

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

[AS PASSED]

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**Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.**

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

[AS PASSED]

An Act of the Scottish Parliament to make provision for Scotland in connection with the withdrawal of the United Kingdom from the EU.

## PART 1

### PURPOSE AND EFFECT OF ACT

- 5     **1     Purpose and effect of this Act**
- (1) The purpose of this Act is to make provision—
- (a) in connection with the prospective withdrawal of the United Kingdom from the EU in consequence of the notification given under section 1 of the European Union (Notification of Withdrawal) Act 2017 (“UK withdrawal”), and
- 10       (b) for ensuring the effective operation of Scots law (so far as within devolved legislative competence) upon and after UK withdrawal.
- (2) In so far as any provision of this Act, or any provision made under it, would, if it were in effect before the relevant time, be incompatible with EU law, the provision is to have no effect until the relevant time.
- 15       (3) In subsection (2), “the relevant time”, in relation to any provision of this Act or any provision made under it, means the time at which the provision of EU law with which it would be incompatible ceases to have effect in Scots law as a consequence of UK withdrawal.
- (4) For the purposes of this section—
- 20       (a) a provision of Scots law is within devolved legislative competence if and to the extent that it is (or would be, if it were contained in an Act of the Scottish Parliament) within the legislative competence of the Scottish Parliament, and
- (b) “EU law” has the same meaning as in the Scotland Act 1998 (see section 126(9) of that Act).

## PART 2

### RETENTION OF EXISTING EU LAW

#### *Saving and incorporation of existing EU law*

### **2 Saving for devolved EU-derived domestic legislation**

- 5 (1) Devolved EU-derived domestic legislation, as it has effect in Scots law immediately before exit day, continues to have effect in Scots law on and after exit day.
- (2) In this section, “EU-derived domestic legislation” means any enactment so far as—
- (a) made under section 2(2) or paragraph 1A of schedule 2 of the European Communities Act 1972 (“the 1972 Act”),
- 10 (b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,
- (c) relating to anything—
- (i) which falls within paragraph (a) or (b), or
- (ii) to which section 3(1) or 4(1) applies, or
- 15 (d) relating otherwise to the EU or the EEA.
- (3) For the purposes of this section, EU-derived domestic legislation is devolved if and to the extent that it makes provision that is (or would be, if it were contained in an Act of the Scottish Parliament) within the legislative competence of the Scottish Parliament.
- (4) This section is subject to sections 6 to 9.

### **3 Incorporation of devolved direct EU legislation**

- 20 (1) Devolved direct EU legislation, so far as operative immediately before exit day, forms part of Scots law on and after exit day.
- (2) In this Act, “direct EU legislation” means—
- (a) any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before exit day and so far as—
- 25 (i) it is not an exempt EU instrument (see section 29),
- (ii) it is not an EU decision addressed only to a member State other than the United Kingdom, and
- (iii) its effect is not reproduced in an enactment to which section 2(1) applies,
- 30 (b) any Annex to the EEA agreement, as it has effect in EU law immediately before exit day and so far as—
- (i) it refers to, or contains adaptations of, anything falling within paragraph (a), and
- (ii) its effect is not reproduced in an enactment to which section 2(1) applies,
- 35 or
- (c) Protocol 1 to the EEA agreement (which contains horizontal adaptations that apply in relation to EU instruments referred to in the Annexes to that agreement), as it has effect in EU law immediately before exit day.

- (3) For the purposes of this section, direct EU legislation is devolved if and to the extent that it makes provision that would be, if it were contained in an Act of the Scottish Parliament, within the legislative competence of the Scottish Parliament.
- (4) For the purposes of this section, any direct EU legislation is 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 applies immediately before exit day,
  - (b) in the case of a decision which specifies to whom it is addressed, it has been notified to that person before exit day, and
  - (c) in any other case, it is in force immediately before exit day.
- (5) This section—
- (a) brings into Scots law any direct EU legislation only in the form of the English language version of that legislation, and
  - (b) does not apply to any such legislation for which there is no such version,
- but paragraph (a) does not affect the use of the other language versions of that legislation for the purpose of interpreting it.
- (6) This section is subject to sections 6 to 9.

#### **4 Saving for devolved rights etc. under section 2(1) of the 1972 Act**

- (1) Any devolved rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—
- (a) are recognised and available in Scots law by virtue of section 2(1) of the 1972 Act, and
  - (b) are enforced, allowed and followed accordingly,
- continue on and after exit day to be recognised and available in Scots law (and to be enforced, allowed and followed accordingly).
- (2) For the purposes of this section, rights, powers, liabilities, obligations, restrictions, remedies and procedures are devolved if, and to the extent that, were they to be provided for in an Act of the Scottish Parliament, such provision would be within the legislative competence of the Scottish Parliament.
- (3) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they—
- (a) form part of Scots law by virtue of section 3, or
  - (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom exercising devolved jurisdiction in a case decided before exit day (whether or not as an essential part of the decision in the case).
- (4) Subsection (3)(b) does not apply in relation to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they are of a kind recognised by a court or tribunal in a case decided on or after exit day but begun before exit day (whether or not as an essential part of the decision in the case).
- (5) In subsection (3)(b), “devolved jurisdiction” means jurisdiction in relation to matters that are within the legislative competence of the Scottish Parliament.

- (6) This section is subject to sections 6 to 9.

## **5 General principles of EU law and Charter of Fundamental Rights**

- (1) The general principles of EU law and the Charter of Fundamental Rights are part of Scots law on or after exit day so far as they—

- 5 (a) have effect in EU law immediately before exit day, and  
 (b) relate to anything to which section 2, 3 or 4 applies.

- (2) Accordingly—

- 10 (a) to the extent that there is a right of action in Scots law immediately before exit day based on a failure to comply with any of the general principles of EU law or the Charter, there is, on and after exit day, an equivalent right based on a failure to comply with any of the retained (devolved) general principles of EU law or the retained (devolved) Charter, and

- (b) to the extent that a court or tribunal or another Scottish public authority has power, immediately before exit day to—

- 15 (i) disapply or quash any enactment or rule of law, or  
 (ii) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law or the Charter, the court, tribunal or authority has, on and after exit day, an equivalent power based on incompatibility with any of the retained (devolved) general principles of EU law or the retained (devolved) Charter.

- (3) Subsection (1) applies in relation to a general principle of EU law only if it was recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case).

- (4) In this Act—

25 “retained (devolved) general principles of EU law” means any general principles of EU law that form part of Scots law by virtue of subsection (1) as those principles are modified by or under this Act or by any other provision of Scots law from time to time,

30 “retained (devolved) Charter” means the Charter of Fundamental Rights so far as forming part of Scots law by virtue of subsection (1) as modified by or under this Act or by any other provision of Scots law from time to time.

- (5) This section is—

- (a) without prejudice to sections 2 to 4, and  
 (b) subject to sections 6 to 9.

### *Exceptions to savings and incorporation*

## **6 Principle of the supremacy of EU law**

- (1) 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.



- (2) Accordingly, the principle of the supremacy of EU law continues to apply on and after exit day so far as relevant to the interpretation, disapplication or quashing of any devolved enactment or rule of law passed or made before exit day.
- 5 (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any devolved enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification.
- 10 (4) For the purposes of this section, an enactment or rule of law is devolved if and to the extent that it makes, or is, provision that is (or would be, if it were contained in an Act of the Scottish Parliament) within the legislative competence of the Scottish Parliament.

## 7 Challenges to validity of retained (devolved) EU law

- (1) 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.
- (2) Subsection (1) does not apply so far as—
- 15 (a) the European Court has decided before exit day that the instrument is invalid, or
- (b) the challenge is of a kind described, or provided for, in regulations made by the Scottish Ministers.
- (3) Subject to any transitional, transitory or saving provision made by regulations under section 32, subsection (1) does not apply in relation to any right of action accruing
- 20 before exit day.
- (4) Regulations under subsection (2)(b) may provide for a challenge which would otherwise have been against an EU institution to be against a Scottish public authority.
- (5) Regulations under subsection (2)(b) are subject to the affirmative procedure.
- (6) Subsection (5) is subject to section 31.

## 8 Rule in *Francovich*

- 25 (1) There is no right in Scots law on or after exit day to damages in accordance with the rule in *Francovich*.
- (2) Subject to any transitional, transitory or saving provision made by regulations under section 32, subsection (1) does not apply in relation to any right of action accruing
- 30 before exit day.

## 9 Interpretation of sections 6 to 8

- 35 (1) References in sections 6 to 8 to the principle of the supremacy of EU law or the rule in *Francovich* are to be read as references to that principle or rule so far as it would otherwise continue to be, or form part of, Scots law on or after exit day in accordance with this Act.
- (2) Accordingly, the references to the principle of the supremacy of EU law in section 6(2) and (3) do not include anything which would bring into Scots law any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day.

**9A Scrutiny of regulations under section 7(2)(b)**

- (1) The Scottish Ministers must not lay before the Scottish Parliament for approval a draft of a Scottish statutory instrument containing regulations under section 7(2)(b) unless they have consulted in accordance with section 9B.
- 5 (2) Where they do lay a draft of such an instrument before the Parliament for approval, they must do so at least 60 days before the date on which the regulations are expected to come into force.
- (3) In calculating any period of 60 days for the purposes of subsection (2), no account is to be taken of any time during which the Scottish Parliament is—
- 10 (a) dissolved, or  
 (b) in recess for more than 4 days.
- (4) Failure to comply with subsection (2) in relation to a draft Scottish statutory instrument does not prevent the regulations contained in the draft instrument from being approved and made.
- 15 (5) Where a draft Scottish statutory instrument to which subsection (2) applies is laid before the Scottish Parliament but not in accordance with that subsection the Scottish Ministers must explain to the Presiding Officer why that subsection has not been complied with.
- (6) The explanation is to be given as soon as practicable after the draft instrument is laid before the Parliament.

20 **9B Consultation on draft proposals under section 7(2)(b)**

- (1) If the Scottish Ministers propose to make regulations under section 7(2)(b) they must consult about their proposals such persons as they consider appropriate.
- (2) For the purposes of a consultation under subsection (1), the Scottish Ministers must—
- 25 (a) lay before the Scottish Parliament a document setting out their proposals,  
 (b) send a copy of the document to any person to be consulted under subsection (1), and  
 (c) have regard to any representations about the proposals that are made to them.

*Interpretation of retained (devolved) EU law*

**10 Interpretation of retained (devolved) EU law**

- 30 (1) A court or tribunal exercising devolved jurisdiction—
- (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and
- (b) cannot refer any matter to the European Court on or after exit day.
- (2) A court or tribunal exercising devolved jurisdiction must, where it considers it relevant for the interpretation of retained (devolved) EU law, have regard to—
- 35 (a) any principles laid down, or any judgments made, on or after exit day by the European Court, and
- (b) anything done on or after exit day by another EU entity or the EU.

- (3) Any question as to the validity, meaning or effect of any retained (devolved) EU law is to be decided, so far as they are relevant to it—
- (a) in accordance with any retained (devolved) case law, and
  - (b) having regard (among other things) to the limits, immediately before exit day, of EU competences.
- (4) Subsection (3) is subject to—
- (a) section 11(7), and
  - (b) in relation to any modification of retained (devolved) EU law made by an enactment on or after exit day, any provision made by or under the enactment by virtue of which the modification is made.
- (5) But—
- (a) the Supreme Court, in exercising devolved jurisdiction, is not bound by any retained (devolved) EU case law,
  - (b) the High Court of Justiciary is not bound by any retained (devolved) EU case law when—
    - (i) sitting as a court of appeal, or
    - (ii) sitting on a reference under section 123(1) of the Criminal Procedure (Scotland) Act 1995, and
  - (c) no court or tribunal exercising devolved jurisdiction is bound by any retained (devolved) domestic case law that it would not otherwise be bound by.
- (6) Subsection (5)(b) does not apply to the High Court of Justiciary when sitting as a court of appeal in relation to—
- (a) a compatibility issue (within the meaning given by section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995), or
  - (b) a devolution issue (within the meaning given by paragraph 1 of schedule 6 of the Scotland Act 1998).
- (7) In deciding whether to depart from any retained (devolved) EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.
- (8) In this section, “devolved jurisdiction” means jurisdiction in relation to matters that are within the legislative competence of the Scottish Parliament.
- (9) In this Act—
- “retained (devolved) case law” means—
- (a) retained (devolved) domestic case law, and
  - (b) retained (devolved) EU case law,
- “retained (devolved) domestic case law” means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom in the exercise of devolved jurisdiction, as they have effect 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 sections 6 to 9,

(as those principles and decisions are modified by or under this Act or by any other provision of Scots law from time to time),

“retained (devolved) EU case law” means any principles laid down by, and any decisions of, the European Court, 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 sections 6 to 9,

(as those principles and decisions are modified by or under this Act or by any other provision of Scots law from time to time),

“retained (devolved) EU law” means anything which, on or after exit day, continues to be, or forms part of, Scots law by virtue of section 2, 3, 4 or 5 or subsection (3) above (as that body of law is added to or otherwise modified by or under this Act or by any other provision of Scots law from time to time).

### PART 3

#### MAIN POWERS IN CONNECTION WITH UK WITHDRAWAL

##### *Regulation making powers*

## **11 Dealing with deficiencies arising from UK withdrawal**

(1) Where the Scottish Ministers consider—

(a) 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 United Kingdom from the EU, and

(b) 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.

(2) Deficiencies in retained (devolved) EU law are where the Scottish Ministers have reasonable grounds to consider that retained (devolved) EU law—

- (a) contains anything which has no practical application in relation to Scotland or is otherwise redundant or substantially redundant,
- (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to Scotland,
- (c) makes provision for, or in connection with, reciprocal arrangements between—
  - (i) the United Kingdom or Scotland or a public authority in the United Kingdom, and
  - (ii) the EU, an EU entity, a member State or a public authority in a member State,

which no longer exist or are no longer necessary,

(d) makes provision for, or in connection with, other arrangements which—

- (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
- (ii) are otherwise dependent upon the United Kingdom's membership of the EU,

5 and which no longer exist or are no longer necessary,

- (e) makes provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which no longer exist, or are no longer necessary, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties,

10 (f) does not contain any functions or restrictions which—

- (i) were in an EU directive and in force immediately before exit day (including any power to make EU tertiary legislation), and
- (ii) it is appropriate to retain, or

- (g) contains EU references which are no longer necessary.

15 (3) There is also a deficiency in retained (devolved) EU law where the Scottish Ministers have reasonable grounds to consider that there is—

- (a) anything in retained (devolved) EU law which is of a similar kind to a deficiency that falls within subsection (2), or
- (b) a deficiency in retained (devolved) EU law of a kind described, or provided for, in regulations made by the Scottish Ministers.

20 (4) But retained (devolved) EU law is not deficient merely because it does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day.

25 (5) Regulations under subsection (1) may make any provision that could be made by an Act of the Scottish Parliament.

(6) Regulations under subsection (1) may—

- (a) provide for functions of EU entities or public authorities in member States (including making an instrument of a legislative character or providing funding) to be—

- (i) exercisable instead by a Scottish public authority (whether or not established for the purpose), or
- (ii) replaced, abolished or otherwise modified, or

- (ba) provide for the amendment of the general object and purposes of a Scottish public authority to enable it to carry out functions provided for by regulations under subsection (1).

35 (7) Regulations under subsection (1) may provide that section 10(3) does not apply to any provision made by the regulations.

(8) But regulations under subsection (1) may not—

- (a) impose or increase taxation,
- (b) make retrospective provision,
- (c) create a relevant criminal offence,

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- (ca) provide for the establishment of a Scottish public authority,
- (d) remove any protection relating to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office, or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008 (guarantee of the continued independence of the judiciary),
- (e) confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes of the authority,
- (f) be made to implement the UK withdrawal agreement,
- (g) modify any of the matters listed in section 31(5) of the Scotland Act 1998 (protected subject-matter),
- (h) modify the Scotland Act 1998, or
- (i) modify the Equality Act 2006 or the Equality Act 2010.

(9) Paragraphs (d) and (i) of subsection (8) do not prevent the removal of a protection or the making of a modification if alternative provision is made in the regulations that is equivalent to the protection being removed or the provision being modified.

(10) No regulations may be made under this section after the end of the period of 2 years beginning with exit day.

(11) The reference in subsection (1) to 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.

(12) In subsection (8)(d), “judicial office” means—

- (a) the office of judge of any court,
- (b) the office of member of any tribunal,
- (c) any other office, or appointment, having functions of a judicial nature.

## **12 Complying with international obligations**

(1) Where the Scottish Ministers consider—

- (a) that there is, or would be, a breach of the international obligations of the United Kingdom arising from the withdrawal of the United Kingdom from the EU, and
- (b) that it is necessary to make provision for the purpose of preventing or remedying the breach,

they may by regulations make such provision as they consider appropriate for that purpose.

(2) Regulations under this section may make any provision that could be made by an Act of the Scottish Parliament.

(3) But regulations under this section may not—

- (a) impose or increase taxation,
- (b) make retrospective provision,
- (c) create a relevant criminal offence,

- (ca) provide for the establishment of a Scottish public authority,
- (d) remove any protection relating to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office, or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008 (guarantee of the continued independence of the judiciary),
- (e) confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes of the authority,
- (g) modify any of the matters listed in section 31(5) of the Scotland Act 1998 (protected subject-matter),
- (h) modify the Scotland Act 1998, or
- (i) modify the Equality Act 2006 or the Equality Act 2010.

(4) Paragraphs (d) or (i) of subsection (3) do not prevent the removal of a protection or the making of a modification if alternative provision is made in the regulations that is equivalent to the protection being removed or the provision being modified.

(5) No regulations may be made under this section after the end of the period of 2 years beginning with exit day.

(6) In subsection (3)(d), “judicial office” means—

- (a) the office of judge of any court,
- (b) the office of member of any tribunal,
- (c) any other office, or appointment, having of functions of a judicial nature.

### **13 Power to make provision corresponding to EU law after exit day**

(1) The Scottish Ministers may by regulations 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.

(2) In making regulations under subsection (1), the Scottish Ministers may, in particular—

- (a) omit anything which has no practical application in relation to Scotland or is otherwise redundant or substantially redundant,
- (b) omit functions of, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to Scotland,
- (c) omit provision for, or in connection with, reciprocal arrangements between—
  - (i) the United Kingdom or Scotland or a public authority in the United Kingdom, and
  - (ii) the EU, an EU entity, a member State or a public authority in a member State,

which no longer exist or are no longer necessary,

- (d) omit provision for, or in connection with, other arrangements which—
- (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
  - (ii) are otherwise dependent upon the United Kingdom's membership of the EU,

and which no longer exist or are no longer necessary,

- (e) omit provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which no longer exist, or are no longer necessary, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties,

- (f) confer functions or impose restrictions which—

- (i) are in an EU directive and in force (including any power to make EU tertiary legislation), and
- (ii) it is appropriate to retain, or

- (g) omit EU references which are not necessary.

- (3) Regulations under subsection (1) may make any provision that could be made by an Act of the Scottish Parliament.

- (4) Regulations under subsection (1) may provide for functions of EU entities or public authorities in member States (including making an instrument of a legislative character or providing funding) to be—

- (a) exercisable instead by a Scottish public authority (whether or not established for the purpose), or
- (b) omitted or otherwise differently provided for.

- (5) But regulations under subsection (1) may not—

- (a) impose or increase taxation,
- (b) make retrospective provision,
- (c) create a relevant criminal offence,
- (ca) provide for the establishment of a Scottish public authority,
- (d) remove any protection relating to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office, or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008 (guarantee of the continued independence of the judiciary),
- (e) confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes of the authority,
- (f) modify any of the matters listed in section 31(5) of the Scotland Act 1998 (protected subject-matter),
- (g) modify the Scotland Act 1998, or
- (h) modify the Equality Act 2006 or the Equality Act 2010.



- (6) Paragraphs (d) and (h) of subsection (5) do not prevent the removal of a protection or the making of a modification if alternative provision is made in the regulations that is equivalent to the protection being removed or the provision being modified.
- (7) No regulations may be made under subsection (1) after the end of the period of 3 years beginning with exit day.
- (8) The Scottish Ministers may by regulations—
- (a) extend the period mentioned in subsection (7) by a period of up to one year,
  - (b) extend any period of extension provided by regulations under this subsection by a further period of up to one year.
- (8A) The period during which regulations under subsection (1) may be made may not be extended by regulations under subsection (8) so as to last for more than 5 years in total.
- (9) In subsection (5)(d), “judicial office” means—
- (a) the office of judge of any court,
  - (b) the office of member of any tribunal,
  - (c) any other office, or appointment, having functions of a judicial nature.

### **13A Reports relating to the exercise of the section 13(1) power**

- (1) The Scottish Ministers must, for each reporting period, prepare and lay before the Scottish Parliament a report containing an explanation of how the power under section 13(1) has been used in the reporting period.
- (2) The reporting periods are—
- (a) the period of one year beginning with exit day, and
  - (b) each subsequent period of one year (during the total period in which regulations may be made under section 13(1) in accordance with section 13(7) to (8A)).
- (3) Each report must be laid before the Parliament as soon as practicable after the end of the reporting period to which it relates.

### **13B Section 11(1), 12 and 13(1) powers: guiding principles on the environment and animal welfare**

- (1) In making provision in regulations under section 11(1), 12 or 13(1), the Scottish Ministers must have regard to the guiding principles on the environment and animal welfare.
- (2) Subsection (1) requires the Scottish Ministers to have regard to those guiding principles only so far as the Scottish Ministers consider them to be relevant to the provision being made in the regulations.
- (3) The guiding principles on the environment and animal welfare are—
- (a) the precautionary principle as it relates to the environment,
  - (b) that preventative action should be taken to avert environmental damage,
  - (c) that environmental damage should as a priority be rectified at source,
  - (d) that the polluter should pay,
  - (e) that regard must be had to the welfare requirements of animals as sentient beings.

- (4) Those principles are derived from the equivalent principles provided for in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union and accordingly they are to be interpreted, so far as appropriate, in a manner consistent with the interpretation of those equivalent principles by the European Court from time to time.

*Scrutiny of regulations*

**14 Scrutiny of regulations under sections 11, 12 and 13**

(A1) This section is subject to section 14A.

(1) Regulations under section 11(1) or 12 which contain provision falling within subsection (2) are subject to the affirmative procedure.

(2) That provision is provision which—

(ba) provides for the amendment of the general object and purposes of a Scottish public authority to enable it to carry out functions provided for by regulations under section 11(1),

(c) abolishes a function of an EU entity or public authority in a member State without providing for an equivalent function to be exercisable by any person,

(d) provides for any function of an EU entity or public authority in a member State to be exercisable instead by a Scottish public authority,

(e) imposes, or otherwise relates to, a fee or charge in respect of a function exercisable by a public authority in the United Kingdom,

(f) creates, or widens the scope of, a criminal offence,

(g) creates or amends a power to legislate.

(3) Any other regulations under section 11(1) or 12 are (if they have not been subject to the affirmative procedure) subject to the negative procedure.

(4) Regulations under section 11(3)(b) or 13 are subject to the affirmative procedure.

(5) In the case of regulations under section 11(1), 12 or 13(1) containing provision falling within subsection (2)(ba) or (c)—

(a) the Scottish Ministers must not lay before the Scottish Parliament for approval a draft of a Scottish statutory instrument containing the regulations unless they have consulted in accordance with section 15, and

(b) where they do lay a draft of such an instrument before the Parliament for approval, they must do so at least 60 days before the date on which the regulations are expected to come into force.

(5A) In the case of regulations under section 11(1) containing provision falling within subsection (2)(ba) the regulations must be accompanied by an indication of the financial implications of the regulations.

(6) In calculating any period of 60 days for the purposes of subsection (5)(b), no account is to be taken of any time during which the Scottish Parliament is—

(a) dissolved, or

(b) in recess for more than 4 days.

- (7) Failure to comply with subsection (5)(b) in relation to a draft Scottish statutory instrument does not prevent the regulations contained in the draft instrument from being approved and made.
- (8) Where a draft Scottish statutory instrument to which subsection (5)(b) applies is laid before the Scottish Parliament but not in accordance with that subsection the Scottish Ministers must explain to the Presiding Officer why that subsection has not been complied with.
- (9) The explanation is to be given as soon as practicable after the draft instrument is laid before the Parliament.
- (10) This section is subject to section 31.

#### **14A Additional scrutiny of regulations**

- (1) This section applies where the Scottish Ministers—
- (a) lay a Scottish statutory instrument containing regulations which have been made under section 11, 12 or 13 before the Scottish Parliament,
  - (b) lay a draft Scottish statutory instrument containing regulations under section 11, 12 or 13 before the Scottish Parliament for approval.
- (2) The Scottish Ministers must lay before the Scottish Parliament—
- (a) a copy of the regulations or draft regulations,
  - (b) a statement setting out the Scottish Ministers’ opinion on the scrutiny procedure to which the regulations or draft regulations will be subject, and
  - (c) their reasons for that opinion.
- (3) If the committee of the Scottish Parliament mentioned in Rule 6.11 of the Standing Orders of the Parliament, within the relevant period, by resolution, makes a recommendation mentioned in subsection (5), the Scottish Ministers must proceed in accordance with that recommendation.
- (4) For the purposes of subsection (3), the “relevant period” means the period of 20 sitting days (within the meaning given by the Standing Orders of the Scottish Parliament) beginning with the day on which the regulations or draft regulations are laid before the Parliament.
- (5) The recommendation may be that, regardless of the Scottish Ministers’ opinion on the appropriate scrutiny procedure, the regulations or draft regulations—
- (a) should be subject to the negative procedure,
  - (b) should be subject to the affirmative procedure,
  - (c) should be subject to the affirmative procedure and to the requirements set out in paragraphs (a) and (b) of section 14(5).
- (6) If the recommendation is that regulations which have been made subject to the negative procedure should be subject to the affirmative procedure—
- (a) the regulations are to be treated as having been revoked by the Scottish Ministers on the date the recommendation is made,
  - (b) the Scottish statutory instrument containing the regulations is to be treated instead as a draft Scottish statutory instrument laid before the Scottish Parliament for approval on the date the original instrument was laid, and

(c) the regulations may be adjusted by the Scottish Ministers to take account of the effect of paragraphs (a) and (b) (including, in particular, by adjusting the date on which the regulations are to come into force).

5 (7) If the recommendation is that regulations which have been made subject to the negative procedure should be subject to the affirmative procedure and to the requirements set out in paragraphs (a) and (b) of section 14(5), the regulations are to be treated as having been revoked by the Scottish Ministers on the date the recommendation is made.

10 (8) Where subsection (6)(a) or (7) applies, so far as the regulations are in force on that date, nothing further is to be done or continued under, or in reliance on, the regulations after that date.

(9) Subsection (8) does not affect the validity of anything previously done under the regulations.

15 (10) This section does not apply to regulations or draft regulations if they contain a declaration that the Scottish Ministers consider that, by reason of urgency, it is necessary to make the regulations or draft regulations without this section applying to them.

## **15 Consultation on draft proposals**

(1) If the Scottish Ministers propose to make regulations to which section 14(5) applies they must consult about their proposals such persons as they consider appropriate.

20 (2) For the purposes of a consultation under subsection (1), the Scottish Ministers must—

(a) lay before the Scottish Parliament a document setting out—

(i) their proposals,

(ii) in the case of proposed regulations under section 11(1), their reasons for considering that section 11(1)(b) applies,

25 (b) send a copy of the document to any person to be consulted under subsection (1), and

(c) have regard to any representations about the proposals that are made to them.

## **16 Explanatory statements: appropriateness, equalities etc.**

30 (1) This section applies where a Scottish statutory instrument containing regulations under section 11(1), 12 or 13(1), or a draft of such an instrument, is to be laid before the Scottish Parliament.

(2) When the instrument or draft is laid, the Scottish Ministers must make a statement to the effect that—

(a) in their opinion the instrument or draft does no more than is appropriate, and

35 (b) in the case of an instrument or draft containing regulation under section 11(1) or 12, it is necessary to make the provision contained in the regulations.

(3) When the instrument or draft is laid, the Scottish Ministers must make a statement—

(a) as to whether the instrument or draft amends, repeals or revokes any provision of equalities legislation, and

40 (b) if it does, explaining the effect of each such amendment, repeal or revocation.

- 5 (4) When the instrument or draft is laid, the Scottish Ministers must make a statement to the effect that, in relation to the instrument or draft, they have, so far as required to do so by equalities legislation, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.
- (4A) When the instrument or draft is laid, the Scottish Ministers must make a statement explaining the effect (if any) of the instrument or draft on—
- (a) rights and duties relating to employment and health and safety,
  - (b) matters relating to consumer protection,
- 10 so far as it is within devolved competence (within the meaning of section 54 of the Scotland Act 1998) for the instrument to have any such effect.
- (5) When the instrument or draft is laid, the Scottish Ministers must make a statement otherwise explaining—
- (a) the instrument or draft,
  - 15 (b) the reasons for it,
  - (c) the law before exit day which is relevant to it, and
  - (d) its effect (if any) on retained (devolved) EU law.
- (5A) If the instrument or draft is laid when the Scottish Parliament is in recess, the Scottish Ministers must make a statement explaining why the instrument or draft was laid at that time.
- 20 (6) In the case of a draft of an instrument containing regulations to which section 14(5) applies, when the draft is laid, the Scottish Ministers must make a statement—
- (a) setting out details of—
- 25 (i) any consultations undertaken under section 15 in relation to the proposals on which the regulations are based, and
  - (ii) any representations received as a result of the consultation, and
- (b) explaining the changes (if any) made to the proposals as a result of the representations.
- 30 (7) If the Scottish Ministers fail to make a statement required by subsection (2), (3), (4), (4A), (5), (5A) or (6) when the instrument or draft is laid, they must make a statement explaining why they have failed to do so.
- (8) A statement under subsection (2), (3), (4), (4A), (5), (5A), (6) or (7) must be made in writing and be published in such manner as the Scottish Ministers consider appropriate.
- 35 (9) This section does not apply in relation to any laying before the Scottish Parliament of an instrument or draft instrument where an equivalent draft instrument (ignoring any differences relating to procedure) has previously been laid before the Parliament.
- (10) In this paragraph, “equalities legislation” means the Equality Act 2006, the Equality Act 2010 or any subordinate legislation made under either of those Acts.

*Consent to certain UK instruments*

**17 Requirement for Scottish Ministers’ consent to certain subordinate legislation**

- (1) This section applies to subordinate legislation made, confirmed or approved by a Minister of the Crown or any other person (other than the Scottish Ministers) if—
- 5 (a) it contains devolved provision (whether or not it also contains other provision),
- (b) the devolved provision modifies or otherwise affects the operation of—
- (i) retained (devolved) EU law, or
- (ii) anything that would be, on or after exit day, retained (devolved) EU law.
- (c) it is made, confirmed or approved under a function—
- 10 (i) conferred, or
- (ii) modified in accordance with subsection (3),
- by or under an Act of the Parliament of the United Kingdom enacted after the date on which this section comes into force, and
- (d) it does not apart from this section require the consent of the Scottish Ministers
- 15 before it is made, and
- (e) it is made by statutory instrument.
- (2) The subordinate legislation, to the extent that it contains devolved provision, is of no effect unless the consent of the Scottish Ministers was obtained before it was made, confirmed or approved.
- 20 (3) A function is modified in accordance with this subsection if it is modified in a way that enables or requires the subordinate legislation to contain devolved provision that it could not previously contain.
- (4) For the purposes of this section, “devolved provision” means provision that would be, if
- 25 it were contained in an Act of the Scottish Parliament, within the legislative competence of the Scottish Parliament.

**PART 4**

FINANCIAL MATTERS

*Preparatory expenditure*

**18 Preparatory expenditure**

30 The Scottish Administration may incur expenditure for the purpose of, or in connection with, preparing for anything about which provision may be made under a power to make subordinate legislation conferred or modified by or under this Act before any such provision is made.

*Powers in connection with fees and charges*

**19 Power to provide for fees and charges**

- 5 (1) The Scottish Ministers may by regulations make provision for, or in connection with, the charging of fees or other charges in connection with the exercise of a function (“the relevant function”) which a Scottish public authority has by virtue of provision made under any of the following sections—
- (a) section 11(1) (powers to deal with deficiencies arising from UK withdrawal),
  - (b) section 12 (powers relating to compliance with international obligations),
  - (c) section 13(1) (powers to make provision corresponding to EU law after exit day).
- 10 (2) Regulations under this section may—
- (a) specify fees or charges or make provision as to how they are to be determined,
  - (b) provide for the recovery or disposal of any sums payable under the regulations,
  - (c) confer power on the Scottish public authority to make, by subordinate legislation, any provision that the Scottish Ministers may make under this section in relation to the relevant function.
- 15

**20 Power to modify pre-exit fees or charges**

- 20 (1) Subsection (2) applies where subordinate legislation contains provision (“the charging provision”) for, or in connection with, the charging of fees or other charges that—
- (a) was made under section 2(2) of the 1972 Act, section 56 of the Finance Act 1973 or this section, and
  - (b) forms part of retained (devolved) EU law.
- (2) The Scottish Ministers may by regulations make provision modifying the subordinate legislation for the purposes of—
- (a) revoking the charging provision,
  - 25 (b) altering the amount of any of the fees or charges that are to be charged,
  - (c) altering how any of the fees or charges are to be determined, or
  - (d) otherwise altering the fees or charges that may be charged in relation to anything in respect of which fees or charges may be charged under the charging provision.
- 30 (3) Where the charging provision consists solely of 1972 Act provision, regulations under this section may not impose or increase taxation.
- (4) In subsection (3), “1972 Act provision” means—
- (a) provision that is made under section 2(2) of the 1972 Act and not under section 56 of the Finance Act 1973, including such provision as modified under this section, or
  - 35 (b) provision that is made under this section and is incidental to, or supplements or replaces, provision within paragraph (a).

**21 Scrutiny of regulations under sections 19 and 20**

- (1) Regulations under section 19 containing provision falling within subsection (2) are subject to the affirmative procedure.

- (2) That provision is provision which—
- (a) imposes a fee or charge in respect of a function exercisable by a Scottish public authority (unless it is modifying a fee or charge already payable in respect of that function under regulations under section 19), or
  - (b) confers a power as mentioned in subsection (2)(c) of that section.
- (3) Any other regulations under section 19, and regulations under section 20, are subject to the negative procedure.
- (4) This section is subject to section 31.

## 22 Relationship to other powers

This Part does not affect the powers under section 11, 12 or 13, or any other power exercisable apart from this Part, to require the payment of, or to make other provision in relation to, fees or other charges.

## PART 5

### PUBLICATION AND RULES OF EVIDENCE

#### *Publication of retained (devolved) direct EU legislation etc.*

## 23 Duty to publish retained (devolved) direct EU legislation etc.

- (1) The Queen’s Printer for Scotland must make arrangements for the publication of, so far as devolved—
- (a) each relevant instrument that has been published before exit day by an EU entity, and
  - (b) the relevant international agreements.
- (2) In this section—
- “relevant instrument” means—
- (a) an EU regulation,
  - (b) an EU decision, and
  - (c) EU tertiary legislation,
- “relevant international agreements” means—
- (a) the Treaty on European Union,
  - (b) the Treaty on the Functioning of the European Union,
  - (c) the Euratom Treaty, and
  - (d) the EEA agreement.
- (3) For the purposes of this section, a relevant instrument or relevant international agreement is devolved if and to the extent that it makes provision that would be, if it were contained in an Act of the Scottish Parliament, within the legislative competence of the Scottish Parliament.
- (4) The Queen’s Printer for Scotland may make arrangements for the publication of—
- (a) any decision of, or expression of opinion by, the European Court, or



(b) any other document published by an EU entity.

(5) The Queen’s Printer for Scotland may make arrangements for the publication of anything which the Queen’s Printer for Scotland considers may be useful in connection with anything published under this section.

5 (6) This section does not require the publication of—

(a) anything repealed before exit day, or

(b) any modifications made on or after exit day.

## **24 Exceptions from duty to publish**

10 (1) The Scottish Ministers may create an exception from the duty under section 23(1) in respect of a relevant instrument or category of relevant instruments.

(2) An exception is created by giving a direction to the Queen’s Printer for Scotland specifying the instrument or category of instruments that are excepted.

(3) The Scottish Ministers must publish any direction under this section.

(4) In this section—

15 “instrument” includes part of an instrument,

“relevant instrument” has the meaning given by section 23(2).

### *Rules of evidence*

## **25 Questions as to meaning of EU instruments**

20 (1) Where it is necessary, for the purpose of interpreting retained (devolved) EU law in legal proceedings, to decide a question as to—

(a) the meaning or effect in EU law of any of the EU Treaties or any other treaty relating to the EU, or

(b) the validity, meaning or effect in EU law of any EU instrument,

the question is to be treated for that purpose as a question of law.

25 (2) In this section—

“interpreting retained (devolved) EU law” means deciding any question as to the validity, meaning or effect of any retained (devolved) EU law,

“treaty” includes—

(a) any international agreement, and

30 (b) any protocol or annex to a treaty or international agreement.

## **26 Power to make provision about judicial notice and admissibility**

(1) The Scottish Ministers may by regulations—

(a) make provision enabling or requiring judicial notice to be taken of a relevant matter, or

35 (b) provide for the admissibility in any legal proceedings of specified evidence of—

(i) a relevant matter, or

- (ii) instruments or documents issued by or in the custody of an EU entity.
- (2) Regulations under subsection (1)(b) may provide that evidence is admissible only where specified conditions are met (for example, conditions as to certification of documents).
- (3) Regulations under this section may modify any provision made by or under an enactment.
- (4) Regulations under this section are subject to the affirmative procedure.
- (5) In subsection (3), “enactment” does not include primary legislation passed after this Act is passed.
- (6) In this section, each of the following is a “relevant matter”—
- (a) retained (devolved) EU law,
- (b) EU law,
- (c) the EEA agreement, and
- (d) anything which is specified in the regulations and which relates to a matter mentioned in paragraph (a), (b) or (c).

## PART 5A

### ENVIRONMENT

#### **26A Environmental matters: duty to consult**

- (1) The Scottish Ministers must, not later than the end of the period of 6 months beginning with the day on which this section comes into force—
- (a) prepare proposals about the matters set out in subsections (2) and (3),
- (b) consult on those proposals in accordance with subsection (4), and
- (c) lay before the Scottish Parliament a report setting out a summary of—
- (i) the comments received in response to the consultation, and
- (ii) the Scottish Ministers’ views on those comments.
- (2) The first matter is how regard is to be had to the guiding principles on the environment—
- (a) by the Scottish Ministers in—
- (i) developing policies (including proposals for legislation), and
- (ii) determining how to exercise any of their functions,
- (b) by any other Scottish public authority in determining how to exercise any of its functions.
- (3) The second matter is how to ensure that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU.
- (4) The Scottish Ministers must consult—
- (a) such Scottish public authorities, or bodies representative of the interests of such Scottish public authorities, as would be affected by the proposals, and
- (b) such other persons as they consider appropriate.

- (5) The guiding principles on the environment are—
- (a) the precautionary principle as it relates to the environment,
  - (b) that preventative action should be taken to avert environmental damage,
  - (c) that environmental damage should as a priority be rectified at source,
  - (d) that the polluter should pay.
- (6) Those principles are derived from the equivalent principles provided for in Article 191(2) in Title XX of the Treaty on the Functioning of the European Union and accordingly they are to be interpreted, so far as appropriate, in a manner consistent with the interpretation of those equivalent principles by the European Court from time to time.
- (7) In subsection (3), “governance”, in relation to the environment, means appropriate arrangements for the purposes of ensuring—
- (a) compliance with the law relating to the environment, and
  - (b) effective implementation of policy relating to the environment.
- (8) In subsection (7), “appropriate arrangements” includes functions equivalent to those carried out before exit day by the European Commission, the European Court and any other EU institution for the purposes mentioned in that subsection.

## PART 6

### GENERAL AND FINAL PROVISIONS

#### *Interpretation*

#### **27 Interpretation: general**

- (1) In this Act—
- “the 1972 Act” means the European Communities Act 1972,
- “Charter of Fundamental Rights” means the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007,
- “the EEA” means the European Economic Area,
- “enactment” (except in section 2 or where there is otherwise a contrary intention) includes any retained (devolved) direct legislation,
- “EU decision” means—
- (a) a decision within the meaning of Article 288 of the Treaty on the Functioning of the European Union, or
  - (b) a decision under former Article 34(2)(c) of the Treaty on European Union,
- “EU directive” means a directive within the meaning of Article 288 of the Treaty on the Functioning of the European Union,
- “EU entity” means an EU institution or any office, body or agency of the EU,

“EU reference” means—

- (a) any reference to the EU, an EU entity or a member State,
- (b) any reference to an EU directive or any other EU law, or
- (c) any other reference which relates to the EU,

5 “EU regulation” means a regulation within the meaning of Article 288 of the Treaty on the Functioning of the European Union,

“EU tertiary legislation” means—

- (a) any provision made under—
  - (i) an EU regulation,
  - 10 (ii) a decision within the meaning of Article 288 of the Treaty on the Functioning of the European Union, or
  - (iii) an EU directive,

15 by virtue of Article 290 or 291(2) of the Treaty on the Functioning of the European Union or former Article 202 of the Treaty establishing the European Community, or

- (b) any measure adopted in accordance with former Article 34(2)(c) of the Treaty on European Union to implement decisions under former Article 34(2)(c),

but does not include any such provision or measure which is an EU directive,

20 “exempt EU instrument” means anything which is an exempt EU instrument by virtue of section 29,

“member State” (except in the definitions of “direct EU legislation” and “EU reference”) does not include the United Kingdom,

25 “Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975,

“modify” includes amend, repeal or revoke (and related expressions are to be read accordingly),

“primary legislation” means—

- (a) an Act of Parliament,
- 30 (b) an Act of the Scottish Parliament,

“relevant criminal offence” means an offence for which an individual who has reached the age of 21 is capable of being sentenced to imprisonment for a term of more than 2 years (ignoring any enactment prohibiting or restricting the imprisonment of individuals who have no previous convictions),

35 “retained (devolved) direct EU legislation” means any direct EU legislation which forms part of Scots law by virtue of section 3 (as modified by or under this Act or by any other provision of Scots law from time to time, and including any instruments made under it on or after exit day),

40 “retrospective provision”, in relation to provision made by regulations, means provision taking effect from a date earlier than the date on which the regulations are made,

“subordinate legislation” means—

- (a) any Order in Council, order, rules, regulations, scheme, warrant, byelaw or other instrument made under any Act, or
- (b) any instrument made under an Act of the Scottish Parliament,

and (except where there is a contrary intention) includes any Order in Council, order, rules, regulations, scheme, warrant, byelaw or other instrument made on or after exit day under any retained (devolved) direct EU legislation,

“Treaty of Lisbon” means the Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community signed at Lisbon on 13 December 2007,

“tribunal” means any tribunal in which legal proceedings may be brought,

“UK withdrawal agreement” means an agreement (whether or not ratified) between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom’s withdrawal from the EU.

- (2) In this Act references to when an enactment is passed are, in the case of an Act of the Scottish Parliament, references to the date on which the Bill for that Act received Royal Assent.
- (3) In this Act references to anything which continues to be Scots law by virtue of section 2 include references to anything to which subsection (1) of that section applies which continues to be Scots law on or after exit day (whether or not it would have done so irrespective of that section).
- (4) References in this Act to former Article 34(2)(c) of the Treaty on European Union are references to that Article as it had effect at any time before the coming into force of the Treaty of Lisbon.
- (5) Any other reference in this Act to—
  - (a) an Article of the Treaty on European Union or the Treaty on the Functioning of the European Union, or
  - (b) Article 10 of Title VII of Protocol 36 to those treaties,includes a reference to that Article as applied by Article 106a of the Euratom Treaty.

## 28 Meaning of “exit day”

- (1) In this Act, “exit day” means the day that the United Kingdom leaves the EU.
- (3) Where the United Kingdom leaves the EU at a specific time on exit day, references in this Act to before, after or on that day, or to beginning with that day, are accordingly to be read as references to before, after or at that time on that day or (as the case may be) to beginning with that time on that day.
- (4) For the purposes of this section, the United Kingdom leaves the EU when the Treaty on European Union and the Treaty on the Functioning of the European Union cease to apply to the United Kingdom as a consequence of UK withdrawal.

**29 Meaning of “exempt EU instruments”**

- (1) This section sets out what are “exempt EU instruments” for the purpose of the meaning of direct EU legislation (see section 3(2)(a)(i)).
- (2) An EU decision is “an exempt EU instrument” so far as it is, in accordance with a relevant Protocol, not applicable to the United Kingdom immediately before exit day.
- (3) If any decision under Title V or former Title V of the Treaty on European Union is a decision within the meaning of Article 288 of the Treaty on the Functioning of the European Union (and accordingly falls within the definition of “EU decision” in section 27(1)), it is “an exempt EU instrument”.
- (4) An EU regulation is “an exempt EU instrument” so far as it is, in accordance with a relevant Protocol, not applicable to the United Kingdom immediately before exit day.
- (5) EU tertiary legislation is “an exempt EU instrument” so far as it is made under—
- (a) an EU decision or EU regulation which is an exempt EU instrument, or
  - (b) an EU directive so far as it is, in accordance with a relevant Protocol, not applicable to the United Kingdom immediately before exit day.
- (6) The following are “relevant Protocols” for the purposes of this section—
- (a) Protocol 15 to the Treaty on European Union and the Treaty on the Functioning of the European Union (protocol on certain provisions relating to the United Kingdom),
  - (b) Protocol 19 to the Treaty on European Union and the Treaty on the Functioning of the European Union (protocol on the Schengen acquis integrated into the framework of the European Union),
  - (c) the former Protocol integrating the Schengen acquis into the framework of the European Union annexed, in accordance with the Treaty of Amsterdam, to the Treaty on European Union and the Treaty establishing the European Community,
  - (d) Protocol 21 to the Treaty on European Union and the Treaty on the Functioning of the European Union (protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice),
  - (e) the former Protocol on the position of the United Kingdom and Ireland annexed, in accordance with the Treaty of Amsterdam, to the Treaty on European Union and the Treaty establishing the European Community (protocol in respect of Title IV of Part 3 of the Treaty establishing the European Community),
  - (f) Article 10 of Title VII of Protocol 36 to the Treaty on European Union and the Treaty on the Functioning of the European Union (transitional provision with respect to acts of the Union in the field of police co-operation and judicial co-operation in criminal matters adopted before the coming into force of the Treaty of Lisbon).

*Regulations***30 Regulations**

- (1) Any power conferred by this Act on the Scottish Ministers to make regulations includes the power to make—
- (a) different provision for different purposes, and

(b) such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary.

(2) This section does not apply to regulations under section 36.

### **31 Scrutiny of regulations in urgent cases**

(1) Subject to subsection (1A), subsection (2) applies to—

(a) regulations to which section 7(5), section 14(1), section 21(1) or section 32(3) apply, or

(b) regulations to which section 14(3) applies which would not otherwise be made without being subject to the affirmative procedure.

(1A) Subsection (2) does not apply to regulations under section 13(1).

(2) The regulations may be made without being subject to the affirmative procedure if the regulations contain a declaration that the Scottish Ministers consider that, by reason of urgency, it is necessary to make the regulations without being subject to that procedure.

(3) Regulations made in accordance with subsection (2) must be laid before the Scottish Parliament as soon as practicable after they are made.

(4) Regulations made in accordance with subsection (2) cease to have effect at the end of the period of 21 days beginning with the day on which they are made unless, during that period, the regulations are approved by resolution of the Scottish Parliament.

(5) In calculating the period of 21 days, no account is to be taken of any period during which the Scottish Parliament is—

(a) dissolved, or

(b) in recess for more than 4 days.

(6) If regulations cease to have effect as a result of subsection (4), that does not—

(a) affect the validity of anything previously done under the regulations, or

(b) prevent the making of new regulations.

### **31A Suspension of effect of section 31**

(1) The Parliament may, by resolution, determine that the application of section 31(2) to regulations mentioned in section 31(1) is to be suspended.

(2) Subsection (1) applies where the terms of the resolution specify circumstances in which section 31(2) is considered to have been applied in respect of regulations without sufficient justification.

(3) The Parliament may, by resolution, reinstate the application of section 31(2) where it is satisfied that appropriate steps have been taken to ensure that it is not applied without sufficient justification.

*Ancillary provisions*

**32 Ancillary provision**

- 5 (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider necessary for the purposes of, in connection with or for giving full effect to this Act or any provision made under it.
- (1A) The power in subsection (1) includes power to make provision in consequence of, or in connection with, the European Union (Withdrawal) Act 2018 or any other enactment making provision for the purpose set out in section 1(1) or an equivalent purpose.
- 10 (2) Regulations under this section may modify any enactment (including this Act).
- (3) Regulations under this section which make provision mentioned in subsection (2) are subject to the affirmative procedure.
- (4) Any other regulations under this section are subject to the negative procedure.
- (5) Subsection (3) is subject to section 31.

15 **33 Repeal of spent references to EU law etc.**

- (1) In section 29(2)(d) of the Scotland Act 1998 (no competence for Scottish Parliament to legislate incompatibly with Convention rights or EU law), the words “or with EU law” are repealed.
- 20 (2) In section 57(2) of that Act (no power for members of the Scottish Government to act incompatibly with Convention rights or EU law), the words “or with EU law” are repealed.
- (3) Schedule 1 contains further repeals of provisions in that Act which are spent as a consequence of the UK’s withdrawal from the EU.

**34 Consequential, transitional, transitory and saving provision**

25 Schedule 2 contains consequential, transitional, transitory and saving provisions.

*Final provisions*

**35 Index of defined expressions**

- 30 (1) Schedule 3 contains an index of expressions used in this Act and defined or otherwise explained in this Act or in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.
- (2) See paragraph 8 of schedule 2 for amendments made by this Act to schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

**36 Commencement**

- 35 (1) This section and sections 1, 11, 12, 14 to 22, 27 to 32, 35, 37 and 38 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.



- (2A) Regulations appointing a day for the coming into force of section 13 are subject to the affirmative procedure.
- (2B) The Scottish Ministers may not lay before the Scottish Parliament a draft Scottish statutory instrument containing regulations appointing a day for the coming into force of section 13 until the end of the period of one month beginning with the day on which they comply with subsection (2C).
- (2C) The Scottish Ministers must lay before the Parliament a report setting out—
- (a) why they consider it necessary to bring section 13 into force, and
  - (b) the purposes for which they intend to use the section 13 powers.
- (3) Regulations under this section may—
- (a) include transitional, transitory or saving provision,
  - (b) make different provision for different purposes.

### **36A Reports relating to deficiencies arising from UK withdrawal**

- (1) The Scottish Ministers must, for each reporting period, prepare and lay before the Scottish Parliament a report that describes how deficiencies in retained (devolved) EU law have been addressed by the Scottish Ministers, including by—
- (a) making regulations under section 11(1), or
  - (b) giving consent to subordinate legislation to which section 17 applies.
- (2) The reporting periods are—
- (a) the period beginning with the date on which this section comes into force and ending on exit day, and
  - (b) the period beginning with exit day and ending on the date of expiry of the power to make regulations under section 11(1).
- (3) Each report must be laid before the Scottish Parliament as soon as practicable after the end of the reporting period to which it relates.
- (4) In this section, “deficiencies in retained (devolved) EU law” has the same meaning as in section 11.

### **36B Duty to make arrangements for an independent evaluation: health and social care**

- (1) The Scottish Ministers must arrange for the preparation and publication of an independent evaluation of the effect of this Act, and any regulations made under it, on the health and social care sector.
- (2) The evaluation is to be published no later than the end of the period of one year beginning with the day of Royal Assent.
- (3) The evaluation is to be carried out by an independent person to be appointed by the Scottish Ministers.
- (4) The evaluation must—
- (a) analyse and assess the effect of this Act, and any regulations made under it, on—
    - (i) the funding of the health and social care sector,
    - (ii) the health and social care workforce,

(iii) the economy, efficiency and effectiveness of the health and social care sector, and

(b) include any other such matters relevant to the effect of this Act upon the health and care sector as the Scottish Ministers consider appropriate.

5 (5) The person undertaking the evaluation must, in preparing the evaluation, consult—

(a) the Secretary of State,

(b) the Welsh Ministers,

(c) a Northern Ireland department,

(d) providers of health and social care services,

10 (e) individuals receiving health and social care services,

(f) organisations working for and on behalf of individuals receiving health and social care services, and

(g) such other persons as the Scottish Ministers consider appropriate.

15 (6) The Scottish Ministers must, as soon as reasonably practicable after receiving a report of the evaluation, lay a copy of the report before the Parliament.

### **37 Repeal of this Act**

(1) The Scottish Ministers may by regulations repeal this Act.

(2) Regulations under subsection (1) are subject to the affirmative procedure.

### **38 Short title**

20 The short title of this Act is the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018.

SCHEDULE 1  
(introduced by section 33(3))

FURTHER REPEALS OF SPENT REFERENCES TO EU LAW

- 1 The Scotland Act 1998 is amended as follows.
- 5 2 In section 2 (ordinary general elections), in subsection (2A), paragraph (b) and the “or” before it are repealed.
- 3 In section 12 (power of the Scottish Ministers to make provision about elections), in subsection (4)(a)—
- 10 (a) “or the European Parliamentary Elections Act 2002” is repealed,  
(b) “, European Parliamentary elections” is repealed.
- 4 In section 32 (submission of Bills for Royal Assent), in subsection (3), paragraph (b) and the “or” before it are repealed.
- 5 Section 34 (ECJ references) is repealed.
- 6 In section 36 (stages of Bills)—
- 15 (a) in subsection (4), paragraph (b) is repealed (but not the “or” at the end of it),  
(b) in subsection (5)(a), “, (b)” is repealed.
- 7 In section 57 (EU law and convention rights)—
- (a) in the heading, “EU law and” is repealed,  
(b) subsection (1) is repealed.
- 20 8 In section 80D (Scottish taxpayers)—
- (a) in subsection (4)—
- (i) insert “or” at the end of paragraph (a),  
(ii) paragraph (b) and the “or” at the end of it are repealed,
- 25 (b) in subsection (4B), for “any of paragraphs (a) to (c)” substitute “paragraph (a) or (c)”.
- 9 In section 80DA (Scottish taxpayers: Welsh parliamentarians), in subsection (2)(a), for “any of paragraphs (a) to (c)” substitute “paragraph (a) or (c)”.
- 10 In section 82 (limits on salaries of members of the Parliament)—
- (a) in subsection (1)—
- 30 (i) insert “or” at the end of paragraph (za),  
(ii) paragraph (b) and the “or” before it are repealed,
- (b) in subsection (2)(b), for “(1)(za), (a) or (b)” substitute “(1)(za) or (a)”.
- 11 In section 106 (power to adapt functions)—
- (a) in subsection (5), “, or an obligation under EU law,” is repealed,
- 35 (b) subsection (7) is repealed.
- 12 In section 119 (Consolidated Fund etc.), subsection (4) is repealed.

13 In section 126 (interpretation)—

- (a) subsection (9) is repealed,
- (b) in subsection (10), “EU law or” is repealed.

14 In section 127 (index of defined expressions), the entry for EU law is repealed.

5 15 In schedule 4 (enactments etc. protected from modification)—

- (a) paragraph 1(2)(c) is repealed,
- (b) paragraph 13(1)(a) is repealed.

16 In schedule 6 (devolution issues)—

- (a) in each of paragraphs 1(d) and (e), “or with EU law” is repealed,
- 10 (b) in the second sentence (beginning after sub-paragraph (f)), “or with EU law” is repealed.

**SCHEDULE 2**  
*(introduced by section 34)*

CONSEQUENTIAL, TRANSITIONAL, TRANSITORY AND SAVING PROVISION

**PART 1**

GENERAL CONSEQUENTIAL PROVISION

*Existing ambulatory references to retained (devolved) direct EU legislation*

1 (1) Any reference which, immediately before exit day—

- (a) exists in—
  - 20 (i) any devolved enactment,
  - (ii) any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement which is to form part of Scots law by virtue of section 3, or
  - (iii) any document relating to anything falling within sub-paragraph (i) or (ii), and

25 (b) is a reference to (as it has effect from time to time) any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement which is to form part of Scots law by virtue of section 3,

30 is to be read, on or after exit day, as a reference to the EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement as it forms part of Scots law by virtue of section 3 and, unless the contrary intention appears, as modified by Scots law from time to time.

(2) Sub-paragraph (1) does not apply to any reference which forms part of a power to make, confirm or approve subordinate legislation so far as the power to make the subordinate legislation—

- 35 (a) continues to be part of Scots law by virtue of section 2, and
- (b) is subject to a procedure before the Scottish Parliament.

- (3) Sub-paragraphs (1) and (2) are subject to any other provision made by or under this Act or any other enactment.
- (4) For the purposes of this paragraph, an enactment is devolved if and to the extent that it makes provision that is (or would be, if it were contained in an Act of the Scottish Parliament) within the legislative competence of the Scottish Parliament.

*Other existing ambulatory references*

2 (1) Any reference which—

(a) exists, immediately before exit day, in—

(i) any devolved enactment,

(ii) any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement which is to form part of Scots law by virtue of section 3, or

(iii) any document relating to anything falling within sub-paragraph (i) or (ii),

(b) is not a reference to which paragraph 1(1) applies, and

(c) is, immediately before exit day, a reference to (as it has effect from time to time) any of the EU Treaties, any EU instrument or any other document of an EU entity,

is to be read, on or after exit day, as a reference to the EU Treaty, EU instrument or document as it has effect immediately before exit day.

(2) Sub-paragraph (1) does not apply to any reference which forms part of a power to make, confirm or approve subordinate legislation so far as the power to make the subordinate legislation—

(a) continues to be part of Scots law by virtue of section 2, and

(b) is subject to a procedure before the Scottish Parliament.

(3) Sub-paragraphs (1) and (2) are subject to any other provision made by or under this Act or any other enactment.

(4) For the purposes of this paragraph, an enactment is devolved if and to the extent that it makes provision that is (or would be, if it were contained in an Act of the Scottish Parliament) within the legislative competence of the Scottish Parliament.

*Existing powers to make subordinate legislation*

3 (1) Any power to make, confirm or approve devolved subordinate legislation which was conferred before exit day is to be read, on or after exit day and so far as the context permits or requires, as being capable of being exercised to modify (or, as the case may be, result in the modification of) any retained (devolved) direct EU legislation.

(2) Any subordinate legislation modifying any retained (devolved) direct EU legislation which is, or is to be, made, confirmed or approved by virtue of sub-paragraph (1) is to be subject to the same procedure (if any) before the Scottish Parliament as would be the case for that legislation if it were modifying other subordinate legislation.

- 5 (3) Any power to make, confirm or approve devolved subordinate legislation which, immediately before exit day, is subject to an implied restriction that it is exercisable only compatibly with EU law is to be read on or after exit day without that restriction or any corresponding restriction in relation to compatibility with retained (devolved) EU law.
- (4) Sub-paragraphs (1) to (3) are subject to any other provision made by or under this Act or any other enactment.
- 10 (5) For the purposes of this paragraph, subordinate legislation is devolved if, and to the extent that, it makes provision that would be, if it were contained in an Act of the Scottish Parliament, within the legislative competence of the Scottish Parliament.

*Future powers to make subordinate legislation*

- 4 (1) Any power to make, confirm or approve devolved subordinate legislation which is conferred on or after exit day may, so far as applicable and unless the contrary intention appears, be exercised so as to modify (or, as the case may be, result in the modification of) any retained (devolved) direct EU legislation.
- 15 (2) For the purposes of this paragraph, subordinate legislation is devolved if, and to the extent that, it makes provision that would be, if it were contained in an Act of the Scottish Parliament, within the legislative competence of the Scottish Parliament.

**PART 2**

SPECIFIC CONSEQUENTIAL PROVISION

*Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10)*

5 The Interpretation and Legislative Reform (Scotland) Act 2010 is amended as follows.

6 (1) Section 1 (application of Part 1 of the Act) is amended as follows.

(2) In subsection (1)—

25 (a) in paragraph (b), after “day” insert “, in the case of Scottish instruments made as mentioned in paragraph (a) or (b) of the definition of “Scottish instrument” in subsection (4),”, and

(b) after paragraph (b) (but before the “and” at the end of that paragraph) insert—

30 “(ba) Scottish instruments made on or after exit day, in the case of Scottish instruments made as mentioned in paragraph (c), (d) or (e) of the definition of “Scottish instrument” in subsection (4),”.

(3) In subsection (4)—

(a) omit the “or” at the end of paragraph (a), and

(b) after paragraph (b) insert—

35 “(c) any retained (devolved) direct EU legislation,

(d) an Act of the Scottish Parliament (whenever passed) and any retained (devolved) direct EU legislation (whenever made), or

- (e) an Act of the Scottish Parliament and an Act of Parliament (in each case, whenever passed) and any retained (devolved) direct EU legislation (whenever made).”

7 After section 26 insert—

5 **“26A Application of this Part to retained (devolved) direct EU legislation**

- (1) This Part (except sections 2, 3, 4 and 9(3)) applies, unless the contrary intention appears, to any retained (devolved) direct EU legislation so far as it—

(a) is amended by an Act, an Act of the Scottish Parliament or subordinate legislation, and

10 (b) is not a Scottish instrument,

as it applies to an Act of the Scottish Parliament passed at the corresponding time.

- 15 (2) In its application by virtue of subsection (1), section 24 has effect as if the reference to the Act of the Scottish Parliament included a reference to the retained (devolved) direct EU legislation so far as unamended (as well as a reference to that legislation so far as amended).

- (3) References in this Part to the repeal of an Act of the Scottish Parliament are to be read as including references to the revocation of retained (devolved) direct EU legislation.

- 20 (4) In schedule 1, in the definition of “commencement”, the reference to subordinate legislation does not include any retained (devolved) direct EU legislation other than—

(a) any such legislation to which subsection (1) applies, or

25 (b) any instrument made on or after exit day under any retained (devolved) direct EU legislation.

- (5) For the application of this Act to retained (devolved) direct EU legislation which is a Scottish instrument, see section 1.

- 30 (6) In this section, “corresponding time” means the time when the amending Act, Act of the Scottish Parliament or subordinate legislation was passed or (as the case may be) made.”

8 In Schedule 1 (definitions of words and expressions)—

(a) omit from “the EU” to “meanings given by that Act”,

(b) in the definition of “enactment”, at the end insert—

“and includes any retained (devolved) direct EU legislation”,

35 (c) in the definition of “subordinate legislation” after “Scottish Parliament” insert “or made or to be made on or after exit day under any retained (devolved) direct EU legislation”,

(d) at the end insert—

*“Definitions relating to the EU*

5 “The Communities” means Euratom, the Economic Community and the Coal and Steel Community, but a reference to any or all of those Communities is to be treated as being or including (as the context requires) a reference to the EU.

“E.C.S.C. Treaty” means the Treaty establishing the European Coal and Steel Community, signed at Paris on 18 April 1951.

10 “EEA agreement” means the agreement on the European Economic Area signed at Oporto on 2 May 1992, together with the Protocol adjusting that Agreement signed at Brussels on 17 March 1993, as modified or supplemented from time to time, but does not include any retained (devolved) direct EU legislation.

“EEA state”, in relation to a time, means—

15 (a) a state which at that time is a member State, or

(b) any other state which at that time is a party to the EEA agreement.

“E.E.C. Treaty” means the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957.

20 “Entry date” means the date on which the United Kingdom became a member of the Communities (which neither includes nor is a reference to the EU).

25 “The EU” or “the European Union” means the European Union, being the Union established by the Treaty on European Union signed at Maastricht on 7 February 1992 (as amended by any later Treaty); and includes, so far as the context permits or requires, Euratom.

“EU institution” means any institution of the EU.

“EU instrument” means any instrument issued by an EU institution other than any retained (devolved) direct EU legislation.

30 “Euratom”, “Economic Community” and “Coal and Steel Community” mean respectively the European Atomic Energy Community, the European Economic Community and the European Coal and Steel Community (but see the definition of “the Communities” for provision as to the construction of references to those Communities).

35 “Euratom Treaty” means the Treaty establishing the European Atomic Energy Community, signed at Rome on 25 March 1957.

“European Court” means the Court of Justice of the European Union.

“Exit day” (and related expressions) have the same meaning as in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018 (see section 28 of that Act).

40 “Member”, in the expression “member State”, refers to membership of the EU.



“Retained (devolved) EU law” and “retained (devolved) direct EU legislation” have the same meaning as in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018 (see sections 10(9) and 27(1) of that Act).

5 “The Treaties” or “the EU Treaties” means the Treaties or EU Treaties, within the meaning given by section 1(2) of the European Communities Act 1972 as that Act had effect immediately before its repeal by section 1 of the European Union (Withdrawal) Act 2018.”.

### PART 3

#### 10 GENERAL TRANSITIONAL, TRANSITORY OR SAVING PROVISION

*Continuation of existing acts etc.*

9 (1) Anything done—

(a) in connection with anything which continues to be, or forms part of, Scots law by virtue of section 2, 3, 4, 5 or 10(3), or

15 (b) within devolved competence for a purpose mentioned in section 2(2)(a) or (b) of the 1972 Act or otherwise related to the EU or the EEA,

if in force or effective immediately before exit day, continues to be in force or effective on and after exit day.

(2) Anything done—

20 (a) in connection with anything which continues to be, or forms part of, Scots law by virtue of section 2, 3, 4, 5 or 10(3), or

(b) within devolved competence for a purpose mentioned in section 2(2)(a) or (b) of the 1972 Act or otherwise related to the EU or the EEA,

25 which, immediately before exit day, is in the process of being done continues to be done on and after exit day.

(3) Sub-paragraphs (1) and (2) are subject to—

(a) sections 2 to 10,

(b) any transitional, transitory or saving provision made under section 32(1), and

(c) any other provision made by or under this Act or any other enactment.

30 (4) References in this paragraph to anything done include references to anything omitted to be done.

(5) For the purposes of this paragraph, something is done “within devolved competence” so far it would be within the legislative competence of the Scottish Parliament to provide for the doing of the thing.

**PART 4**

SPECIFIC TRANSITIONAL, TRANSITORY AND SAVING PROVISION

*Main powers in connection with withdrawal*

- 5      10      The prohibition on making regulations under section 11, 12 or 13 after a particular time does not affect the continuation in force of regulations made at or before that time (including the exercise after that time of any power conferred by regulations made at or before that time).

SCHEDULE 3  
*(introduced by section 35(1))*

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

[AS PASSED]

An Act of the Scottish Parliament to make provision for Scotland in connection with the withdrawal of the United Kingdom from the EU.

Introduced by: John Swinney  
Supported by: Michael Russell  
On: 27 February 2018  
Bill type: Government Bill

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