

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

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

## Policy Memorandum

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### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is 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:
  - Explanatory Notes (SP Bill 28-EN);
  - a Financial Memorandum (SP Bill 28-FM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 28-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

## Policy objectives of the Bill

### Purpose of the Bill

4. The Scottish Government set out in the legislative consent memorandum on the European Union (Withdrawal) Bill ("EUWB") its position on the task of preparing Scotland's devolved laws for UK withdrawal from the EU:

"It remains a matter of regret to the Scottish Government that the UK plans to withdraw from the EU. The Scottish Government considers

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

this will have widespread detrimental effects on the UK and Scotland. However, the Scottish Government accepts that proper, responsible preparations should be made for withdrawal, including preserving a functioning legal system. The Scottish Government therefore accepts the main purpose of the European Union (Withdrawal) Bill's provisions to retain EU law in domestic law after withdrawal, and to provide powers to ensure these laws function effectively.”<sup>1</sup>

5. The purpose of introducing the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (“the Bill”) is to ensure that Scotland’s devolved laws can be prepared for the effects of UK withdrawal even if it is not possible to rely on the EUWB.

6. The introduction of the Bill does not mean that the Scottish Government has resolved to reject the EUWB and rely instead on this Bill. If the necessary changes are made to the EUWB, then this Bill can be withdrawn and a legislative consent motion lodged by the Scottish Ministers. But until those changes are made, this Bill will be progressed through the Scottish Parliament so that on any scenario there is a legislative framework in place for protecting Scotland’s system of laws from the shock and disruption of UK withdrawal from the EU.

## The European Union (Withdrawal) Bill

7. The Scottish Government remains of the view that the best option for the UK as a whole, and for Scotland, is the one Scotland voted for: remaining in the EU. However, while still opposing exit, the Scottish Government recognises that the UK Government has notified the European Council of its intention to withdraw from the EU under Article 50(2) of the Treaty on European Union<sup>2</sup> and therefore preparations have to be made for withdrawal from the EU. Those preparations include maintaining a functioning system of devolved laws on UK withdrawal by providing, where

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<sup>1</sup> Paragraph 36 of the legislative consent memorandum, which can be found at <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf>

<sup>2</sup> The Prime Minister’s Article 50 letter to Donald Tusk, President of the European Council can be found at <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>.

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

possible, for continuity of law on exit day and ensuring that laws operate effectively once the UK has left the EU.

8. The EUWB was introduced in the House of Commons on 13 July 2017.<sup>3</sup> On introduction, the First Ministers of Scotland and Wales issued a joint statement indicating that their governments considered the approach of the EUWB to the devolved settlements to be “an attack on the founding principles of devolution” and that neither government would be able to recommend that legislative consent be given to the EUWB as drafted.<sup>4</sup>

9. The UK Government acknowledges that the EUWB requires the legislative consent of the Scottish Parliament.<sup>5</sup> The First Minister lodged a legislative consent memorandum (LCM-S5-10) on 12 September 2017 recommending that the Scottish Parliament withhold consent to the EUWB. That memorandum set out the reasons why the Scottish Government did not intend, at that time, to lodge a legislative consent motion seeking the Scottish Parliament’s consent. Proposed amendments to the EUWB were jointly prepared with the Welsh Government and published on 19 September, in advance of Committee Stage of the EUWB in the House of Commons.<sup>6</sup> In a joint letter to the Prime Minister the two First Ministers explained that these amendments “if made, would make the Bill one which

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<sup>3</sup> The EUWB and related documents can be found at

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

<sup>4</sup> The joint statement by the First Ministers can be found at

<https://news.gov.scot/news/eu-withdrawal-bill>.

<sup>5</sup> See paragraphs 68 – 70 and Annex A of the explanatory notes to the EUWB and paragraph 10 and Annex B of the legislative consent memorandum.

<sup>6</sup> The amendments can be found in a letter from the Minister for UK Negotiations on Scotland’s Place in Europe to the Convener of the Finance and Constitution Committee, at

[http://www.parliament.scot/S5\\_Finance/General%20Documents/Letter\\_Minister\\_for\\_UK\\_Negotiations\\_on\\_Scotlands\\_Place\\_in\\_Europe\\_Convener\\_19\\_September\\_2017.pdf](http://www.parliament.scot/S5_Finance/General%20Documents/Letter_Minister_for_UK_Negotiations_on_Scotlands_Place_in_Europe_Convener_19_September_2017.pdf).

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

we could consider recommending to the Scottish Parliament and the National Assembly for Wales”.<sup>7</sup>

10. Amendments corresponding to those promoted by the Scottish and Welsh Governments were tabled in the House of Commons but none was accepted by the UK Government at either Committee Stage or at Report Stage.

11. On 9 January 2018, the Finance and Constitution Committee issued its interim report on the legislative consent memorandum.<sup>8</sup> It concluded that the Committee was “not in a position to recommend legislative consent on the [EUWB] as currently drafted”.<sup>9</sup> In particular:

- it concluded that clause 11 of the EUWB was “incompatible with the devolution settlement in Scotland”,<sup>10</sup>
- it was “deeply concerned” at powers which would allow UK Ministers to make provision in areas of devolved responsibility,<sup>11</sup>
- it supported the principle “that Scottish Ministers should have the same powers as UK Ministers in the Bill”,<sup>12</sup>
- it was “particularly concerned that the use of delegated powers to amend the Scotland Act 1998 would not engage the Sewel Convention, circumventing a key principle of the current devolution settlement”.<sup>13</sup>

## The introduction of the Bill

12. The Scottish Government has always accepted that there are advantages to being able to prepare for UK withdrawal across the UK’s

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<sup>7</sup> The letter can be found at <https://beta.gov.scot/publications/eu-withdrawal-bill-joint-letter-to-prime-minister/>

<sup>8</sup> The interim report can be found at <https://digitalpublications.parliament.scot/Committees/Report/FCC/2018/1/9/European-Union--Withdrawal--Bill-LCM---Interim-Report#Introduction>

<sup>9</sup> Paragraph 165

<sup>10</sup> Paragraph 39

<sup>11</sup> Paragraph 129

<sup>12</sup> Paragraph 141

<sup>13</sup> Paragraph 146

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

legal jurisdictions using a single statute.<sup>14</sup> It continues to believe that it is possible and desirable for Scotland's laws to be prepared for UK withdrawal in this way and in a manner which respects the founding principles of devolution. The preferred option of the Scottish Government remains being able to recommend consent to an amended EUWB and being able to make the necessary legislative preparations for UK withdrawal on the basis of co-operation and co-ordination between the governments of the UK. The scale of the task that is required to ensure a functioning statute book means that governments across the UK need to work closely together to ensure effective withdrawal arrangements that reflect the interests of all.

13. As the EUWB is drafted, with neither the Scottish Government nor the lead committee in the Scottish Parliament able to recommend it for consent, it is necessary to consider options following consent being withheld. If the UK Government will not support the changes to the EUWB which would allow it to be given consent then the Scottish Government recognises that the consequence is that it and the Scottish Parliament must take responsibility themselves for preparing devolved law in Scotland for UK withdrawal.

14. To the extent to which consent is withheld to the EUWB, it will have to be amended so it does not apply to matters within the competence of the Scottish Parliament or change the role of the devolved institutions. While there is a realistic prospect of consent being withheld, the Scottish Government considers that introducing this Bill is a necessary and responsible step. Having a viable alternative statute will ensure that, on all scenarios, the Scottish Government and Parliament have the tools necessary to prepare Scotland, within their devolved responsibilities, for the legislative consequences of leaving the EU.

15. The introduction of this Bill provides Scotland with three possible routes for preparing its devolved laws for UK withdrawal.

16. The first is relying on an amended EUWB, with the consent of the Scottish Parliament. If the UK Parliament makes the necessary changes to

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<sup>14</sup> See, for example, paragraph 181 of Scotland's Place in Europe, which can be found at <http://www.gov.scot/Resource/0051/00512073.pdf> or paragraph 12 of the legislative consent memorandum.

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

the EUWB's approach to devolution, then the Scottish Government would be able to change its recommendation regarding consent. This route would have the benefit of allowing those preparations best made on a UK-wide basis to be made that way. Where, for example, the changes required were uncontroversial, technical or the same or similar across the UK's jurisdictions, they could be made by the UK Government with the consent of the devolved administrations. Where a UK-wide framework is required to provide for continuity on UK withdrawal from the EU, this could be agreed between the relevant governments and implemented in the devolved legislatures or in the UK Parliament with the consent of the devolved legislatures.

17. If the EUWB were amended to respect the principles of devolution, the Scottish Government could lodge a legislative consent motion which, if passed by the Scottish Parliament, would mean that the Bill would no longer be necessary. Standing Orders provide for the withdrawal of a Bill at any point before the conclusion of Stage 1.<sup>15</sup> After that, withdrawal requires the agreement of the Scottish Parliament. Should the Bill be passed, it contains provision for its own repeal, meaning that it could be effectively withdrawn even after completing its parliamentary passage.

18. The second is relying on a combination of the Bill and the EUWB following the qualified withholding of legislative consent. The Scottish Parliament can withhold or give legislative consent to any part of the EUWB on any basis. In terms of the Sewel Convention, the Bill would then have to be amended in accordance with the terms of that decision. Given the advantages of being able, where appropriate, to make UK-wide changes in preparation for withdrawal the Scottish Parliament could withhold consent for the Bill on the basis and understanding that changes to devolved law would only be made with the Scottish Ministers' consent. Section 17 of the Bill accordingly provides that where an instrument which would adjust the EU law retained by the Bill is made by UK Ministers, it requires Scottish Ministers' consent before it can be made.<sup>16</sup> The Scottish Parliament and Scottish Government would therefore maintain control of the extent to which the powers in the EUWB could be used in relation to devolved matters, with the principal powers required to prepare devolved law for UK withdrawal coming from the Bill.

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<sup>15</sup> Standing Orders of the Scottish Parliament, rule 9.13.

<sup>16</sup> See paragraphs 67 to 69 of this Policy Memorandum.

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

19. The third is relying on the Bill alone following the withholding of legislative consent. If the Scottish Parliament were to withhold consent to the EUWB entirely then it would have to be amended so that the provisions of it requiring legislative consent did not extend to Scotland. Powers given to UK Ministers in the EUWB would have to be modified so that they could not be exercised within devolved competence. As a result, every change necessary to devolved laws in anticipation of UK withdrawal would have to be made using the powers in this Bill. Even where the changes required were technical or where identical changes were necessary across the UK's jurisdictions, separate instruments would be required in the UK and Scottish Parliaments to ensure an operating body of law after UK withdrawal.

20. The Scottish Government has made clear that this third route is a scenario it wishes to avoid. It would add to the complexity of the post-exit position for those who need to operate and work with the legislation. It would also require a large number of technical instruments to be laid and scrutinised in the Scottish Parliament where the same or similar provision was being made in the UK Parliament. The co-ordination of these instruments across the UK's jurisdictions, particularly where they were intended to produce identical, co-ordinated or compatible effects across the UK, would present serious logistical challenges. That complexity would, however, flow from the refusal of the UK Government to amend its Bill in a manner which respects the position of the Scottish Parliament within the constitution. If, however, preparation for UK withdrawal from the EU ultimately requires to be done on this basis, then the Bill provides a framework for doing so.

## Legal background

21. On 1 January 1973 the UK joined the European Economic Community, now the European Union. The principal statute which gives domestic effect to EU law and gives the governments of the UK the ability to implement EU law is the European Communities Act 1972 ("ECA").

22. On 23 June 2016, a referendum was held in the UK and Gibraltar on the question whether the UK should remain a member state of the EU. 52% of the votes were for leaving the EU, with 48% voting to remain. In Scotland, 62% of the votes were for remaining in the EU, with 38% voting to leave.

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

23. On 29 March 2017, the Prime Minister notified the European Council of the UK's intention to withdraw from the EU. Under the terms of Article 50, 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, two years after notification. On that date, the UK will have been a member state for 46 years. Throughout this period Scotland and the UK's laws have reflected, and have been adapted to reflect, EU law. The EU has been one of the major sources of law for the UK throughout this period.<sup>17</sup>

24. The UK Supreme Court confirmed in the *Miller* case that one of the effects of UK withdrawal from the EU would be an expansion of the Scottish Parliament's ability to make law in devolved areas currently covered by EU law:

“The removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence.”<sup>18</sup>

25. Section 29(2)(d) of the Scotland Act 1998 provides that Acts of the Scottish Parliament are not law so far as they are incompatible with EU law. Once EU law ceases to operate in the UK following UK withdrawal, this restriction will empty of meaning. Section 1 of the Bill therefore makes provision in anticipation of this adjustment to the Parliament's ability to make laws and ensures that the Bill, and the powers in it, will only have effect once the restriction in section 29(2)(d) is spent and no longer has any effect.

26. The Scottish Government considers that, to the greatest extent possible, Scotland's system of laws should continue to operate on the day after the UK leaves the EU as it did on the day before. This is to ensure

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<sup>17</sup> See paragraphs 15 to 32 of the explanatory notes to the European Union (Withdrawal) Bill for further information about the need for legislation to prepare for EU withdrawal, and on the legal background to the way in which EU law currently operates in the UK's jurisdictions.

<sup>18</sup> R (on the application of Miller and another. v Secretary of State for Exiting the EU [2017] UKSC 5, paragraph 130.



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

consistency and predictability for the people who live and work in Scotland and those who do business here and with us in Europe. The Scottish Ministers also consider that it should remain possible for devolved legislation to continue to be updated or aligned with new EU law where that is appropriate. The purpose of the Bill is therefore to ensure the greatest possible continuity of law on and after the day that the UK leaves the EU (“exit day”). To achieve this the Bill does three main things:

- it saves all domestic devolved law that relates to the EU and separately incorporates devolved EU law that is directly applicable into domestic law,
- it gives the Scottish Ministers the powers needed to ensure that devolved law that is saved or incorporated into domestic law continues to operate effectively after the UK has left the EU, and
- it gives the Scottish Ministers the power to, where appropriate, ensure that Scotland’s laws keep pace with developments in EU law.

27. The context for the Bill is therefore to facilitate the legal process that has been set in motion under EU law as a consequence of the triggering of Article 50. Nothing in the Bill impacts on the Scottish Government’s ongoing legal requirements to transpose, implement and otherwise abide by EU law so long as the UK remains a member of the EU.

## The retention of EU law

28. Section 2(1) ECA provides for directly applicable law (such as EU regulations) to have effect in domestic law.

29. Other types of EU law (such as Directives) are implemented through domestic law, frequently using the powers provided for that purpose in section 2(2) ECA. If nothing were done on exit day to provide for continuity of law, then EU laws as they operate before exit would cease to have effect on the repeal of the ECA and on the UK’s withdrawal from the EU. This would result in significant gaps in Scotland’s system of laws with damaging consequences for legal certainty, business and society.

30. Instead, the Bill provides for the retention of existing EU law, whatever its source, so that as far as possible the same laws, rules and schemes will operate after UK withdrawal as they did before.

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

31. The Bill achieves this in four ways:

- it saves those laws made in devolved areas under the ECA to implement EU law or which otherwise relate to the EU,
- it incorporates into domestic law all directly applicable EU law in devolved areas,
- it saves other devolved EU law rights currently available in domestic law, and
- it incorporates the general principles of EU law and the Charter of Fundamental Rights into domestic law.

## The main powers in connection with UK withdrawal from the EU

32. A significant proportion of devolved law in Scotland contains provisions which will not operate effectively when the UK leaves the EU. The Bill therefore gives the Scottish Ministers powers to correct deficiencies in laws caused by UK withdrawal.

33. Examples of deficiencies which will require correction include:

- references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states”,
- functions which require interaction with EU institutions, such as requirements to obtain an opinion from, or report something to, the Commission,
- functions which are currently carried out by EU institutions, and
- reciprocal arrangements which require modification or which are no longer appropriate as a consequence of leaving the EU.

34. Many international obligations are implemented in the UK through membership of the EU. The Bill therefore also gives the Scottish Ministers a power allowing provision to be made where needed to ensure that devolved Scottish laws continue to comply with the UK’s international obligations.

35. Both of these powers expire two years after exit day.

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

36. Further information about the delegated powers in the Bill can be found in the Delegated Powers Memorandum.

## Scrutiny of the use of the main powers

37. The Bill provides for a higher level of parliamentary scrutiny of the use of the main powers than the EUWB.

38. In particular, the Bill provides for a heightened form of scrutiny where the main powers are used to establish new public bodies for discharging existing EU law functions or where they would abolish an existing EU law function without providing for an equivalent replacement function. These two possible uses of the powers are considered to be particularly significant.

39. Where the powers are used to create a new public body, transfer functions to a new public body or abolish an existing function, an enhanced version of affirmative procedure applies to the regulations. The Scottish Parliament is given additional time to complete its scrutiny: 60 days, rather than 40 days, must elapse before the regulations can be brought into force. The Scottish Ministers must also consult, in advance of laying the regulations, on the proposals and report on that consultation to the Scottish Parliament at the same time as they lay the regulations. That report must set out the representations received about the proposal and any changes made to the instrument as a result of those representations.

## Keeping pace with EU law

40. A substantial number of subjects are currently regulated under ECA section 2, either directly through subsection (1) or by subordinate legislation made under subsection (2). On the repeal of the ECA in many cases the only existing legislative route for regulating in a particular field will be lost. If legislative lacunae are to be avoided something must fill the gap: either a replacement for section 2 of the ECA or a suite, in primary legislation, of new and discrete subject-matter-specific powers to regulate in individual fields.

41. 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. This will mean choosing to keep pace with developments in a particular field of regulation

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

after UK withdrawal, for example continuing to apply new and developing rules about food safety. Particularly where there is no other 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. In many cases, existing legislation will not provide a sufficient range of regulatory powers, since it was designed in the expectation that section 2 of the ECA would provide the principal or only power needed to regulate in a field covered by EU law.

42. The ability to keep pace with EU law may only be required in the short term, where no specific powers to regulate in a particular field have yet been taken. The Bill therefore provides that these powers expire five years after exit day, unless renewed (again for a period not exceeding five years) unless renewed again using the same procedure by the Scottish Ministers bringing forward regulations, which are subject to the affirmative procedure. Where a sufficient range of regulatory powers were taken in primary legislation after UK withdrawal to mean that the ability to keep pace with EU law was no longer required, the Scottish Ministers would not seek the renewal of this power.

43. An example of an area where the Scottish Government might use a keeping pace power is the regulation of food. A substantial amount of food regulation is made using section 2(2) of the ECA. This is done to implement, and to ensure enforcement and execution of, EU food law in Scotland. It includes a wide range of important risk-management policies such as provisions governing the pre-market authorisation of the safety of novel foods and food processes, the list of permitted additives allowed to be added to foods and animal feeding-stuff placed on the market in the EU, and the list of approved claims which can be made about the nutritional and health properties of products.

44. All of these methods of approval and lists of authorised products are updated regularly to exclude materials which have recently been determined to be unsafe and permit the marketing of other new safe products and ingredients. In addition, new general rules such as those governing the place of provenance and country of origin of processed foods are expected from the Commission and are of specific interest to the Scottish Ministers. When the ECA is repealed the Scottish Ministers would, if nothing else were done, lose the ability to update food law in these areas,

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

including important matters concerning the safety of certain products and additives. In addition, where an ambulatory reference (that is, a reference to an EU instrument which automatically updates when that instrument is amended) is at present used under section 2(2) and paragraph 1A of Schedule 2 of the ECA, the law would no longer automatically update when certain changes were made at EU level, for example materials and articles which may come into contact with food and food additives, flavourings and extraction solvents.

45. The Scottish Ministers' policy for the development of these important matters is likely to be, at least in the short term after UK withdrawal, to maintain regulatory alignment with these EU rules as they develop, since this will help maintain the current levels of public health protection afforded to Scottish consumers and also help maintain the regulatory equivalence likely to be necessary to allow Scottish companies to continue to trade with the EU member states. A power to keep pace with this law would therefore be a useful method of maintaining continuity of law, in advance of primary legislation on the subject of food regulation being able to fill the gaps.

## Comparison with the European Union (withdrawal) Bill

46. The Bill is intended to deliver continuity of law on exit day and, where possible, to provide for a coherent and coordinated programme of preparation for UK withdrawal with the other jurisdictions of the UK. It therefore shares a structure and approach with the EUWB in relation to how devolved Scots law is dealt with. This is intended to complement the treatment of reserved Scots law, which will have to be dealt with by the EUWB. The Scottish Government has, however, chosen to diverge from the approach in the EUWB in a number of areas, in order to provide for greater continuity of law on and after exit day and to reflect the different policy choices of the Scottish Ministers.

## Amending devolved direct EU legislation

47. The EUWB contains a number of restrictions on the Scottish Ministers' ability to prepare devolved laws for UK withdrawal. The principal restriction is that only UK Ministers are able to use the powers to amend direct EU legislation, even in devolved areas. The Finance and Constitution Committee, in its interim report on the EUWB, supported "the

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

principle that Scottish Ministers should have the same powers as UK Ministers”.<sup>19</sup>

48. Sections 11 and 12 of the Bill therefore allow the Scottish Ministers to make the necessary legislative preparations for UK withdrawal, including amending retained (devolved) direct EU legislation.

## The Charter of Fundamental Rights

49. Article 6(1) of the Treaty of European Union recognises the rights in the EU Charter of Fundamental Rights (“the Charter”) as having the same legal status as the Treaties. The Charter contains a set of rights relevant to the operation of EU law protecting values such as dignity, freedom, equality, solidarity, citizens’ rights and justice.

50. Clause 5(4) of the EUWB excepts the Charter from incorporation into domestic law. The UK Government has published a memorandum setting out its comparison of Charter rights against domestic law, arguing that the incorporation of the Charter into domestic law is unnecessary.<sup>20</sup> The Scottish Government, however, considers that the Charter is an important source of law and protections and that certainty and continuity of law, and the principles which apply to that law, should continue to be the same on and after exit day.

51. Section 5 of the Bill therefore incorporates the Charter into Scots law on exit day, as it applies to devolved matters retained in Scots law by the Bill.

## The general principles of EU law

52. The general principles of EU law come from a wide variety of sources, some of which have been given primary status because of their incorporation into the Treaties or their inclusion in the Charter. Those not codified into primary law have mainly been introduced into the EU legal order by the Court of Justice. They may be used to interpret and assess

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<sup>19</sup> Paragraph 141

<sup>20</sup> The memorandum can be found at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/664891/05122017\\_Charter\\_Analysis\\_FINAL\\_VERSION.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf)

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

the EU's own laws or relied on to challenge EU laws or member states' application of EU law.

53. While the EUWB retains the general principles for some purposes (for example, in the interpretation of retained EU law), it provides that there should be no right of action, or power for the courts to disapply laws, based on the general principles (paragraphs 2 and 3 of schedule 1). As the UK Government concedes in its memorandum on the Charter:

“Where a right is largely or wholly drawn from a general principle of EU law, as set out in CJEU case law, the right will be converted into UK law in the form of [an] interpretative obligation ... but the way in which someone may rely on that right will be different. It will not be possible for someone to bring a challenge after exit day on the specific grounds of a failure to comply with that right, or for a court to disapply legislation which is incompatible with that right.”<sup>21</sup>

54. The Scottish Government considers that the general principles are an important aspect of EU law and should have the same status after exit day as they did before. Certainty and continuity are therefore best achieved by retaining in devolved law the ability to bring an action based on the general principles and the power of the courts to provide a remedy for acting incompatibly with the principles.

## Francovich damages

55. 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. The EUWB excepts the rule in *Francovich* from being retained as part of domestic law. Transitional provision, in paragraph 27(3) of part 4 of schedule 8 of the EUWB, provides that the rule is not abolished for proceedings which have been instituted but not yet decided. Once the UK is no longer a member state, there will be no new duties to implement EU law. The Scottish Government considers that it would not be appropriate to retain this concept in relation to retained EU law. The Scottish Government considers, however, that it is inappropriate to abolish existing, accrued

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<sup>21</sup> Paragraph 23

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

rights of action on EU withdrawal, even where an action has not yet been commenced. The Bill therefore preserves existing rights of action under the rule in *Francovich* where they exist before exit day.

## A test of necessity

56. The EUWB provides, in clauses 7, 8, and 9 (and, for the devolved administrations, in schedule 2) powers which can be used to make such provision “as the Minister considers appropriate”. Combined with the broad scope of the powers, and in particular of the power to correct deficiencies in clause 7, this amounts to a very wide discretion for Ministers to identify both where it is appropriate for provision to be made and which type of provision is the most appropriate to be made.

57. Given the scale and scope of the deficiencies which UK withdrawal will cause in the devolved statute book and the significant uncertainty about the terms on which the UK will withdraw from the EU, breadth will be an inevitable feature of any power which would enable the statute book to be properly prepared for UK withdrawal. However, both the Delegated Powers and Law Reform Committee and the Finance and Constitution Committee supported the inclusion of a test of necessity for the use of these powers.<sup>22</sup> The Scottish Government considers that the powers should be no broader than is required for the task. Further information about the rationale for the delegated powers in the Bill can be found in the Delegated Powers Memorandum.

58. Correcting a deficiency in law will often require a choice between policy options: for example, which body should exercise after exit day a function that is currently discharged by an EU institution. A test of appropriateness is the best way of giving the Scottish Ministers the discretion they will require to address such matters and to choose between possible alternatives. However, the Scottish Government agrees with the two Scottish Parliament committees that ‘appropriateness’ is an unsuitable threshold for deciding the prior question of whether the power can or

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<sup>22</sup> See paragraph 119 of the Finance and Constitution Committee’s interim report and paragraph 48 of the Delegated Power and Law Reform Committee’s interim report, which can be found at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2017/11/17/Legislative-Consent-Memorandum-on-the-European-Union--Withdrawal--Bill/DPLRS52017R54.pdf/>



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

should be exercised or not. Ministers should not be empowered to decide that a particular aspect of retained EU law requires to be modified in consequence of withdrawal unless that modification is necessary as a result of the UK withdrawing from the EU.<sup>23</sup>

59. The Scottish Government therefore believes that the power should only be capable of being used where necessary, but that once a threshold of necessity has been passed the Scottish Ministers should be empowered to decide, as appropriate, what provision should be made. The Bill therefore includes a test of necessity before either of the main powers in connection with UK withdrawal from the EU can be used.

### Additional limits on the use of the main powers

60. The EUWB contains some limits on the use of the main powers. For example, the power to correct deficiencies cannot be used to impose or increase taxation, or to amend the Human Rights Act 1998.<sup>24</sup> The Scottish Government considers that it is appropriate for additional limits to be placed on the use of these powers to reflect the principle that certain matters are of sufficient importance or constitutional significance that changing them using delegated powers would be inappropriate.

61. The Bill accordingly protects the Equality Act 2006 and the Equality Act 2010 from modification, as well as the Scotland Act 1998. Any adjustments to the law of equality or to the devolution settlement required in consequence of UK withdrawal will have to be made in primary legislation, either in this Bill or in other primary legislation. The main powers also cannot be used to remove any protections relating to the independence of the judiciary.

62. The Bill requires any regulations which confer functions on public authorities to do so in a way that is consistent with the general objects and purpose of the authority. This will ensure that where it is necessary to confer a function currently discharged by an EU institution on a domestic

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<sup>23</sup> For further analysis of a necessity threshold, see paragraphs 22 to 26 of the House of Lords Delegated Powers and Regulatory Reform Committee Report on the EUWB, which can be found at <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/22.pdf>

<sup>24</sup> EUWB clause 7(6)

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

one after exit day, Ministers will have to make sure that only functions which in some way relate to a body's existing functions can be given to it. This reflects the principle that where the Scottish Parliament has established a public body for a particular purpose, it is inappropriate to use delegated powers to fundamentally alter the nature of its responsibilities.

## No power to implement the withdrawal agreement

63. Clause 9 of the EUWB would give UK Ministers the power to make regulations implementing the terms of the withdrawal agreement. Schedule 2 of the Bill contains a limited version of this power for use by the devolved administrations.

64. The UK Government recently announced a forthcoming Withdrawal Agreement and Implementation Bill. The purpose of this Bill will be to directly implement into domestic law “the major policies set out in the Withdrawal Agreement ... by primary legislation – not by secondary legislation under the EU (Withdrawal) Bill”.<sup>25</sup> It is expected to cover the contents of the withdrawal agreement, including issues such as citizens' rights, the financial settlement with the EU and the details of the implementation period agreed between the UK and EU. Despite this announcement, the UK Government has stated, during Committee Stage consideration of the EUWB, that it intends to retain the power in clause 9 to allow it to prepare for UK withdrawal before the passing of the Withdrawal Agreement and Implementation Bill.<sup>26</sup>

65. The exact details of the withdrawal agreement are the subject of ongoing negotiation and cannot be known until those negotiations are near completion. The Scottish Government considers that it is inappropriate to take a power to implement an agreement in advance of knowing the terms of that agreement, and that the powers in the forthcoming Withdrawal Agreement and Implementation Bill ought to be the preferred mechanism for adapting Scotland's and the UK's laws to the agreement negotiated with the EU. The question of Scottish parliamentary consent to that Bill or the possibility of further Scottish legislation on the subject of the withdrawal

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<sup>25</sup> <https://www.gov.uk/government/news/new-bill-to-implement-withdrawal-agreement>.

<sup>26</sup> European Union (Withdrawal) Bill, HC Deb, 13 December 2017, col 475 – 476.

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

agreement will be considered when the terms of that agreement and the content of the proposed Bill are known.

66. The Bill therefore does not include a power to implement the terms of the withdrawal agreement corresponding to clause 9 of the EUWB.

## Requirement for Scottish Ministers' consent to certain UK instruments

67. Clauses 7, 8 and 9 of the EUWB allow UK Ministers to make provision in respect of devolved matters. Policy responsibility and expertise in devolved areas rests with the Scottish Government. In devolved areas those policy choices about the appropriate correction to be made to devolved law are a matter for the Scottish Ministers, who are accountable for them to the Scottish Parliament. Under the EUWB, UK Ministers would have the power to make changes to law in devolved areas without any formal mechanism for accountability to the Scottish Parliament or consent from the Scottish Ministers. In relation to directly effective EU law, UK Ministers would have the sole power to make corrections to law in devolved areas. The Scottish Government does not believe that this is acceptable. The Finance and Constitution Committee, in its interim report on the EUWB, was “deeply concerned that clauses 7 to 9 [...] would allow UK Ministers to make statutory instruments in devolved areas without any statutory requirement to seek the consent of the devolved administrations”.<sup>27</sup>

68. While it may prove efficient or beneficial to be able to make provision on a UK-wide basis, the Scottish Government considers that this should only be possible with the consent of the Scottish Ministers.<sup>28</sup> Amendments to the EUWB to this effect were jointly proposed by the Scottish and Welsh Governments but were not accepted by the UK Government.

69. In order to ensure the involvement of devolved Scottish institutions in devolved Scottish law-making, the Bill therefore creates a default procedural requirement under which UK Ministers must obtain the consent of the Scottish Ministers before they make, confirm or approve secondary legislation relating to devolved matters which modifies, or would modify,

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<sup>27</sup> Paragraph 130

<sup>28</sup> See paragraph 28 of the legislative consent memorandum.

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

any retained (devolved) EU law. This allows the Scottish Ministers to be held accountable for those decisions to the Scottish Parliament and properly reflects the allocation of responsibilities that is inherent in the constitution of the United Kingdom. The purpose of this provision is to preserve the integrity of the devolved law that is retained as a consequence of the Bill and to enable co-operation and co-ordination between the UK and Scottish Governments over the programme of legislation required to prepare for withdrawal. It also establishes a basis on which the Scottish Parliament might be invited to consent to the powers in clauses 7 and 8 of the Bill, on the condition and understanding that they could only be lawfully exercised in relation to devolved matters with the consent of the Scottish Ministers. The requirement applies to provision that is made under future Acts of Parliament. It therefore does not affect any existing functions that UK Ministers may have in devolved areas (for example, the exercise of powers under section 57(1) of the Scotland Act 1998 to implement EU law).

## Alternative approaches

70. There is a need for legislation to provide for continuity of law on exit day and for that law to be adjusted so that it continues to operate effectively after exit day. The only alternative to using this Bill for that task is to rely on the powers in the EUWB. For the reasons given by the Scottish Government in the legislative consent memorandum and those given by the Scottish Parliament's Finance and Constitution Committee in its interim report on the EUWB, this is not considered a viable option as that Bill is currently drafted.

71. The EUWB will be required so that reserved law in Scotland can be prepared for EU withdrawal. It is therefore necessary for this Bill to work in a compatible and complementary way with the EUWB, should both Bills ultimately be used. If divergent schemes were proposed for the incorporation and interpretation of devolved and reserved law in Scotland after exit day, the effect on the coherence of Scots law would be profound. For that reason, the Scottish Government has chosen to introduce a Bill which, in the main, adopts a parallel approach to the EUWB and which is intended, should it be required, to work alongside it.

72. The Scottish Government therefore considers that there is no sensible alternative to the introduction of a Bill, restricted to devolved matters and intended to operate compatibly with the EUWB.

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

## Consultation

73. Given the timescales involved, no formal consultation has been possible on the Bill in advance of its introduction. However, the Bill shares a structure and approach with the EUWB and the Scottish Government has taken into account the extensive commentary on that Bill in adapting the EUWB to devolved law in Scotland. In particular, account has been taken of the recommendations in the interim reports on the EUWB by the Scottish Parliament's Delegated Powers and Law Reform Committee and its Finance and Constitution Committee. The adaptations which have been made as a result are set out in this Memorandum.

74. The Scottish Government intends to consult, where possible, on the content of any instruments made under the Bill which are of particular policy significance. In contrast to the EUWB, the Bill includes statutory consultation requirements where certain categories of instrument are made.

## Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

### Equal opportunities

75. The Scottish Government has considered the effect of the Bill on equal opportunities.

76. The Bill itself is a framework for providing for continuity of law. As such it is unlikely that any of the Bill's provisions will have a direct impact on equal opportunities. Particular uses of the main powers in the Bill could potentially have effects on equal opportunities. For this reason, section 16 requires instruments made using these powers to be accompanied by an explanatory statement. This statement must set out whether the instrument would modify equalities legislation and, if it does, explain the effect of that modification. The explanatory statement must also set out that the Scottish Ministers have had regard to their duties under the Equality Act 2010. The decision to conduct an Equalities Impact Assessment would be considered as part of the development of the statutory instrument.

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

77. Additionally, the main powers in the Bill have been limited such that they cannot be used to modify the two main pieces of primary legislation relating to equalities: the Equality Act 2006 and the Equality Act 2010.

78. The Scottish Government considers that these safeguards ensure that equal opportunities are taken account of when the main powers in the Bill are used and scrutinised by the Scottish Parliament.

## Human rights

79. The Scottish Government has considered the effect of the Bill on human rights.

80. Under section 5 of the Bill, the general principles of EU law and the Charter of Fundamental Rights as they have effect before exit day and as they relate to retained (devolved) EU law will continue to apply in Scotland. Rights of action in Scots law based on a failure to comply with the general principles and the Charter are retained. By ensuring that the Charter of Fundamental Rights is retained in relation to devolved Scots law after UK withdrawal, the Scottish Government considers that the Bill supports and enhances the protection of human rights in Scotland. The Bill also seeks generally to preserve rights of action that exist under EU law rather than extinguishing them on exit. For example, despite the abolition of Francovich damages, the Bill preserves any existing rights of action that exist on exit day.

## Island communities

81. The Bill has no disproportionate effect on island communities.

## Local government

82. The Bill itself is a framework for providing for continuity of law. As such it makes no direct reference to local government, and it is unlikely that any of its provisions will have a direct impact on local government. Particular uses of the main powers in the Bill could potentially have such effects, for example the adjustment of the responsibilities or functions of local authorities, transferring functions from EU institutions to local authorities or providing for the charging regime associated with these functions.

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

83. The Bill provides that, where the main powers are used to confer a function on a Scottish public authority, including a local authority, then the function must be broadly consistent with the general objects and purposes of the authority. Accordingly, only functions with some connection with or relevance to local government could be conferred on local authorities. Where a particular use of the main powers in the Bill has an impact on local government, the Scottish Government expects to consult with local government.

84. The Scottish Government considers that these safeguards ensure that the interests of local government are taken account of when the main powers in the Bill are used and scrutinised in the Scottish Parliament.

## Sustainable development

85. The Bill itself is a framework for providing for continuity of law including environmental protections in EU law. However, it makes no direct reference to sustainable development, and it is unlikely that any of its provisions will have a direct impact on sustainable development. Particular uses of the main powers in the Bill could potentially have such effects, for example if deficiencies in the law relating to environmental protection or land development required to be addressed. However, the main powers in the Bill are limited to being able to be used only where necessary, and the type of provision which can be made is limited to that which is appropriate only for the purpose of addressing that deficiency. The Scottish Government is clear that the purpose of the main powers is to change no more than it is necessary: to address deficiencies in law and to continue the operation of existing law. The Scottish Government has reached the view that as the Bill is likely to have no or minimum effect in relation to the environment, as per Section 7 of the Environmental Assessment (Scotland) Act 2005 and can therefore be considered exempt. A pre-screening report outlining this view and the relevant information has been prepared and submitted to the Consultation Authorities via the SEA Gateway as per the requirements of the 2005 Act.

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

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

## Policy Memorandum

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