

# **UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, introduced in the Scottish Parliament on 27 February 2018.
2. The following other accompanying documents are published separately:
  - a Financial Memorandum (SP Bill 28–FM);
  - a Policy Memorandum (SP Bill 28–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 28—LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a section or schedule, or part of a section or schedule, does not require any explanation or comment, none is given.

### **OVERVIEW OF THE BILL**

5. The Bill seeks to ensure that, to the greatest extent possible, continuity of law is maintained on UK withdrawal from the EU. This is to ensure certainty, stability and predictability for the people who live and work in Scotland and those who do business here and with Scotland in Europe. To achieve this, the Bill does three main things:
  - it retains in domestic law EU law currently operating in devolved areas,
  - it gives the Scottish Ministers the powers needed to ensure that devolved law continues to operate effectively after UK withdrawal, and
  - it gives the Scottish Ministers the power to, where appropriate, ensure that Scotland's devolved laws keep pace after UK withdrawal with developments in EU law.
6. The Bill contains 38 sections and three schedules, as follows:

- Section 1 sets out the purpose and effect of the Bill.
- Sections 2 to 5 provide for EU law in devolved areas, as it operates on exit day, to be retained in Scots law.
- Sections 6 to 9 set out some exceptions to the retention of EU law.
- Section 10 sets out how retained (devolved) EU law should be interpreted by courts and tribunals.
- Sections 11 and 12 contain the powers to be used by the Scottish Ministers to ensure that retained (devolved) EU law continues to operate effectively after UK withdrawal.
- Section 13 contains a power to keep pace after UK withdrawal with developments in EU law.
- Sections 14 to 16 provide for the scrutiny of regulations made using the main powers in the Bill.
- Section 17 requires UK Ministers (and others) to seek Scottish Ministers' consent before making subordinate legislation that contain devolved provision that modifies or otherwise affects the operation of retained (devolved) EU law.
- Sections 18 to 22 contain some financial matters relating to the Bill, including powers to provide for, or modify existing, fees and charges.
- Sections 23 and 24 contain rules about the publication of retained (devolved) EU law.
- Sections 25 and 26 provide rules of evidence for the purpose of applying retained (devolved) EU law in legal proceedings.
- Sections 27 to 38 contain general and final provisions, including interpretation provision, repeals of spent references to EU law a definition of "exit day" and a scheme for scrutinising regulations that need to be made urgently.
- Schedule 1 contains further repeals of spent references to EU law.
- Schedule 2 contains consequential, transitional, transitory and saving provision.
- Schedule 3 contains an index of defined expressions.

## **COMMENTARY ON SECTIONS**

### **PART 1 – PURPOSE AND EFFECT OF ACT**

#### **Section 1 – Purpose and effect of this Act**

7. Section 1(1) sets out that the purpose of the Bill is to make provision in connection with the prospective withdrawal of the UK from the EU and to ensure the effective operation of devolved Scots law on and after UK withdrawal.

8. On the UK's withdrawal from the EU, the limits on the Scottish Parliament's legislative competence in section 29(2)(d) of the Scotland Act 1998 will empty of meaning and EU law

obligations will no longer apply to the UK. Subsection (2) prevents the Bill, or any provision made under it, from having effect in law, so far as it would be incompatible with EU law, before any relevant EU law ceases to have effect in Scotland. It postpones the effect of any provision contained in or made under the Bill that would be incompatible with EU law until after the provisions of EU law giving rise to the potential incompatibility cease to have effect as a consequence of UK withdrawal. Subsection (3) takes account of the possibility that different provisions of EU law might cease to apply on different days, e.g. in the context of a transitional period for UK withdrawal.

9. Subsection (4) defines when a provision is within devolved legislative competence for the purpose of this section.

## **PART 2 – RETENTION OF EXISTING EU LAW**

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

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

10. Section 2 corresponds to clause 2 of the European Union (Withdrawal) Bill<sup>1</sup> (“EUWB”). It ensures that existing domestic devolved legislation which implements EU obligations remains on the domestic statute book after the UK leaves the EU.

11. If nothing else were done, secondary legislation made under the European Communities Act 1972 (“ECA”) would lapse when that Act is repealed as part of UK withdrawal. Doubt would also be cast over the continuity or effect of other legislation which was made in consequence of, or on the assumption of, the UK being a member state of the EU, or which refers to the EU. This section therefore provides for devolved EU-derived legislation to be retained as part of Scots law on UK withdrawal, despite withdrawal and despite the repeal of the ECA.

12. Subsection (1) provides that devolved EU-derived domestic legislation remains in place and continues to have effect on and after exit day. Subsection (3) sets out which legislation is devolved for this purpose.

13. Subsection (2) sets out what is covered by devolved EU-derived domestic legislation:

- Subsection (2)(a) covers devolved instruments made under the ECA section 2(2)<sup>2</sup> or paragraph 1A of schedule 2 to implement the UK’s obligations under EU law. Paragraph 1A allows for ambulatory cross-references<sup>3</sup> to EU instruments. This means that references to EU instruments will automatically update when an EU

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<sup>1</sup> The European Union (Withdrawal) Bill was introduced in the UK Parliament on 13 July 2017. It, and accompanying documents, can be found at:

<https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>.

<sup>2</sup> ECA section 2(2)(a) is used to implement (or enable the implementation of) EU obligations or rights under the EU Treaties. Section 2(2)(b) is used to deal with matters arising out of or related to those obligations or rights.

<sup>3</sup> An ambulatory reference is a reference to an EU instrument which operates as a reference to that instrument as it is amended from time to time.

instrument is amended. Paragraph 1 of schedule 2 of the Bill makes further provision about ambulatory references.

- Subsection (2)(b) covers other legislation that, while not made under ECA section 2(2), was included in an Act of the Scottish Parliament or made using other powers for the purpose of implementing an EU law obligation. For example, the Environmental Assessment (Scotland) Act 2005 in part implements Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. Section 5 of the Criminal Justice (Scotland) Act 2016 implements Directive 2012/13/EU on the right to information in criminal proceedings. Devolved law on food safety is often made to ensure enforcement of EU obligations but is normally made under the powers in the Food Safety Act 1990 and ECA section 2(2).
- Subsection (2)(c) covers legislation which is connected to, but does not fall within the definitions of, the legislation preserved by subsection (2)(a) or (2)(b). It ensures that provisions which are tied in some way to EU law, or to domestic law which implements EU law, can continue to operate properly post exit. For example, it will ensure that a provision that goes beyond the minimum needed to comply with requirements under EU law (known as ‘gold plating’), is not excluded. This will allow these provisions to be amended by the powers in the Bill so that they still work effectively after UK withdrawal.
- Subsection (2)(d) covers other provisions which otherwise relate to the EU or EEA. For example where there is a cross-reference to a definition contained in an EU instrument those provisions will fall within the definition and would be retained.

14. Subsection (4) provides that the preservation of devolved EU-derived legislation is subject to the exceptions in sections 6 to 9, which provide for some exceptions to the retention of EU law.

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

15. Section 3 corresponds to clause 3 of the EUWB. Directly-applicable EU law is given effect in the UK by ECA section 2(1), “in accordance with the EU Treaties”. The two main treaties are the Treaty on European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”). That provision ensures that, for example, EU Regulations are directly applicable and binding in all member states (see Article 288 TFEU).

16. When these treaties no longer apply to the UK, if nothing else were done, this entire body of law would no longer have effect in domestic law. This section provides for this direct EU legislation to continue to have effect as part of Scots law. It does this by converting devolved direct EU legislation into Scots law at the point of exit on UK withdrawal, despite withdrawal and despite the repeal of the ECA.

17. Subsection (1) therefore provides for the retention of devolved direct EU legislation. Where legislation is retained under this provision, it is the text of the legislation itself, including any recitals, that will form part of Scots law.

18. Subsection (2) sets out what is covered by devolved direct EU legislation:

- Subsection (2)(a) converts EU regulations, EU decisions and EU tertiary legislation (now known as delegated and implementing acts) as they have effect immediately before exit day. These terms are defined in section 27. Section 2(a)(i) provides that this does not include exempt EU instruments (defined in section 29). The definition of exempt EU instruments reflects the fact that certain EU instruments did not apply to the UK because the UK did not adopt the Euro, or because the UK participated in only some aspects of the EU *acquis* in the field of freedom, security and justice. Section 2(a)(ii) also excludes EU decisions that were addressed only to a member state other than the UK. Section 2(a)(iii) excludes from conversion any EU-derived domestic legislation under section 2 that reproduces the effect of an EU regulation, decision or tertiary legislation. This is to avoid duplication on the statute book after exit.
- Subsections (2)(b) and (c) ensure the conversion into Scots law of any relevant EU regulations, decisions and tertiary legislation as they apply to the European Economic Area (“EEA”). This covers the European Economic Area Act 1993 which makes the EEA Agreement one of the “EU Treaties” for the purposes of the ECA and section 2(1) and (2) ECA apply to provisions of the EEA Agreement. This means that direct EU legislation applies to the EEA by virtue of its inclusion in the Annexes to the EEA Agreement with any adaptations that are necessary for it to apply in the EEA context. This direct legislation, as adapted, then flows into Scots law as a result of ECA section 2(1). Protocol 1 to the EEA Agreement contains horizontal adaptations which set out general interpretative provisions that apply throughout the Annexes to the Agreement. For instance, whenever EU acts refer to nationals of an EU member state, the reference is, for the purposes of the EEA Agreement, also understood as a reference to nationals of European Free Trade Association states.<sup>4</sup>
- Subsection (2)(b) therefore converts any Annex to the EEA Agreement to the extent that it relates to those EU instruments which are converted by subsection (2)(a). The effect of this is to bring into devolved Scots law EU Regulations, decisions and tertiary legislation as they apply and are adapted for the EEA context. As with the EU version of instruments, where domestic enactments saved under section 2 reproduce the effect of an EU instrument, these adapted instruments are not converted under this section. Again, this is to avoid duplication on the statute book after exit.
- Subsection (2)(c) converts Protocol 1 to the EEA agreement as it was immediately before exit.

19. Subsection (3) contains the definition of “devolved” for the purpose of the retention of direct EU legislation.

20. Subsection (4) ensures that direct EU legislation is only retained so far as it is operative immediately before exit day, reflecting the fact that the application of some EU legislation may

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<sup>4</sup> “Switzerland (also in EFTA) is not part of the EEA Agreement, but has a set of bilateral arrangements with the EU.”

be staggered. If the date of application of any provision falls after exit day, the provision is not converted.

21. Subsection (5) clarifies that section 3 will only convert the English language version of direct EU legislation into Scots law. Other language versions can continue to be considered as aids to interpretation by the courts

22. Subsection (6) provides that the conversion of devolved direct EU legislation is subject to the exceptions in sections 6 to 9.

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

23. Section 4 corresponds to clause 4 of the EUWB. As well as the EU law retained by sections 2 and 3, other aspects of EU law will have to be retained if continuity of law on exit day is to be achieved. For example, the EU Treaties confer rights directly on individuals which can currently be relied on in domestic law. If nothing else were done, these rights would lapse when these treaties no longer apply to the UK. This section provides for these other rights, etc., to be retained as part of Scots law on UK withdrawal, despite withdrawal and despite the repeal of the ECA.

24. Other rights which are retained in Scots law as a result of this section include multilateral agreements to which the EU is a party and which confer directly effective rights, such as the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, in relation to cross-border child cases and the enforcement of judgments relating to children.

25. Subsection (2) contains the definition of “devolved” for the purpose of this section.

26. Subsection (3) provides that rights, etc., are only retained under this section where they have not been retained under either section 3 or implemented by domestic implementation (and are therefore retained under section 2).

27. Subsection (4) clarifies that this section only retains rights, etc., recognised in decisions of courts made before exit day.

28. Subsection (5) contains the definition of “devolved jurisdiction” for the purpose of the recognition of these rights, etc..

29. Subsection (6) provides for the retention of these rights, etc., to be subject to the exceptions in sections 6 to 9.

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

30. Section 5 ensures that the general principles of EU law and the Charter of Fundamental Rights continue to be part of Scots law, so far as they have effect in EU law immediately before exit day and so far as they relate to anything to which section 2, 3 or 4 of the Bill applies.

31. The general principles of EU law are part of the EU law which member states are bound to comply with. Many of them have no express basis in the Treaties. For example, the following have been recognised as general principles by the Court of Justice of the European Union:

- proportionality (see *ABNA* C-453/03, C-11/04, C-12/04 and C-194/04 EU:C:2005:741, paragraphs 76-85),
- non-retroactivity (see *Moravia Gas Storage AS* C-596/13 P, paragraph 32),
- fundamental rights (see *Hauer* 44/79, EU:C:1979:290, paragraph 15),
- equivalence, or non-discrimination against EU law (see *Rewe* C-33/76, paragraph 5),
- effectiveness (see *Van Schijndel*, C-430/93 and C-431/93, EU:C:1995:441, paragraph 19).

32. The general principles are applied by the Court of Justice and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law and are also an aid to the interpretation of EU law. Domestic law that is within the scope of EU law and EU legislation (such as Directives) that do not comply with the general principles can be challenged and disapplied. Administrative action taken under EU law must also comply with the general principles.

33. The Charter of Fundamental Rights is a codification of general principles of EU law relating to human rights.

34. If nothing else were done, the status of the general principles and the Charter would not be clear. This section therefore expressly provides for them to be retained as part of Scots law on UK withdrawal, despite withdrawal and the repeal of the ECA.

35. Subsection (1)(a) retains the general principles and the Charter on exit day, to the extent that they had effect in EU law immediately before exit day. Subsection (1)(b) ensures that they only form part of Scots law so far as they relate to the law that is saved and incorporated into Scots law by sections 2 to 4. Currently, the general principles and the Charter would be relevant in relation to actions that are within the scope of EU law (for example, the manner in which a Directive was implemented by a member state). Under the Bill, the equivalent after UK withdrawal will be action that is taken that is within the scope of the law retained under sections 2 to 4. A public authority that is acting under retained EU law will therefore require to comply with the general principles.

36. Subsection (2) provides for equivalent rights of action based on a failure to comply with the retained general principles and the Charter and provides that enactments or rules of law can be dis-applied or quashed and that conduct can be quashed or declared unlawful by the courts. This provision applies to the extent that there is a right of action in Scots law immediately before exit based on a failure to comply. It will therefore be necessary to show that the action complained of related in some way to the law that has been saved or incorporated as an equivalent to action that is taken within the scope of EU law.

37. Subsection (3) clarifies that it is only the general principles as recognised by the Court of Justice before exit day that are retained by subsection (1).

38. Subsection (4) contains the definition of “retained (devolved) general principles of EU law” and “retained (devolved) Charter” for the purpose of this section.

39. Subsection (5) provides for the retention of the general principles and the Charter of Fundamental Rights to be subject to the exceptions in sections 6 to 9.

## **Exceptions to savings and incorporation**

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

40. Section 6 corresponds to clause 5(1) to (3) of the EUWB. The principle of supremacy means that domestic laws must be disapplied or quashed by the courts if they are found to be inconsistent with EU law. In Scotland, this is also reflected in the devolution settlement through the provision in section 57 of the Scotland Act 1998 that the Scottish Ministers have no power to make any subordinate legislation or do any other act so far as the legislation or act is incompatible with EU law, and in the provision in section 29 that an Act of the Scottish Parliament is not law so far as it is incompatible with EU law.

41. Subsections (1) and (2) provide that, while this principle does not apply to laws made on or after exit day, it will continue to apply to law made before exit day. What this means is that legislation made after exit day which is inconsistent with EU law retained by the Bill will take precedence over earlier legislation. But where a conflict exists between pre-exit Scots law and retained EU law, then the retained EU law is to be preferred. The principle is not however relevant to provision that is made under the Bill in preparation for the UK’s exit from the EU unless subsection (3) applies.

42. The principle of supremacy also means that domestic law must be interpreted, as far as possible, in accordance with EU law. This duty will not apply to Scots law that is passed or made on or after exit day, but subsection (2) preserves this duty in relation to devolved Scots law that is passed or made before exit.

43. Subsection (3) sets out that the principle of supremacy operates even where the retained EU law has been modified (for example, using the powers in this Bill), where that is consistent with the intention of the modification.

44. Subsection (4) contains the definition of “devolved” for the purpose of this section.

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

45. Section 7 corresponds to paragraph 1 of schedule 1 of the EUWB. It provides that, after UK withdrawal, there can be no challenge to the validity of retained EU law on the basis that the underlying EU instrument was invalid. Subsection (2) sets out exceptions to this rule. It does not apply where a pre-exit day decision of the Court of Justice has invalidated a law, or where

the Scottish Ministers have set out in regulations a type of challenge to validity that can still be made.

46. Subsection (3) provides that this does not affect any rights of action accruing before exit day.

47. Subsection (4) allows regulations under this section to provide for challenges that would otherwise have been against an EU institution to be against a Scottish public authority instead.

### **Section 8 – Rule in *Francovich***

48. Section 8(1) corresponds to paragraph 4 of schedule 1 of the EUWB. The rule in *Francovich* (C-6/90 and C-9/90 [1991] ECR I-5357) allows damages to be claimed against a member state for a failure to implement EU law fully. The rule only applies if the relevant law was intended to confer rights on individuals, if the breach is sufficiently serious and if there is a direct causal link between the breach and the damage suffered by the individual.

49. This section excepts the rule from being retained as part of Scots law after exit day. This, however, is subject to the specific transitional provision in subsection (2) which provides that the abolition of *Francovich* damages does not apply in relation to a right of action that existed before exit day. The transitional provision in paragraph 27(3) of schedule 8 of the EUWB preserves *Francovich* rights only if proceedings have been instituted but not yet decided. Under this Bill, in contrast, *Francovich* damages will therefore continue to be available for failures arising before UK withdrawal whether or not proceedings were initiated before exit day.

### **Section 9 – Interpretation of sections 6 to 8**

50. Section 9 corresponds to paragraph 5 of schedule 1 of the EUWB. It clarifies that the references in sections 6 to 8 to the principle of the supremacy of EU law and the rule in *Francovich* are to be read as references to them as they stood on exit day and not as they might operate in EU law after UK withdrawal.

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

### **Section 10 – Interpretation of retained (devolved) EU law**

51. Section 10 corresponds to clause 6 of the EUWB. It sets out how the law retained by the Bill is to be interpreted on and after UK withdrawal.

52. Subsections (1) and (2) explain the relationship between the case law of the Court of Justice and courts and tribunals exercising jurisdiction in relation to the law retained by the Bill after UK withdrawal. Courts and tribunals:

- are not bound by decisions made by the Court of Justice after UK withdrawal,
- cannot refer any matter to the Court of Justice after UK withdrawal, but
- may have regard to things done by the Court of Justice and other EU institutions after UK withdrawal if considered appropriate.

53. Subsection (3) provides that questions about retained (devolved) EU law are to be decided, as far as is relevant, in accordance with case law and with regard to the limits of EU competencies. This interpretative obligation exists even when this law has been modified using the main powers in the Bill, given the definition of “retained (devolved) EU law” in subsection (9) (which defines it to include that law as it is amended from time to time).

54. Subsection (4) provides that this is subject to section 11(7) which enables regulations to disapply this interpretative rule if it is appropriate in any particular case: for example, where the application of the case law would no longer be relevant. This approach to interpretation is different from the approach in clause 6(3) of the EUWB, which applies the interpretative rule only if the retained EU law has not been modified.

55. Subsections (5) to (7) provide that, unlike other courts, the two highest courts in relation to devolved matters in Scotland – the Supreme Court in its devolved jurisdiction and the High Court of Justiciary as a criminal court of appeal – are not bound by retained (devolved) EU or domestic case law. Retained (devolved) case law is treated in the same way as judgments from these courts would be. These courts are required to use the same test as they would when deciding whether to depart from their own previous decisions, when deciding whether to depart from retained (devolved) EU case law.

56. Subsection (8) contains a definition of “devolved jurisdiction” for the purpose of this section.

57. Subsection (9) contains definitions for the purposes of the Bill.

## **PART 3 – MAIN POWERS IN CONNECTION WITH UK WITHDRAWAL**

### **Regulation making powers**

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

58. Section 11 corresponds to clause 7 of the EUWB. It gives the Scottish Ministers the powers needed to make sure that retained (devolved) EU law continues to operate effectively after UK withdrawal.

59. This power can only be used where:

- there is or would be a deficiency in retained (devolved) EU law,
- that deficiency is caused by UK withdrawal from the EU, and
- it is necessary to make provision in order to correct that deficiency.

60. Where these conditions are met, the Scottish Ministers may make provision in regulations as they consider appropriate for the purpose of correcting the deficiency.

61. Subsection (2) contains a list of the things that amount to a deficiency, such as where retained (devolved) EU law no longer has a practical application, confers functions on an EU

institution, makes provision for reciprocal arrangements which are no longer appropriate or contains references to the EU which will no longer be appropriate on UK withdrawal.

62. Subsection (3)(a) establishes that deficiencies also exist where anything similar to the types of deficiency listed in subsection (2) arises as a result of UK withdrawal. Subsection (3)(b) provides Scottish Ministers with a regulation-making power allowing them to set out other types of deficiency which can be addressed through the use of this power.

63. Subsection (4) clarifies that retained (devolved) EU law is not deficient simply because it is inconsistent with a development in EU law that takes place after UK withdrawal. Section 13 contains a power concerning post-withdrawal developments in EU law.

64. Subsection (5) establishes that the power in subsection (1) may be used to make any kind of provision that could be made by an Act of the Scottish Parliament.

65. Subsection (6) sets out some of the things that can be done using the power, such as transferring EU functions to public authorities in Scotland or establishing new public authorities to carry out those functions.

66. Subsection (7) allows these regulations to disapply the interpretative duty set out in section 10(3).<sup>5</sup>

67. Subsections (8) and (9) set out limits on the use of this power:

- it cannot be used to impose or increase taxation, make retrospective provision or create certain types of criminal offence (broadly, those punishable with a sentence of more than 2 years),
- it cannot be used to implement the UK withdrawal agreement from the EU,
- the Scotland Act 1998 (and the protected subject-matters listed in section 31(5) of that Act), the Equality Act 2006 and the Equality Act 2010 are protected from modification,
- protections relating to judicial independence cannot be removed,
- functions conferred on public authorities in Scotland must be broadly consistent with the purpose of the authority.

68. Subsection (10) provides that the power expires and is no longer available to the Scottish Ministers two years after exit day.

69. Subsection (11) clarifies that a deficiency can include something arising out of UK withdrawal taken together with the effect of the Bill.

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<sup>5</sup> See para 53 of these Explanatory Notes.

## **Section 12 – complying with international obligations**

70. Section 12 corresponds to clause 8 of the EUWB. It gives the Scottish Ministers the powers needed to make sure that devolved law in Scotland continues to comply with the UK's international obligations after UK withdrawal.

71. This power can only be used where:

- there is or would be a breach of the UK's international obligations,
- that breach is caused by UK withdrawal from the EU, and
- it is necessary to make provision in order to correct that breach.

72. Where these conditions are met, the Scottish Ministers may make provision in regulations as they consider appropriate for the purpose of correcting or preventing the breach.

73. Subsection (2) establishes that the power may be used to make any kind of provision that could be made by an Act of the Scottish Parliament.

74. Subsections (3) and (4) set out limits on the use of this power:

- it cannot be used to impose or increase taxation, make retrospective provision or create certain types of criminal offence (broadly, those punishable with a sentence of more than two years),
- it cannot be used to implement the UK withdrawal agreement from the EU,
- the Scotland Act 1998 (and the protected subject-matters listed in section 31(5) of that Act), the Equality Act 2006 and the Equality Act 2010 are protected from modification,
- protections relating to judicial independence cannot be removed,
- functions conferred on public authorities in Scotland must be broadly consistent with the purpose of the authority.

75. Subsection (5) provides that the power expires and is no longer available to the Scottish Ministers two years after exit day.

## **Section 13 – power to make provision corresponding to EU law after exit day**

76. Section 13 gives the Scottish Ministers the power to make sure that, where appropriate, the law in devolved areas keeps pace with developments in EU law after UK withdrawal.

77. Subsection (1) gives Ministers the power, by regulations, to make provision that would correspond to provision in EU law after UK withdrawal. Paragraphs (a) to (c) set out the different types of EU law that provision may be made in relation to.

78. Subsection (2) clarifies the extent of Ministers' ability to adapt provision made under subsection (1) so that it operates effectively in Scots law despite the UK no longer being a

member of the EU. The adaptations which can be made using this power are similar to those which can be made to retained (devolved) EU law on UK withdrawal using the powers in sections 11 and 12. It contains a list of the sort of adaptations that may have to be made.

79. Subsection (3) establishes that the power may be used to make any kind of provision that could be made by an Act of the Scottish Parliament.

80. Subsection (4) sets out some of the things that can be done using the power, such as providing that new EU functions should be carried out by public authorities in Scotland or establishing new public authorities to carry out those functions.

81. Subsections (5) and (6) set out limits on the use of the power:

- it cannot be used to impose or increase taxation, make retrospective provision or create certain types of criminal offence,
- it cannot be used to implement the UK withdrawal agreement from the EU,
- the Scotland Act 1998 (and the protected subject-matters listed in section 31(5) of that Act), the Equality Act 2006 and the Equality Act 2010 are protected from modification,
- protections relating to judicial independence cannot be removed,
- functions conferred on public authorities in Scotland must be consistent with the general objects and purposes of the authority.

82. Subsections (7) and (8) provide that the power expires and is no longer available to the Scottish Ministers 5 years after exit day. Scottish Ministers may, by regulations subject to the affirmative procedure, extend that five-year period by a period of up to five years, or extend any such further period by up to five years, and so on.

## **Scrutiny of regulations**

### **Section 14 – scrutiny of regulations under sections 11, 12 and 13**

### **Section 15 – consultation on draft proposals**

### **Section 16 – explanatory statements: appropriateness, equalities, etc.**

83. Sections 14 to 16 provide for scrutiny of the main powers in the Bill.

84. Instruments that make any of the following types of provision are subject to an enhanced form of affirmative procedure:

- establishing a new public authority,
- giving a currently-exercised EU function to a newly-created public authority,
- abolishing an existing EU function without providing for a replacement equivalent function.

85. Under this enhanced procedure, an instrument must be laid for 60 (rather than 40) days in the Scottish Parliament before the date on which it is expected to come into force. Before laying an instrument, the Scottish Ministers must consult on the proposal and must have regard to any representations made. When the instrument is laid, it must be accompanied by a statement setting out the details of the consultation, the representations that were received and any changes made as a result.

86. Section 14(7) to (9) sets out the consequences of a failure to comply with the 60-day laying period. The instrument may still be made, but the Scottish Ministers must explain the failure to comply to the Presiding Officer. This corresponds to the provision in section 31 of the Interpretation and Legislative Reform (Scotland) Act 2010 regarding a failure to comply with laying requirements under that Act.

87. Instruments that make any of the following types of provision are subject to the affirmative procedure:

- giving a currently-exercised EU function to an existing public authority,
- imposing, or making provision relating to, a fee or charge,
- creating or widening the scope of a criminal offence,
- creating or amending a power to legislate, such as adjusting an existing power to make subordinate legislation or creating a new power.

88. Otherwise, instruments made under these powers are subject to the negative procedure.

89. Section 16 provides for all instruments made under these powers to be accompanied by an explanatory statement, setting out certain matters relating to the making of the instrument:

- that the Scottish Ministers consider that it does no more than is appropriate,
- whether it modifies any provision of equalities legislation and if so, what its effect is,
- that the Scottish Ministers have had regard to their duties under equalities legislation,
- a report of any consultation required under section 15, and
- an explanation of the instrument, the reasons for making it, the pre-withdrawal law being modified by it, and its effect on retained (devolved) EU law.

90. Section 16(7) requires the Scottish Ministers, if they cannot make such a statement, to set out the reasons why.

91. Section 16(8) requires the Scottish Ministers to arrange for the publication of these statements.

92. Section 16(9) provides that the Scottish Ministers do not have to comply separately with the requirement to make an explanatory statement if they have previously done so for an equivalent instrument (for example, where a draft has been withdrawn and re-laid with minor modifications).

## **Consent to certain UK instruments**

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

93. Section 17 provides that subordinate legislation making devolved provision which affects the operation of the law being retained by sections 2 to 5 can only take effect if it has been consented to by the Scottish Ministers. This would, for example, include the use of the powers in clauses 7 to 9 of the EUWB, should they become law.

94. Subsection (1) sets out when the consent of the Scottish Ministers is required. Consent is required:

- for any statutory instrument containing devolved provision,
- which is made under a power conferred or modified by an Act of Parliament which receives Royal Assent after this section comes into force, and
- where the devolved provision would modify or affect the operation of retained (devolved) EU law or anything that would become retained (devolved) EU law after exit day.

95. Subsection (2) provides that devolved provision made without the Scottish Ministers’ consent is of no effect.

96. Subsection (3) explains when a function is modified by an Act of Parliament such as to require the Scottish Ministers’ consent under this section.

97. Subsection (4) contains the definition of “devolved provision” for the purpose of this section.

## **PART 4 – FINANCIAL MATTERS**

### **Preparatory expenditure**

#### **Section 18 – Preparatory expenditure**

98. Section 18 corresponds to section 12(2) of the EUWB. It enables the Scottish Ministers to incur expenditure in preparing for the use of the powers in the Bill.

99. This provides an underlying power for preparatory activities which applies only in advance of provision being made in regulations under the Bill. It does not remove the need to follow the usual Budget Act processes under the Public Finance and Accountability (Scotland) Act 2000 for any expenditure using this power. This means that changes to budget have to be processed by the annual Budget Bill, Autumn Budget Revision or Spring Budget Revision by regulations under that bill, in advance of expenditure or at the next available budget event.

## **Powers in connection with fees and charges**

### **Section 19 – Power to provide for fees and charges**

### **Section 20 – Power to modify pre-exit fees or charges**

### **Section 21 – Scrutiny of regulations under sections 19 and 20**

### **Section 22 – Relationship to other powers**

100. These sections set out the Scottish Ministers' powers to make provision relating to fees and charges, where those fees and charges relate to a function of a public authority provided for by this Bill.

101. Section 19 corresponds to paragraph 1 of schedule 4 of the EUWB. It provides that, where a public authority has been given a function using the main powers in the Bill, the Scottish Ministers may by regulations enable it to charge fees or other charges in connection with carrying out that function. Subsection (2) contains an illustrative list of some of the things that this power may do. In particular it may set the amounts of fees or charges or say how they are to be determined, for example by a formula. It may also provide for how the money is collected and spent. Subsection (2)(c) provides that regulations made under this power can sub-delegate this power to the public authority that has the function. Where they do, the use of this power will be subject to the affirmative procedure, and the exercise of the sub-delegated power will be subject to whatever arrangements for scrutiny are set out in the relevant provisions. Where this power is used to impose a new fee or charge then it is subject to the affirmative procedure, otherwise its use is subject to the negative procedure.

102. Section 20 corresponds to paragraph 6 of schedule 4 of the EUWB. It gives the Scottish Ministers a power to modify secondary legislation about fees or other charges created before UK withdrawal using the powers in the ECA or section 56 of the Finance Act 1973. Section 56 of the Finance Act contains a specific power for fees or other charges connected to EU obligations. Subsection (2) contains a list of purposes which this power may be used for. The use of this power is subject to the negative procedure.

103. Section 22 corresponds to paragraphs 5 and 10 of schedule 4 of the EUWB. It clarifies that these powers do not affect other powers in the Bill which may be used to make provision concerning fees and charges e.g. to ensure it creates no implied restrictions on the use of any other powers.

## **PART 5 – PUBLICATION AND RULES OF EVIDENCE**

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

#### **Section 23 – Duty to publish retained (devolved) direct EU legislation, etc.**

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

104. Section 23 corresponds to paragraph 1 of schedule 5 of the EUWB. To ensure that retained (devolved) EU law is accessible after UK withdrawal, this section requires the

publication by the Queen's Printer for Scotland of, amongst other things, retained (devolved) direct EU legislation.

105. Subsection (1) requires the Queen's Printer for Scotland to arrange for the publication of certain retained (devolved) EU law and certain treaties.

106. Subsection (2) sets out which instruments and international agreements are covered by the duty.

107. Subsection (3) contains the definition of "devolved" for the purpose of this section.

108. Subsection (4) permits, but does not require, the Queen's Printer to publish decisions of the Court of Justice or other documents published by EU entities.

109. Subsection (5) permits the Queen's Printer for Scotland to publish anything else considered useful connected to publication under this section, for example, amended versions of retained (devolved) direct EU legislation which reflect any changes made using the main powers in the Bill, or guidance associated with retained (devolved) direct EU legislation.

110. Subsection (6) limits the duty to publish to instruments as they stand on exit day.

111. Section 24 provides for exceptions to the duty where the Queen's Printer for Scotland is directed that instruments or categories of instruments need not be published.

## **Rules of evidence**

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

112. Section 25 corresponds to paragraph 2 of schedule 5 of the EUWB. ECA section 3 provides for questions as to the meaning or effect of EU law to be treated as questions of law in domestic courts and resolved in accordance with decisions of the Court of Justice. If nothing else were done, on the repeal of the ECA questions of EU law would fall to be treated in Scottish courts the same way as the law of any other jurisdiction, as a question of fact. Questions of EU law, even after UK withdrawal, may be important or necessary for the determination of how retained (devolved) EU law operates, for example where a court needs to have regard to the meaning or content of a Directive (which is not retained by the Bill). Section 25 therefore provides that where determining the meaning or effect of EU law is necessary for a court to interpret retained (devolved) EU law, then judges in Scottish courts should continue to determine the meaning or effect as a question of law.

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

113. Section 26 corresponds to paragraph 4 of schedule 5 of the EUWB. ECA section 3 provides for judicial notice of the Treaties, the Official Journal of the European Union and of decisions of the Court of Justice. This means that they are, in law, within the knowledge of the court and do not require to be proved. If nothing else were done, on the repeal of the ECA the

text of EU instruments and decisions would have to be proved in court. This section gives the Scottish Ministers the power to set out rules for judicial notice and admissibility after UK withdrawal.

114. Subsection (1) allows the Scottish Ministers, by regulations, to provide for judicial notice or the admissibility in legal proceedings of certain matters. These are set out in subsection (6) and include retained (devolved) EU law.

115. Subsection (2) allows these regulations to impose conditions on the admissibility of documents.

116. Subsection (3) allows these regulations to modify any provision made by or under an enactment. Subsection (5) confines this to legislation that has already passed.

117. Subsection (4) provides for these regulations to be subject to the affirmative procedure.

## **PART 6 – GENERAL AND FINAL PROVISIONS**

### **Interpretation**

#### **Section 27 – Interpretation: general**

118. Section 27 defines some terms used in the Bill.

#### **Section 28 – Meaning of “exit day”**

119. Section 28 allows the Scottish Ministers to appoint “exit day”, the day on which a number of provisions and powers in the Bill will come into effect. The day appointed will be the day on which the UK ceases to be a member of the EU.

#### **Section 29 – Meaning of “exempt EU instruments”**

120. Section 29 corresponds to schedule 6 of the EUWB. It sets out the instruments which are excepted from being retained under section 3 (incorporation of devolved direct EU legislation). These include:

- EU decisions which do not apply in the UK under a relevant Protocol,
- decisions relating to common foreign and security policy under Title V of the Treaty on European Union,
- EU regulations which do not apply in the UK under a relevant Protocol, and
- EU tertiary legislation made under an exempt EU decision, regulation or a directive which does not apply under a relevant Protocol.

121. Subsection (6) sets out which are the relevant Protocols for the purpose of this section.

## **Regulations**

### **Section 30 - Regulations**

122. Section 30 provides for the powers in the Bill (except for the commencement powers) to be able to be used to make ancillary provision.

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

123. There may be the need, on occasion, to make regulations under the Bill urgently. Where regulations under the Bill are subject to the affirmative procedure, section 31 therefore allows them to be made before being laid before the Scottish Parliament.

124. Subsection (2) sets out that this may be done when the Scottish Ministers consider that it is necessary to make the regulations urgently.

125. Subsection (3) requires the regulations to be laid as soon as possible after being made.

126. Subsection (4) provides for the regulations to expire unless they are approved by resolution of the Scottish Parliament within 28 days of being made. Subsection (5) contains rules for the calculation of that 28 day period.

## **Ancillary provisions**

### **Section 32 – Ancillary provision**

127. Section 32 allows the Scottish Ministers to make ancillary provision.

### **Section 33 – Repeal of spent references to EU law etc.**

### **Schedule 1 – Further repeals of spent references to EU law**

128. When the UK withdraws from the EU, the Scotland Act will contain a number of spent references to EU law. Section 33 and schedule 1 tidy up these references by repealing them.

### **Section 34 – Consequential, transitional, transitory and saving provision**

### **Schedule 2 - Consequential, transitional, transitory and saving provision**

129. Section 34 and schedule 2 set out how the Bill will operate on coming into force.

130. Many references to EU instruments are ambulatory in effect, meaning that they refer to the EU instrument as it is updated or amended from time to time. Paragraph 1 of this schedule corresponds to paragraph 1 of schedule 8 of the EUWB. It sets out how existing ambulatory references to direct EU legislation (principally EU regulations) should be construed after UK withdrawal. These references will stop updating after exit day and will instead become references to the retained version of the relevant EU instrument.

131. Paragraph 2 corresponds to paragraph 2 of schedule 8 of the EUWB. It sets out how other ambulatory references should be construed after UK withdrawal. These references also stop updating after exit day. Since there is no retained equivalent to many things, such as EU Directives, this paragraph provides that the references should be construed as a reference to the version having effect immediately before exit day.

132. Paragraph 3 corresponds to paragraph 3 of schedule 8 of the EUWB. It describes the effect that UK withdrawal will have on existing powers to make subordinate legislation. Paragraph 3(1) provides for existing powers to be capable of amending retained (devolved) direct EU legislation. Paragraph 3(2) sets out that this does not affect the procedure that the legislation would be subject to. Paragraph 3(3) provides that implied restrictions requiring powers to be exercised compatibly with EU law cease to apply after UK withdrawal.

133. Paragraph 4 corresponds to paragraph 5 of schedule 8 of the EUWB. It confirms that future powers to make subordinate legislation may, unless the contrary intention appears, modify retained (devolved) direct EU legislation.

134. Paragraphs 5 to 8 contain consequential amendments to the Interpretation and Legislative Reform (Scotland) Act 2010.

135. Paragraph 9 corresponds to paragraph 25 of schedule 8 of the EUWB. It contains general transitional, transitory or saving provision, establishing that anything done or in force before exit day (or in the process of being done) relating to the law retained by the Bill is continued in effect. This clarifies that, for example, a license issued under an EU law regime before exit day continues to have effect after exit day.

136. Paragraph 10 corresponds to paragraph 28 of schedule 8 of the EUWB. It clarifies that instruments made using the main powers in the Bill do not expire when those powers expire, and that any power created is not affected.

## **Final provisions**

### **Section 35 – Index of defined expressions**

#### **Schedule 3 – Index of defined expressions**

137. Section 35 and schedule 3 set out an index of the expressions defined in the Bill.

### **Section 36 – Commencement**

### **Section 37 – Repeal of this Act**

138. Section 36 provides for the commencement of the Bill by the Scottish Ministers.

139. Section 37 provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to repeal the Bill or any provision of it, should the Bill be passed by the Scottish Parliament.

*This document relates to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (SP Bill 28) as introduced in the Scottish Parliament on 27 February 2018*

**Section 38 – Short title**

140. Section 38 provides for the short title of the Bill.

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# **UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL**

## **EXPLANATORY NOTES**

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