) requires any regulations made by devolved authority to be within “devolved competence” as that expression is defined in paragraphs 9 to 12. But there is already a definition of “devolved competence” in s. 127(1) of the Scotland Act where it is provided that, when used in connection with the exercise of functions, it is to be construed in accordance with s. 54 of the Scotland Act. It is suggested that it is confusing to give this expression a different meaning in this context in paragraphs 9 to 12 of this Schedule; and it is not understood why the definition of devolved competence in paragraphs 19 to 22 is different from that already in the Scotland Act and, in particular, why it provides that the requirement to comply with EU law or not to modify retained EU law should be ignored. We also note similar provisions at paragraphs 18 and 22.

Schedule 2 paragraph 3 excludes devolved authorities from modifying any retained EU law. Similar provisions are contained in paragraphs 15(i) and 23 (i). It would be helpful for Ministers to explain the need for these provisions.

### **Schedule 3 - Further amendments of devolution legislation**

Part 1 of Schedule 3 makes amendments to the devolution legislation relating to executive competence as clause 11 does in relation to legislative competence. Similar comments apply to these provisions as are made in relation to clause 11 above.

Part 2 makes a number of miscellaneous amendments to the devolution legislation.

### **Schedule 4 - Powers in connection with fees and charges**

The power to change fees appears to be very wide. At the very least the exercise of these powers should be subject to prior consultation.

### **Schedule 5 - Publication and rules of evidence**

We have no comment to make.

### **Schedule 6 - Instruments which are exempt EU instruments**

We have no comment to make.

### **Schedule 7- Regulations**

Schedule 7 makes provision for the scrutiny by Parliament and the devolved legislatures of regulations made under the Act and other general provisions about such regulations.

Part 1 contains provisions relating to the scrutiny of the regulation making powers to remedy deficiencies.

Paragraph 1(1) provides that regulations by a Minister of the Crown under clause 7 which contain provisions falling within paragraph 1(2) are to be subject to draft affirmative resolution procedure and other regulations are subject to negative procedure in the UK Parliament. Paragraph 1(4) similar provision is made for regulations made by Scottish Ministers under Part 1 of Schedule 2: only those containing provisions falling within paragraph 1(2) are subject to affirmative procedure while the rest are subject to negative procedure in the Scottish Parliament.

Part 2 contains provisions about scrutiny of other powers under the bill.

Schedule 7 was amended during its House of Commons passage to provide for the creation of a Committee to sift regulations involving a Minister of the Crown.

### **Our Comment**

In its Report on *The Great Repeal bill and Delegated Powers* (9<sup>th</sup> Report, Session 2016-17), the House of Lords Select Committee on the Constitution made various recommendations about the content of the Explanatory Memorandum which accompanies each SI amending the retained EU law. For example, they recommended that the Minister making the regulations should sign a declaration stating that “the

instrument does no more than necessary to ensure that the relevant aspect of EU law will continue to make sense in the UK following the UK's exit from the EU, or that it does no more than necessary to implement the [withdrawal agreement]" and that the Explanatory Memorandum should set out clearly what the pre-exit EU did, what effect the amendments will have on the retained EU law on and after exit day and why the amendments were considered necessary.

Accordingly we believe that this schedule needs amendment.

We note that some of the House of Commons Procedure Committee's recommendations relating to the establishment of the Sifting Committee have, following the Committee's Report *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report* (HC386) been given effect to in the bill by amendments to Schedule 7 paragraphs 3 and 13. However, these amendments (welcome though they are) do not implement in full the recommendations of either the Procedure Committee or of the Constitution Committee.

In particular the Constitution Committee considered that an instrument which "amends EU law in a manner that determines matters of significant interest or principle should undergo a strengthened scrutiny procedure" and that there should be an opportunity for the SI to be revised by the Minister in the light of the parliamentary debate.

The Procedure Committee also highlighted the need for a route for stakeholders to express to the Sift Committee their views on the political importance and/or drafting of the instrument and that there should be provision for the Committee to challenge the Government on the content or the drafting of an instrument and where necessary to recommend amendments.

We hope that the Government will respond positively to these recommendations during the passage of the bill.

The Procedure Committee made no recommendations regarding the House of Lords, given that it has its own structures for consideration of delegated legislation, but we echo the view that whatever structures are created by the two Houses should work constructively together.

The scrutiny of subordinate legislation under the bill needs to be improved so that MPs and Peers can adequately review the orders before they become law.

### **Schedule 8 - Consequential, transitional, transitory and saving provisions**

See our comments on clause 17.

### **Schedule 9 - Additional repeals**

We have no comment to make.



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