

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

Amendment to be moved at Stage 2

Section 2, page 2, line 10

After <passed> insert <and
Commenced>

Effect

This is a probing amendment to ascertain the precise meaning of the word “passed” as it is used in Section 2.

Reason

Section 27 defines “enactment” as meaning an “enactment whenever passed or made and includes...

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

The definition of devolved EU-derived domestic legislation in Section 2 appears to include any enactment which has effect in scots law immediately before exit day (i.e. any pre exit enactment) but, in view of the reference in Section 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. It is therefore suggested that the reference to “passed” in Section 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 Section 2(1) refers to “*EU-derived legislation as it has effect in Scots 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? Section 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 “devolved direct EU legislation” in Section 3(3)(a) and not in Section 2, this should be clarified.

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 28, 32, 33, 34 and 36(1)(c) of the Scotland Act 1998. The Scotland Act 1998 S 28(3) details that “a bill receives Royal Assent at the beginning of the day on which Letters Patent under the Scottish seal signed with Her Majesty’s own hand signing Her Assent are recorded in the Register of the Great Seal”. 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.

We note that the definition of “enactment” in the bill is distinct from that in the Schedule to the Interpretation and Legislative Reform (Scotland) Act 2010:

“enactment” means any of the following, whenever passed or made—

- (a) an Act of Parliament,
- (b) an Act of the Scottish Parliament,
- (c) an instrument made under an Act of Parliament,
- (d) a Scottish instrument,
- (e) a provision of any such Act or instrument

Perhaps the Government could consider whether this definition would be better than that currently in the bill.

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Amendment to be moved at Stage 2

Section 2, page 2, line 15

Add at end –

<(3) for the purposes of this Section, any EU derived domestic legislation is devolved operative immediately before exit day if –

(a) in the case of anything which comes into force at a particular time and is stated to apply from a later time it is in force and it applies immediately before exit day,

(b) in any other case, it has been commenced and is in force immediately before exit day.>

Effect

This amendment is designed to probe the meaning of Clause 2(1) and is consequential on the preceding amendment – see point iii.

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

Amendment to be moved at Stage 2

Section 4, page 3, line 24

After <continue> insert <subject to Section 7.>

Effect

This amendment clarifies the meaning of Section 4(1).

Reason

We question how effective the continued enforcement of the rights referred to in Section 4 (1) will be in view of Section 7 which provides:

“3 (1) There is no right Section 7 in Scots law on or after exit day based on a failure to comply with any of general principles of EU law.

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Amendment to be moved at Stage 2

Section 6, page 4, line 37

Leave out Subsection (1) and insert -

<(1) An enactment or rule of law passed or made on or after exit day will not be subject to the principle of the supremacy of EU law>

Effect

Clause 5 (1) states “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”. This is unclear in its meaning and the amendment is designed to simplify Section 6 (1).

Reason

We are concerned about the approach taken in Section 6 (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 devolved EU law because it is difficult to interpret to what law the principle in fact applies. Section (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, can it inherit the “supremacy” of EU law?”. Questions may also be 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 Section 2(2) when that domestic legislation has not benefited from supremacy? Does retained EU law under Sections 3 and 4 benefit from the supremacy of EU law as provided for in Section 6(2)?

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Amendment to be moved at Stage 2

Section 10, page 6, line 7

Leave out Subsection (2) and insert –

<(2) A court or tribunal may regard the decisions of the European Court made on or after exit day to be persuasive.>

Effect

This amendment enables UK Courts and Tribunals to consider the decisions of the European Court to be persuasive.

Reason

We believe that Section 10 should be made clearer. Lord Neuberger, the former president of the UK Supreme Court, in an interview with the BBC, said when talking about the analogous clause in the European Union (Withdrawal) bill 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), of that bill as this is the clause on which the status of future ECJ case law depends.

Clause 6(2) leaves much to judicial discretion. Section 10 (2) states: "*A court or tribunal exercising devolved jurisdiction may have regard to anything done on or after exit day by the European Court, another EU entity or the EU.*"

Whilst we approve of the judges having wide discretion, we believe that it would provide better guidance for the courts were they to be allowed 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.

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

Amendment to be moved at Stage 2

Section 11, page 7, line 33

Leave out <appropriate> and insert
<necessary.>

Effect

This amendment ensures that Ministers can only bring forward regulations under Clause 7 when it is necessary to do so.

Reason

We recognise that it is necessary (a) to adapt retained EU law to enable it to work appropriately in Scotland 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 powers to amend Acts and ASPs, on Scottish Ministers to do so by regulations.

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...

We endorse this approach which applies as much to the bill as it does to the European Union (Withdrawal) bill.

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.

The powers conferred by Section 11 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 Section 11 (2)) because the deficiencies in Section 11 (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.

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

Amendment to be moved at Stage 2

Section 12, page 9, line 40

Leave out <appropriate> and insert
<necessary>

Effect

See our reasons for Section 11.

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

Amendment to be moved at Stage 2

Section 13, page 12, line 17

Leave out subsection (8)

Effect

This amendment deletes subsection (8) and ensures that Scottish Ministers cannot extend the sunset provision for section 13 by regulations.

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

Amendment to be moved at Stage 2

Section 28, page 21, line 35

Leave out <as the Scottish Ministers may by regulation appoint> and insert <29th March 2019 at 11pm.>

Effect

This amendment sets the date of 29 March 2019 at 11pm as the exit day.

Reason

We note that section 28 defines “exit day” as meaning such day as the Scottish Ministers may appoint and that they may appoint a time on that day. This differs from the EUWB clause 14 which provides that “exit day” means “29 March 2019 at 11.00 p.m.”. This is subject to clause 14 subsections (2) to (5), clause 17 and provisions in schedule 7 (9) of the EUWB.

The provisions in the bill could result in a lack of clarity about the date of exit and the section should be amended to reflect the EUWB.

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

Amendment to be moved at Stage 2

Section 28, page 21, line 37

Leave out Subsections (2) and (3)

Effect

Consequential amendment.