

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

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. 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 us 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 Scottish Ministers the powers needed to ensure that devolved law continues to operate effectively after UK withdrawal, and
- it gives Scottish Ministers the power to, where appropriate, ensure that Scotland's devolved laws keep pace after UK withdrawal with developments in EU law.

4. The Bill contains 38 sections and 3 schedules, as follows:

- Section 1 sets out the purpose 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 contains 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, 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.

Rationale for subordinate legislation

5. The rationale for the powers in the Bill is the preparation of Scotland's devolved laws for UK withdrawal from the EU. This preparation is necessary to ensure that, as far as is possible, continuity of law is

maintained on UK withdrawal. This means that the same rules, systems and schemes, adapted where necessary, should be able to operate after UK withdrawal as they did before. To this end, the Bill also gives the Scottish Ministers a power to keep pace, after UK withdrawal, with developments in EU law. This ensures that continuity of law can, where appropriate, extend beyond the date of UK withdrawal (“exit day”).

6. On exit day, Scotland and the UK’s laws will have reflected, and will have been adapted to reflect, EU law for 46 years. The EU has been one of the major sources of law for the UK and Scotland throughout this period. A substantial amount of Scotland’s devolved laws, across a wide range of subject-matters, have their origins in or have been adapted to take account of EU law. The programme of legislation required to ensure these laws continue to operate after UK withdrawal will be substantial and complex.

7. It would not be possible or practical to make all of the necessary preparations for UK withdrawal on the face of the Bill. The three main reasons for this are the scale of the changes required, the timetable and uncertainty against which those changes will have to be made, and the technical nature of many of the changes needed. It is therefore appropriate for the programme of change to be delivered, in the main, by subordinate legislation.

8. The scale of the changes required would make their inclusion on the face of the Bill impractical, even if it were possible. According to the EU’s statute law database there are over 6600 Directives and nearly 12,000 EU Regulations in force¹. Since devolution, nearly 700 Scottish Statutory Instruments (“SSIs”) have cited the European Communities Act 1972 (“ECA”) in their enabling powers, with many EU obligations implemented in Scotland using other legislation. It is likely that much of this legislation will require at least some correction to enable it to operate sensibly after UK withdrawal. At the UK level, the UK Government estimates that 800 to 1000 statutory instruments will be required², and the current working assumption of the Scottish Government is that preparing for UK withdrawal may require around 300 SSIs, as many as a typical year’s SSI programme.

¹ Searches conducted of EUR-Lex, 13 February 2018. EUR-Lex can be found at <http://eur-lex.europa.eu/>.

² European Union (Withdrawal) Bill Factsheet 1, which can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/678328/Factsheet_1- General.pdf.

9. The timetable and uncertainty against which the changes have to be made means that it is impossible to say in advance what the content of the changes that need to be made is. The terms and timetable by which the UK will withdraw from the EU are not yet known. In particular, the possibility of a transition period being negotiated or regulatory alignment being agreed have not yet been resolved. Both will be important factors when considering the content of, and timetabling of, any legislative programme that would flow from these powers. The changes required will very often depend on the terms of the UK-EU agreement: whether participation in a mutual recognition scheme is to be continued, for example, or the extent of citizenship-related rights that are maintained on withdrawal.

10. Finally, the technical nature of many of the changes required would make the use of primary legislation inappropriate. Updating legislative references such that they continue to function after UK withdrawal, adapting a reciprocal process based on EU membership which is intended to continue to operate after withdrawal, or conferring an administrative function (for example, receiving an annual report) on a domestic public body rather than an EU institution would be examples of measures likely to involve only technical change to legislation, rather than matters of substance. While it is recognised that there are potential uses of the power which raise more substantial questions of policy, the Scottish Government is clear that the purpose of this suite of powers is to change no more than it is necessary to address deficiencies in law and to continue the operation of existing law.

Enhanced affirmative procedure

11. For the reasons set out above, responsible preparation for UK withdrawal will necessarily involve taking purposive powers designed to give Scottish Ministers a range of tools to ensure the continued operation of Scotland's devolved laws after exit day. It is recognised that there will be uses of these powers which involve more substantial change, or require a choice to be made between policy options. For this reason, it is the Scottish Government's view that a higher level of scrutiny should be given to those uses of the power which involve policy choice of particular significance.

12. The Scottish Government considers that those potential uses of the power which involve the establishment of new public authorities or the elimination of currently-operating functions are of sufficient significance to

justify additional scrutiny by the Scottish Parliament, including a requirement for statutory consultation.

13. Sections 14(5), 15 and 16 of the Bill therefore set out an enhanced affirmative procedure when the main powers in the Bill do any of the following:

- Establish a Scottish public authority,
- Give any function currently exercised by an EU institution to a newly-established public authority, or
- Abolish a function currently exercised by an EU institution without providing for a replacement function.

14. Under the enhanced affirmative procedure, the following process applies:

- The Scottish Ministers must consult on the proposals and lay a document before the Scottish Parliament setting them out.
- The Scottish Ministers must send copies of the consultation document to such persons as they consider appropriate, and have regard to any representations made.
- The regulations must be laid before the Scottish Parliament for 60 (rather than 40) sitting days before the anticipated date of coming into force to allow for additional scrutiny by Parliament.
- When the regulations are laid, the Scottish Ministers must include in the statement laid alongside them a report on the consultation, including a report on any representations made and any changes to the proposals made as a result.

15. Where instruments are subject to the enhanced affirmative procedure, this is set out below, in the explanation of each power.

Urgent procedure

16. The Prime Minister notified the European Council of the UK's intention to withdraw from the EU on 29 March 2017. Under the terms of Article 50 of the Treaty on European Union, unless a deal between the UK and the EU is concluded earlier, or the UK and the European Council agree to extend the deadline, the UK will cease to be a member of the EU on 29 March 2019, 2 years after notification. The main powers under the Bill, under sections 11 and 12, largely require to be exercised in advance of UK withdrawal. They expire two years after exit day.

17. The Scottish Government is concerned that the tight timetable required to prepare for UK withdrawal might exceptionally require regulations to be made on an urgent basis, particularly if the outcome of negotiations or the changes required to implement them in law only become clear at short notice. Urgent procedure might also be required if systems or schemes require to be set up substantially in advance of exit day in order to be prepared for the assumption of functions, and therefore regulations establishing them need to be made in sufficient time to allow proper preparation to take place.

18. Section 31 therefore provides an “urgent procedure” for certain regulations under the Bill. The Scottish Government does not intend to rely on it except where necessary, in exceptional circumstances, and considers that the procedure provided for will ensure that the Parliament has an opportunity to scrutinise instruments made. Under this procedure, regulations must be laid before the Scottish Parliament as soon as practicable after they are made and cease to have effect unless approved by the Parliament within 28 sitting days of being made.

19. Where instruments can be made under the urgent procedure, this is set out below, in the explanation of each power.

Delegated Powers

Section 7 – challenges to validity of retained (devolved) EU law

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

20. The Bill provides at section 7(1) that on or after exit day there will be no right in domestic law to bring a challenge to retained (devolved) EU law on the basis that, immediately before exit day, the EU instrument the retained law is derived from was invalid.

21. Section 7(2)(b) and (4) allows Scottish Ministers to set out exceptions to this rule and to provide that challenges may, instead of being made against an EU institution, be made against a Scottish public authority.

Reason for taking power

22. Currently, only the Court of Justice can annul an EU instrument or declare it to be invalid. The Bill does not attempt to create an entirely new jurisdiction for domestic courts to, in effect, step into the shoes of the Court of Justice and consider whether the relevant EU institution misused its powers or did not comply with procedural requirements.

23. However, it is recognised that in some circumstances individuals or businesses may be individually affected by an EU instrument. A decision may have been addressed directly to that individual or business and it may be appropriate to allow the validity of the retained EU law that has been incorporated into domestic law to be challenged. This power will allow the Scottish Ministers to provide for or describe the kinds of challenges that may be made after exit day to retained (devolved) EU law on the grounds that the underlying EU instrument was invalid. This will ensure that, after UK withdrawal, certain instruments that have been incorporated into domestic law by the Bill can still be challenged on the grounds of invalidity. Under subsection (4) the regulations can provide for the relevant challenge to be brought against a Scottish public authority.

Choice of procedure

24. The Scottish Ministers consider that regulations made using this power should be subject to the affirmative procedure. Regulations will be able to provide for matters of policy, such as new categories of challenge to legislation available in the courts and types of invalidity in retained (devolved) EU law.

25. These regulations may be made under the urgent procedure, but as noted in paragraphs 16 and 17 the Scottish Government does not intend to rely on this procedure except where necessary.

Section 11(1) – dealing with deficiencies arising from UK withdrawal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative or affirmative

Provision

26. This power allows the Scottish Ministers to correct deficiencies in law which would be caused by UK withdrawal from the EU.

Reason for taking power

27. The purpose of this power is to ensure that retained (devolved) EU law operates effectively on and after UK withdrawal.

Necessity and appropriateness

28. Before Scottish Ministers can make regulations under section 11(1), they must be satisfied that it is necessary to use the power to prevent, remedy or mitigate either a failure of retained (devolved) EU law to operate effectively or another type of deficiency. This is a higher test than being satisfied that using the power is appropriate.

29. Once satisfied that it is necessary to use the power, section 11(1) allows the Scottish Ministers to make any provision they consider appropriate for the purpose of preventing, remedying or mitigating the failure to operate effectively or other deficiency. This is an appropriate threshold for this aspect of the power since exercising it will often involve a choice between different policy options about how best to address the deficiency. For example, a deficiency would exist where a function was currently exercised by an EU institution; there would therefore be a policy choice about the most appropriate Scottish public authority to take on that function, or whether a new Scottish public authority should be established for that purpose. The Scottish Government does not consider that a decision to choose from among these policy choices could be justified as being strictly necessary and so a test of appropriateness has been chosen to allow Scottish Ministers to exercise their judgment about the policy choice they consider best to address the deficiency.

30. The Scottish Government considers that this threshold, requiring both a test of necessity and appropriateness to be met, is appropriate for the use of this power.

Types of deficiency

31. Section 11(2) contains a list of the kinds of deficiency. Section 11(3)(a) means that, where there is a deficiency in retained (devolved) EU law which is similar to the kinds of deficiencies listed in section 11(2), then it can be addressed by the power in section 11(1). An example of deficiencies that would be of a similar kind to those listed are references to EEA countries in legislation (rather than references to EU member states).

32. Retained (devolved) EU law is deficient if it has no practical application or is otherwise redundant or substantially redundant. Redundant provisions might include those which referred to obligations to

conform with EU law or to have regard to certain aspects of EU law which would no longer apply after UK withdrawal. Provisions which required cooperation between EU institutions and Scottish public authorities (for example a requirement to notify an EU institution of a step being taken) might also be redundant after UK withdrawal.

33. Retained (devolved) law is deficient if it confers functions on EU entities that no longer have functions in Scotland. Depending on the outcome of UK-EU negotiations some functions may continue to be exercised at the EU level in Scotland, but most will require to be exercised instead by an appropriate domestic body.

34. Retained (devolved) EU law is deficient if it relates to reciprocal arrangements (or other arrangements) which no longer exist or are no longer appropriate. Many EU schemes which involve reciprocity or mutual recognition will no longer apply or could no longer operate effectively after UK withdrawal. Depending on the outcome of EU-UK negotiations, these provisions might need to be amended or repealed on exit day.

35. Retained (devolved) EU law is deficient if it contains an inappropriate EU reference. This is expected to be the largest category of necessary changes. A reference which would no longer operate on UK withdrawal, or which would operate in an unexpected way, will need to be updated, replaced or removed to ensure that devolved law continues to operate in the manner in which it was intended.

36. Section 11(11) clarifies that a deficiency also exists where the deficiency is caused by the UK leaving the EU taken alongside the operation of the Bill or regulations made under it.

The use of the power

37. Section 11(5) and (6) set out what may be done with the power. Any provision which could be made in an Act of the Scottish Parliament may be included in regulations under section 11(1), unless the limits on the use of the power apply. For example, the power can be used for establishing new public authorities in Scotland, for conferring existing EU functions on public authorities in Scotland, and for replacing, abolishing or modifying existing functions to address deficiencies caused by UK withdrawal.

Limits on the use of the power

38. Section 11(8) and (9) sets out some 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 (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.

39. Subsection (10) provides that the power expires two years after exit day.

Choice of procedure

40. The enhanced procedure applies to certain uses of section 11(1) (see paragraphs 10 to 14).

41. While many uses of the power are considered to be mechanistic and therefore appropriate for the negative procedure, the Bill identifies some uses which are considered by the Scottish Government to involve decisions of significance justifying the affirmative procedure. As well as those covered by the enhanced affirmative procedure, any regulations which contain the following sorts of provision are subject to the affirmative procedure:

- providing for any function of an EU entity to be exercised instead by an existing Scottish public authority,
- imposing a fee or charge,
- creating, or widening the scope of, a criminal offence,
- creating or amending a power to legislate.

42. These regulations may be made under the urgent procedure, but as noted in paragraphs 16 and 17 the Scottish Government does not intend to rely on this procedure except where necessary.

Section 11(3)(b) – describing or providing for a kind of deficiency in retained (devolved) EU law

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

43. This power allows Scottish Ministers to provide for, or describe, further types of deficiency which can be addressed using the power in section 11(1).

Reason for taking power

44. The power in section 11(1) may only be used where there is a deficiency and where that deficiency falls within the list of types of deficiency in section 11(2) (read with section 11(3)(a)). As the outcome of negotiations between the UK and EU becomes clear, and as the Scottish Government's analysis of the extent of the deficiencies caused by UK withdrawal continues to develop, it is possible that further categories of deficiency may be identified. It is therefore considered important, if the Government is to have the range of tools it needs to provide for continuity of law on exit day, to be able to supplement the list of deficiencies with further descriptions of or provisions regarding deficiencies.

Choice of procedure

45. Since the power involves supplementing provision in primary legislation and amending the scope of a power to make subordinate legislation, the Scottish Government considers that the affirmative procedure is appropriate.

Section 12 – complying with international obligations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative or affirmative

Provision

46. This power enables the Scottish Ministers to ensure that devolved law continues to comply with international obligations on UK withdrawal.

Reason for taking power

47. The Scottish Government and Scottish Parliament are responsible for implementing international obligations within areas of devolved competence.

48. This power will only be exercisable when a breach of international obligations in devolved areas would arise from UK withdrawal from the EU. In many cases, international obligations are given effect in EU member states through corresponding EU law provision. The changes needed to ensure that international obligations continue to be observed might not, however, necessarily be in retained (devolved) EU law and so would not come within the scope of the power in section 11(1). An example might be an international agreement that provided an exemption for EU member states which was reflected in domestic law.

The use of the power

49. Section 12(2) sets out what may be done with the power. Any provision which could be made in an Act of the Scottish Parliament may be included in regulations under section 12(1), unless the limits on the use of the power apply.

Limits on the use of the power

50. Section 12(3) and (4) sets out some 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 (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.

51. Subsection (5) provides that the power expires two years after exit day.

Choice of procedure

52. The enhanced procedure applies to certain uses of section 12(1) (see paragraphs 10 to 14).

53. While, as with the power in section 11, many uses of the power are considered mechanistic and therefore appropriate for the negative procedure, the Bill identifies some uses which are considered by the Scottish Government to involve decisions of significance justifying the affirmative procedure. As well as those covered by the enhanced affirmative procedure, any regulations which contain the following sorts of provision are subject to the affirmative procedure:

- providing for any function of an EU entity to be exercised instead by an existing Scottish public authority,
- imposing a fee or charge,
- creating, or widening the scope of, a criminal offence,
- creating or amending a power to legislate.

54. These regulations may be made under the urgent procedure, but as noted in paragraphs 16 and 17 the Scottish Government does not intend to rely on this procedure except where necessary.

Section 13(1) – power to make provision corresponding to EU law after exit day

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative or affirmative

Provision

55. Section 13 gives Scottish Ministers the ability to ensure that, where appropriate, devolved law in Scotland keeps pace with post-withdrawal developments in EU law.

Reason for taking power

56. Giving effect to EU law by secondary legislation is consistent with current practice, where new EU law is implemented using section 2(2) of the European Communities Act 1972. A substantial number of subjects are currently regulated under section 2. On the repeal of the 1972 Act in many cases the only legislative route for regulating in a particular field, other than

new primary legislation, will be lost. This power is intended, in part, to fill the gap that will be caused on that repeal.

57. The Scottish Government considers that there are likely to be fields where its policy will be, at least immediately following UK withdrawal, voluntarily to maintain regulatory alignment with EU rules. Particularly where there is no other subordinate legislation-making power to regulate in an area, a power to keep pace with post-withdrawal developments in EU law would help the Scottish Government maintain, as appropriate, continuity of law in certain areas extending after exit day. For further information about the Scottish Government's reasons for seeking this power, see paragraphs 40 to 45 of the Policy Memorandum for the Bill.

The use of the power

58. Section 13(2) makes provision for Ministers to be able to adapt anything in new EU law which would not be relevant in relation to a non-member State: for example, anything which has no practical application in relation to Scotland. Section 13(3) and (4) set out what may be done with the power. Any provision which could be made in an Act of the Scottish Parliament may be included in regulations under section 13(1)), broadly equivalent in the Scottish context to the scope of the power in section 2(2) of the European Communities Act 1972, unless the limits on the use of the power apply. For example, the power can be used to establish new public authorities in Scotland, for conferring existing EU functions on public authorities in Scotland, and for replacing, abolishing or modifying existing functions to address deficiencies caused by UK withdrawal.

Limits on the use of the power

59. Section 13(5) and (6) sets out some 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 (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.

Choice of procedure

60. The enhanced procedure applies to certain uses of section 13(1) (see paragraphs 10 to 14).

61. Many uses of the power may be mechanistic in nature and therefore appropriate for the negative procedure: for example, the updating of a list of permitted additives in an already-existing regulatory scheme. The Bill does identify some uses which are considered by the Scottish Government to involve decisions of significance justifying the affirmative procedure. As well as those covered by the enhanced affirmative procedure, any regulations which contain the following sorts of provision are subject to the affirmative procedure:

- providing for any function of an EU entity to be exercised instead by an existing Scottish public authority,
- imposing a fee or charge,
- creating, or widening the scope of, a criminal offence,
- creating or amending a power to legislate.

62. These regulations may be made under the urgent procedure, but as noted in paragraphs 16 and 17 the Scottish Government does not intend to rely on this procedure except where necessary.

Section 13(8) – extending the period in which section 13(1) regulations may be made

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

63. Section 13(7) provides for the power to keep pace with post-withdrawal EU law to expire five years after exit day. Section 13(8) allows the Scottish Ministers to, by regulations, extend this period by up to five years and to extend any such further period, also by up to five years.

Reason for taking power

64. The Scottish Ministers envisage the power in section 13(1) to be required only on a transitional basis, to avoid the emergence of regulatory lacunae on UK withdrawal, and in anticipation of discrete subject-matter-specific powers being legislated for. It is also considered to be appropriate

for use in those sectors where it is intended that Scotland's laws in devolved areas should maintain regulatory alignment with EU law after UK withdrawal.

65. It is difficult to predict exactly how long such a power may be needed after UK withdrawal. A renewable period of 5 years is considered to strike an appropriate and proportionate balance, and ensures that the Scottish Parliament is involved in the decision to continue to allow the Scottish Ministers, in principle, to make provision keeping pace with EU law.

Choice of procedure

66. The Scottish Government considers that affirmative procedure is appropriate for deciding whether a power should expire or continue to be exercisable. Any further use of the power, if the ability to use it is extended under this section, would be subject to the enhanced, affirmative or negative procedure, as set out above.

Section 19 – power to provide for fees and charges

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative or affirmative

Provision

67. Where functions are transferred using the main powers in the Bill from EU institutions to Scottish public authorities, this power provides for fees and charges to be set in connection with the exercise of those functions. Fees and charges will only be set where considered appropriate for a particular user or sector. The power is also capable of being used to confer a power on a Scottish public authority to set up their own schemes for fees and charges.

Reason for taking power

68. At this stage, the Scottish Government does not have a complete understanding of how functions currently exercised by EU institutions will operate after UK withdrawal. Taking a power allows the Scottish Ministers the flexibility needed to set up schemes for charging for the use of these functions, where appropriate.

69. The power can only be used in connection with the functions given to Scottish public authorities under the main powers in the Bill. The Scottish Government considers that a higher level of scrutiny is appropriate where a

decision is being taken whether to charge a fee for a particular function, and where decisions to sub-delegate are made. The negative procedure is appropriate for other regulations, which will involve decisions about the adjustment of already-existing charging arrangements.

Choice of procedure

70. Where the power is used to impose a new fee in respect of a Scottish public authority's functions, or used to sub-delegate the power to set up a fees and charges scheme, then the affirmative procedure applies.

Otherwise, the negative procedure applies, for example if the power were being used to adjust an already-imposed fee or charge.

71. These regulations may be made under the urgent procedure, but as noted in paragraphs 16 and 17 the Scottish Government does not intend to rely on this procedure except where necessary.

Section 20 – power to modify pre-exit fees or charges

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

72. Fees and charges required in connection with EU obligations can presently be set under section 2(2) of the European Communities Act 1972 and section 56 of the Finance Act 1973. This power provides for the continuity of this arrangement, ensuring that Scottish Ministers continue to be able to amend those fees and charges after UK withdrawal from the EU.

73. The power would allow for the modification of the amount of a fee or charge or the basis on which fees and charges are calculated, but it would not allow fees or charges to be imposed for new functions.

Reason for taking power

74. Where a domestic body or government charges for a service or function derived from EU law currently, this power ensures that those charges continue to be amendable after UK withdrawal. The power effectively continues present arrangements and would not allow for charging for new functions.

Choice of procedure

75. The negative procedure is considered appropriate, since the power is only exercisable with respect to existing fees and charges and cannot be used to set up new charging schemes. The Scottish Government considers that negative procedure is appropriate for decisions involving the level of a fee or charge, rather than the decision whether or not to charge. This is consistent with the procedure that currently applies to the corresponding powers in the European Communities Act 1972 and Finance Act 1973.

Section 24 – exceptions from duty to publish

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

76. Section 23 of the Bill will place the Queen's Printer for Scotland under a duty to publish EU instruments that could form part of the law retained under the Bill, particular aspects of the key treaties, and other EU instruments or documents that may be relevant or useful after UK withdrawal from the EU.

77. Section 24 provides for the Scottish Ministers to be able to direct the Queen's Printer for Scotland not to publish instruments that would otherwise be covered by this duty.

Reason for taking power

78. Not all instruments caught by the duty in section 23 will be relevant after the UK has left the EU. Additionally, it is anticipated that there will be the need for coordination of the use of this power and of the corresponding provision in Part 5 of schedule 1 of the European Union (Withdrawal) Bill to ensure that the Queen's Printer for Scotland and the Queen's Printer (the two offices are currently held together) do not have to determine the effect of the two Bills' provision nor come under parallel duties to publish legislation. This power has therefore been taken in order to allow the Scottish Ministers to relieve the Queen's Printer for Scotland from certain aspects of the duty, following discussion with the UK Government and the Queen's Printers about the appropriate way for the duty to ensure that retained (devolved) EU law is published in a coherent and accessible way on UK withdrawal from the EU.

Choice of procedure

79. The extent of the publishing duty imposed on the Queen's Printer for Scotland is an administrative matter, likely to involve considerations principally of technical detail and coordination between institutions. The Scottish Government therefore considers that no parliamentary procedure is necessary. The Directions must be published, ensuring transparency and accountability as to their use.

Section 26 – power to make provision about judicial notice and admissibility

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

80. This power enables the Scottish Ministers to make provision concerning judicial notice, admissibility and the evidential rules relating to EU law, the EEA agreement and retained (devolved) EU law.

Reason for taking power

81. The European Communities Act 1972 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 Scottish Ministers the power to set out rules for judicial notice and admissibility after UK withdrawal.

82. Matters concerning judicial notice and admissibility may be dealt with by court rules (see, for example, the powers in sections 103 and 104 of the Courts Reform (Scotland) Act 2014). The approach taken to ensuring continuity of the rules regarding judicial notice and admissibility after UK withdrawal will require consultation and consideration and is therefore considered to be best set out in secondary legislation.

Choice of procedure

83. The Scottish Ministers consider that regulations made using this power should be subject to the affirmative procedure. The principal rules

for judicial notice and admissibility in respect of EU law are currently set out in primary legislation.

Section 28 – meaning of “exit day”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

84. The Scottish Ministers may, by regulations, appoint a date and a time as “exit day”, the point at which a number of other provisions of the Bill will take effect or operate in respect of. This provision, as with the rest of the Bill, is subject to section 1(2), so could not cause anything to take effect until any EU law with which it would be incompatible ceased to have effect in Scots law as a consequence of UK withdrawal from the EU.

Reason for taking power

85. At present, it is anticipated that the UK will cease to be a member state of the European Union at 11 pm on 29th March 2019. This date could change if the UK and the European Council agree to extend the deadline. In either scenario, the date on which the UK leaves the EU, and EU obligations stop applying to the UK and Scotland will be a matter of legal fact.

Choice of procedure

86. The Scottish Ministers need to be able to ensure that the effect of the provisions of the Bill operating coincides with the point at which the UK leaves the EU. There is a strong parallel between this power and commencement powers, which are typically subject to no procedure. Both powers are used to bring into force parts of a Bill or to provide for the effective functioning of parts of a Bill.

Section 32 – ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative or affirmative

Provision

87. Section 32 provides that the Scottish Ministers may by regulations make freestanding ancillary provision, namely incidental, supplementary, consequential, transitional, transitory or savings provision which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the enacted Bill or provision made under it.

Reason for taking power

88. The Bill contains some specific transitional provisions, for example in Part 3 of schedule 2. Other provisions are identified as potentially subject to transitional provision in section 32 (for example, sections 7 and 8 of the Bill). It may be necessary to make specific transitional provision for litigation that is ongoing in the Court of Justice at the point of exit or to deal with the basis upon which domestic courts deal with ongoing cases.

89. For other ancillary matters, it is appropriate to take a power to deal with anything that might emerge in the course of implementing the Bill, for example unexpected interaction between modifications made to secondary legislation, older statutes or rules of law, or the rules of interpretation. Without the power proposed it would be necessary to return to Parliament to deal with a matter that is clearly within the policy intentions of the original Bill, which would not be an effective use of parliamentary or government resource.

90. Such matters are best addressed through subordinate legislation. The power is restricted in that it can only be used for the purposes of, in connection with, or for the purpose of giving full effect to the Bill, or provision made under it. This means that its use will be limited to completing the policies otherwise set out in the Bill, namely the retention of existing EU law in Scots law, the adaptation of that law to work after UK withdrawal and keeping pace with post-withdrawal developments in EU law.

91. The Scottish Government considers this power to be particularly needed in the context of the significant uncertainty involved in UK withdrawal from the EU.

Choice of procedure

92. Where regulations modify an enactment, the affirmative procedure applies. Otherwise, the negative procedure applies. This is considered to be an appropriate division of instruments between the procedures and, in

particular, provides an appropriate level of safeguards where there is a proposal to amend legislation.

93. These regulations may be made under the urgent procedure, but as noted in paragraphs 16 and 17 the Scottish Government does not intend to rely on this procedure except where necessary.

Section 36 – commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

94. Section 36 enables the Scottish Ministers to commence the provisions of the Bill that do not automatically come into force on the day after Royal Assent by conferring a power on Ministers, by regulations, to bring provisions into force on such day as they appoint. Subsection (3) provides that such regulations may include transitional, transitory or saving provision and may make different provision for different purposes.

Reason for taking power

95. It is standard for Ministers to have powers over the commencement of Bills. It is appropriate for the provisions of the Bill not coming into effect on Royal Assent (see subsection (1)) to be commenced at such a time as the Scottish Ministers consider suitable.

Choice of procedure

96. The default laying requirement typically applies to commencement powers.

Section 37 – repeal of this Act

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

97. This power provides that the Bill, or any part of it, can be repealed by regulations.

Reason for taking power

98. The Scottish Government has been clear that its preference is to be able to rely on an amended European Union (Withdrawal) Bill for the legislative preparations for UK withdrawal³. It has been clear that, if the required changes are made, its proposal would be to withdraw this Bill and put a legislative consent motion before the Scottish Parliament, seeking consent to the European Union (Withdrawal) Bill.

99. Should the Bill become an Act, any proposal to repeal it, or part of it, would necessarily be accompanied by a complementary proposal concerning legislative consent to the European Union (Withdrawal) Bill.

Choice of procedure

100. For a decision involving the repeal of primary legislation, the Scottish Government considers that affirmative procedure is appropriate.

³ See paragraph 12 of the Policy Memorandum.

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

Delegated Powers Memorandum

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