



Law Society
of Scotland

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

Briefing by the Law Society of Scotland

March 2018



Introduction

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

General Comment

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.

The LCB mirrors many aspects of the European Union (Withdrawal) Bill (EUWB) currently in Committee in the House of Lords. The LCB therefore replicates many of the issues which affect the EUWB. In our view like the EUWB it is complex, often difficult to interpret, and sometimes lacking in clarity. Even where the LCB takes a different approach, for example in connection with the Charter of Fundamental Rights or the role of Ministers regarding Ministerial regulation making powers, the Scottish Government should be permissive with suggestions to improve or clarify the bill as it passes through the Parliament.

The LCB introduces new categories of law like "retained (devolved) EU law" - this approach (while to a certain extent understandable) may make it more difficult to be certain about the law. This is highlighted when considering "retained (devolved) EU law" alongside "retained EU law" under the EUWB. Individuals and their advisers will need to be alert to the potentially different treatment in the context of withdrawal from the EU for both reserved and devolved areas of Scots law.

The LCB should proceed at a pace which will enable it to take account of technical improvements which might be made during the passage of the EUWB, currently at Committee Stage in the House of Lords.

We take the view that there is a public interest, in this instance, in the Scottish Government and the Scottish Parliament publishing the legal advice they have respectively received on the legislative competence of the LCB.

We recommend that the Scottish 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 Scots law can be as efficient as possible.

Specific Comment

Section 1 - Purpose and effect of this Act

Our Comment

Since the decision in the EU referendum we have consistently maintained that it is vitally important that there is stability in the law following withdrawal and that there should be the greatest amount of clarity about what that law is. The Scottish Government have stated in paragraph 7 of the Explanatory Notes on the CLB that *preparations have to be made for withdrawal from the EU. Those preparations include maintaining a functioning system of devolved laws on UK withdrawal by providing, where possible, for continuity of law on exit day and ensuring that laws operate effectively once the UK has left the EU.* We have not commented on the issue of whether the bill is within the competence of the Scottish Parliament. It is not for the Society to adjudicate on that matter - under section 33 of the Scotland Act 1998 that is a matter for the UK Supreme Court to decide if the bill is passed by the Parliament and if it is referred to the Supreme Court by the Law Officers.

Section 2 - Saving for devolved EU – derived domestic legislation

Our Comment

2.1 The Scottish Government's objective in section 2 is to retain the devolved EU-derived domestic legislation and maintaining its effect after the exit day, subject to the exceptions in sections 6 to 9 of the bill.

Section 3 - Incorporation of devolved direct EU legislation

Our Comment

3.1 The Scottish Government's objective in section 3 is to convert devolved direct EU legislation into Scots law on and after exit day, subject to the exceptions in sections 6 to 9. In order to operate effectively some of this legislation will need to be amended using the powers in section 11. Section 3 raises issues about

the status of devolved direct EU legislation which were raised during its passage in the House of Commons in respect of the analogous category of retained direct EU legislation in the EUWB (is it to be treated as primary or secondary legislation).

Section 4 - Saving for devolved rights etc. under section 2(1) of the ECA

Our Comment

4.1 The Scottish Government's objective in section 4 is to ensure that remaining devolved EU rights and obligations which are not specifically dealt with in section 3 will continue on and after exit day to be recognised, available and enforced in Scots law.

4.2 Section 4(2) gives some shape to the devolved rights etc. by providing that they are devolved if and to the extent that were they in an Act of the Scottish Parliament such a provision would be in devolved competence.

4.4 We also question how effective the continued enforcement of these rights will be in view of section 7(1).

Scottish Ministers should explain exactly what the rights which are referred to in section 4 relate to and how those rights will be enforced in Scots law.

Section 5 - General principles of EU Law and Charter of Fundamental Rights

Charter of Fundamental Rights

5.1 Section 5(1) provides that the general principles of EU Law and the Charter of Fundamental Rights are part of Scots law on and after exit day so far as they

(a) have effect in EU law immediately before exit day, and

(b) relate to anything to which section 2, 3 or 4 applies.

5.2 It makes sense for the Charter to form part of retained (devolved) EU law because the Charter only applies in areas to which EU law applies. The courts can therefore rely upon its terms when determining the validity, meaning and effect of retained (devolved) EU law as detailed in section 5(2)(b).

5.3 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

5.4 As referred to above Section 5(1) provides that the general principles of EU Law are part of Scots law on or after exit day. These fundamental rights or principles are not defined in the bill although by section 5(4) they can be “modified by the Act or by any other provision of Scots law from time to time”.

We believe it would be helpful if the Government could identify what general principles it considers are retained in Scots law.

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.

Section 6 - Principle of the supremacy of EU law

Comment

6.1 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 devolved 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 section 6(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. Section 6(2) states that ... the principle of the supremacy of EU law continues to apply.....to the interpretation, disapplication or quashing of any devolved enactment or rule of law passed or made before exit day. The relationship between the supremacy of EU law and retained EU law under either the EUWB or (due to the conceptual relationship the LCB) 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”? Questions may also be asked as to whether it applies¹ to all retained EU

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

law or only some retained devolved EU law. How does this supremacy principle apply to EU derived domestic legislation under section 2 when that domestic legislation has not benefited from supremacy? Does devolved retained EU law under sections 3 and 4 benefit from the supremacy of EU law as provided for in section 6(2)?

6.2 Section 6(2) refers to “a devolved enactment ... passed or made before exit day”. However an ASP is passed by the Scottish Parliament when it is approved at the end of stage 3 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(2), 32, 33, 34 and 36(1)(c) of the Scotland Act 1998. We suggest that it should be clarified whether it is intended only to apply to ASPs which have been enacted before the exit day rather than just passed before that day.

6.3 Section 6(2) 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 devolved EU-derived domestic legislation in section 2(1). Section 2(1) provides that devolved 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 section 6(2) is meant to be an exception to the saving of the provisions in, inter alia, section 2, should it not match the scope of the saving itself? Otherwise the effect of section 6(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 devolved EU-derived domestic legislation.

Section 7 - Challenges to validity of retained (devolved) EU law

Our Comment

7.1 To the extent that the devolved rights or principles of EU law which are saved in sections 4 and 5 fall within retained (devolved) EU law, the saving appears to have limited effect because of section 7(1) which provides:

There is no right in Scots law on or after exit day to challenge any retained (devolved) EU law on the basis that, immediately before exit day, an EU instrument was invalid.

We note that regulations under section 7(2)(b) will describe the types of challenges which will be permitted to the validity of the retained (devolved) EU law. It would be helpful were Scottish Ministers to detail the potential content of such regulations.

Section 8 - Rule in Francovich

We have no comment to make.

Section 9 - Interpretation of sections 6 to 8

We have no comment to make.

Section - 10 Interpretation of retained (devolved) EU law

Our Comment

10.1 Section 10(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.

10.2 Section 10(2) provides that a court or tribunal exercising devolved jurisdiction may have regard to anything done on after exit day by the European Court, another EU entity or the EU.

10.3 Section 10(3) provides that any question as to the validity, meaning or effect of retained (devolved) EU law is to be decided so far as they are relevant to it in accordance with any retained (devolved) case law and having regard among other things to the limits, immediately before exit day, of EU competences.

10.4 Section 10(5) qualifies section 10(3) by providing that neither the Supreme Court nor the High Court of Justiciary sitting as the Court of Appeal or on a reference under the Criminal Procedure Act 1995 is bound by any retained EU case law.

10.5 Section 10 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.

10.6 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 England, 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.

Section 11- Dealing with deficiencies arising from UK withdrawal

Our Comment

11.1 Section 11 empowers Scottish Ministers where they consider that there is or would be *(i) a failure of retained (devolved) EU law to operate effectively or (ii) any other deficiency in retained (devolved) EU law arising from the withdrawal of the UK from the EU, and that it is necessary to make provision for the purpose of preventing, remedying or mitigating the failure or other deficiency. They may by regulations make such provision as they consider appropriate for that purpose.*

11.2 Section 11(2) provides examples of those deficiencies such as that the retained (devolved) EU Law has no practical application in relation to Scotland or is otherwise redundant or substantially redundant or confers functions on EU entities which no longer have functions in relation to Scotland or makes provision for reciprocal arrangements between the UK or Scotland or a public authority in the UK and the EU, an EU entity, a member state or a public authority in a member state which are no longer appropriate.

11.3 Section 11(5) provides that regulations may make any provision that could be made by an Act of the Scottish Parliament. This would enable the regulations to amend or repeal provisions in ASPs (or devolved orders). Section 11(6) further clarifies that the regulations may provide for functions of EU entities to be exercisable instead by a Scottish public authority (whether or not newly established or established for the purpose).

11.4 These powers are, however, subject to the restrictions in Section 11(8) which provides that the regulations cannot impose or increase taxation, make retrospective provision, create criminal offences, remove any protection relating to the independence of judicial decision-making or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008, confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes

of the authority, be made to implement the UK withdrawal agreement, modify any of the matters listed in section 31(5) of the Scotland Act 1998 (protected subject-matter), modify the Scotland Act 1998, or modify the Equality Act 2006 or the Equality Act 2010. Section 11 also contains a sunset provision in subsection 11(10).

11.5 Much of this section reflects Clause 7 of the EUWB for example Clause 7(7) of the EUWB also puts a time limit of two years after exit day on making regulations under this section.

11.6 We recognise that it is necessary (a) to adapt retained EU law to enable it to work appropriately both at UK level and 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 Primary Legislation by regulations made by the UK Government and devolved Governments.

11.7 So far as the scope of the regulation making powers is concerned, the House of Lords Committee (when addressing the analogous provision in the EUWB) 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”. Neither the EUWB nor the LCB contain any such express provision. 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) because the deficiencies in section 11 are neither exhaustive nor limited to deficiencies of the same kind. Indeed section.
- section 11(11) broadens the category of deficiency by providing “a failure or other deficiency arising from the withdrawal of the United Kingdom from the EU includes a reference to any failure or other deficiency arising from that withdrawal taken together with the operation of any provision, or the interaction between any provisions, made by or under this Act”.
- what provision is made “to prevent, remedy or mitigate” such deficiencies would be whatever the Scottish Ministers considered appropriate which could be quite wide ranging.

The Scottish Government have provided in the bill that Scottish Ministers should make regulations when there is a failure in retained (devolved) EU Law and it is necessary to make provision to prevent the deficiency. However having considered these matters Scottish Ministers are then given the discretion to make such provision as they consider “appropriate”. However if it is necessary to make a regulation under the statutory test then Scottish Ministers should make such an order as they consider “necessary” rather than “appropriate”.

Section 12 - Complying with international obligations

Our Comment

Section 12.1 Provides that a Scottish Minister 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.

Section 12.2 Similar to section 11, provisions under regulations arising from this section can make any provision that could be made by an Act of the Scottish Parliament but the regulation making power cannot be used to impose or create taxation, make retrospective provision, create a criminal offence, remove protections of the independence of the judiciary, confer certain powers on Scottish Public Authorities implement the UK withdrawal agreement or modify the Scotland Act 1998 or the Equality Act 2006 or the Equality Act 2010. There is a similar limitation period of that which applies to regulations made under section 11: two years from exit date.

12.3 We also reiterate the comments made at paragraph 11.7 above in connection with the regulation making power under section 12.

Section 13 - Power to make provision corresponding to EU law after exit day

Our Comment

13.1 Section 13 empowers Scottish Ministers, by regulations, to make provision:

- (a) corresponding to provision in an EU regulation, EU tertiary legislation or an EU decision,
- (b) for the enforcement of provision made under paragraph (a) or otherwise to make it effective, or
- (c) to implement an EU directive,

So far as the EU regulation, EU tertiary legislation, EU decision or EU directive has effect in EU law after exit day.

This is a significant power to implement laws in Scotland corresponding EU Law even if that EU Law is effective after exit day. The explanatory notes state that the power is "to make sure that, where appropriate, the law in devolved areas keeps pace with developments in EU law after UK withdrawal". Section 11(2) sets out the kind of changes that Scottish Ministers can make to the EU Law.

13.2 Section 13(3) provides that the regulation making power may be used to make any kind of provision that could be made by an Act of the Scottish Parliament. This is a form of words which is lacking in clarity – if it is intended that Scottish Ministers can only make regulations which are with the competence of the Parliament then the LCB should say so.

Section 14 - Scrutiny of regulations under sections 11, 12 and 13

We have no comment to make.

Section 15 - Consultation on draft proposals

Our Comment

We agree with the general proposition that Scottish Ministers should consult with interested parties before making regulations under section 14(5). However Scottish Ministers must ensure that there is adequate time to consider such draft regulations.

Section 16 - Explanatory statements: appropriateness, equalities etc.

Our Comment

We have no comment to make.

Section 17 - Requirement for Scottish Ministers' consent to certain subordinate legislation

Our Comment

There is no general requirement to obtain the consent of the Scottish Parliament in relation to delegated legislation made in respect of Scotland by UK ministers although such orders or regulations may sometimes require the consent of Scottish ministers before they can be made (see Himsworth and O'Neil paragraph 7.19). However under section 9 of the UK Public Bodies Act 2011 an order in terms of sections 1-5 of the Act requires a consent motion by the Scottish Parliament where the order would be within the legislative competence of the Scottish Parliament if it were contained in an Act of the Parliament, or modifies the functions of the Scottish Ministers.

So far the qualification of the order making power of UK Ministers has been contained in Acts of the UK Parliament. Section 17(1)(c) raises the question whether it is competent for a provision in an ASP to seek to attach conditions upon the exercise of subordinate legislative powers, even in relation to devolved matters, which are conferred upon UK Ministers by a subsequent enacted Act of the UK Parliament.

Sections 18 - 22 Finance

We have no comment to make.

Section 23 - Duty to publish retained (devolved) direct EU legislation etc. and

Section 24 - Exceptions from duty to publish

Our Comment

23.1 We believe that the provisions of Section 23 that the Queen's Printer must make arrangements for the publication of so far as devolved each relevant instrument that has been published before exit day by an EU entity and the relevant international agreement and the decisions of the European Court or any other document published by European entity will be necessary and useful.

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 of the EUWB and Section 23 of the LCB are significant steps forward in this direction and will be of significant assistance to those to whom this body of law will apply and to their advisers.

Section 25 - Questions as to meaning of EU instruments

Our Comment

25.1 We agree 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.

Section 26 - Power to make provision about judicial notice and admissibility

Our Comment

26.1 We question whether it is necessary to empower Scottish Ministers to make regulations enabling or requiring judicial knowledge to be taken of the relevant matter as stated in section 25(6).

Section 27 - Interpretation

We have no comment to make.

Section 28 - Meaning of "exit day"

Our Comment

28.1 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 bill. This could result in a lack of clarity about the date of exit and the section should be amended accordingly.

Sections 29 - 38

We have no comments to make.

Schedule 1 - Further repeals of spent references to EU Law

The Scotland Act 1998

Schedule 1, paragraph 1 LCB replicates schedule 3 paragraph 4 EUWB
Schedule 1, paragraph 2 LCB replicates schedule 3 paragraph 5 EUWB
Schedule 1, paragraph 3 LCB replicates schedule 3 paragraph 6 EUWB
Schedule 1, paragraph 4 LCB replicates schedule 3 paragraph 8 EUWB
Schedule 1, paragraph 5 LCB replicates schedule 3 paragraph 9 EUWB
Schedule 1, paragraph 6 LCB replicates schedule 3 paragraph 10 EUWB
Schedule 1, paragraph 7 LCB replicates schedule 3 paragraph 11 EUWB
Schedule 1, paragraph 8 LCB replicates schedule 3 paragraph 12 EUWB
Schedule 1, paragraph 9 LCB replicates schedule 3 paragraph 13 EUWB
Schedule 1, paragraph 10 LCB replicates schedule 3 paragraph 14 EUWB
Schedule 1, paragraph 11 LCB replicates schedule 3 paragraph 15 EUWB
Schedule 1, paragraph 12 LCB replicates schedule 3 paragraph 16 EUWB
Schedule 1, paragraph 13 LCB replicates schedule 3 paragraph 17 EUWB
Schedule 1, paragraph 14 LCB replicates schedule 3 paragraph 18 EUWB
Schedule 1, paragraph 15 LCB replicates schedule 3 paragraph 19 EUWB
Schedule 1, paragraph 16 LCB replicates schedule 3 paragraph 20 EUWB

Schedule 2 PART 2

SPECIFIC CONSEQUENTIAL PROVISION

Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10)
Schedule 2, paragraph 5 LCB replicates schedule 8 paragraph 20 EUWB
Schedule 2, paragraph 6 LCB replicates (partially) schedule 8 paragraph 21 EUWB
Schedule 2, paragraph 7 LCB inserts a new paragraph in the 2010 Act
Schedule 2, paragraph 8 LCB replicates schedule 8 paragraph 23 EUWB
Postscript on EUWB Schedule 2

Postscript on EUWB Schedule 2

Schedule 2 - Corresponding powers involving devolved authorities

Parts 1, 2 and 3 of Schedule 2 of the EUWB 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 of that bill.

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.

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.



For further information, please contact:

Michael P Clancy

Director Law Reform

Law Society of Scotland

DD: 0131 476 8163

michaelclancy@lawscot.org.uk