

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

FINANCIAL MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial 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 Policy Memorandum (SP Bill 28-PM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 28-LC).
3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

OVERVIEW OF THE BILL

4. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill ("the Bill") provides a framework for ensuring that, to the greatest extent possible, continuity of law is maintained on UK withdrawal from the EU. This is to ensure consistency 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 the Scottish Ministers the powers needed to ensure that devolved law continues to operate effectively after UK withdrawal, and
 - it gives the Scottish Ministers the power to, where appropriate, ensure that Scotland's laws keep pace after UK withdrawal with developments in EU law.
5. The Bill is not about substantive policy change. It concerns the continuation and adaptation of existing regulation, existing functions and existing schemes at the point of UK withdrawal from the EU. It provides a framework for continuing that law and for making adaptations where necessary to provide for continuity. Where a change in substance from existing policy is required in consequence of UK withdrawal, separate legislation will be necessary.
6. The Bill itself changes very little about the way in which devolved law will operate on UK withdrawal. Instead it provides a structure for ensuring the continuity of already-operating

laws and a set of powers for adapting those laws to the UK no longer being a member state of the EU. The exercise of the delegated powers in the Bill is likely in many cases to involve expenditure, since the changes required to the operation of existing laws on UK withdrawal will often involve costs. For example, where it is proposed to use the powers to transfer a function from an EU institution to a domestic Scottish public body, then that body will incur costs involved in preparing for the assumption of the function on exit day and for exercising the function.

7. The way in which these powers will be used cannot be predicted at present. Estimates of the cost of the entire programme of legislation required by UK withdrawal are difficult to quantify. There is still considerable uncertainty over the terms on which the UK will withdraw from the EU and the timetable against which withdrawal will take place. These will depend on the outcome of negotiations between the UK and EU and on policy decisions not yet taken. In particular, the prospect of regulatory alignment during a transition period or beyond has not been agreed between the EU and UK, nor have the terms of any future relationship. The Scottish Government's position on the future relationship between Scotland, the UK and EU has been set out in Scotland's Place in Europe (December 2016)¹ and Scotland's Place in Europe: People, Jobs and Investment (January 2018)².

8. The Bill therefore provides a structure for a programme of legislation in advance of being able to say with confidence what will be involved in that programme. This is a direct consequence of the need to prepare, in part, for UK withdrawal before the terms of withdrawal are known. 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, 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. The programme of secondary legislation required will therefore necessarily be being prepared while the outcome of negotiations is becoming clear.

9. Where there are financial implications of the use of the main powers in the Bill, the explanatory notes accompanying each instrument will set out the expected financial implications of the instrument. The Bill therefore provides for enhanced scrutiny of certain categories of instrument that are considered to involve particularly significant changes or cost, such as the establishment of new public bodies or the removal of existing functions. The additional scrutiny afforded by this enhanced procedure will allow for greater analysis of each instrument's financial implications.

10. The UK Government's European Union (Withdrawal) Bill (EUWB) makes similar provision for the UK. The financial consequences of that Bill are set out in the Explanatory Notes to it.³

¹ <http://www.gov.scot/Publications/2016/12/9234>

² <http://www.gov.scot/Publications/2018/01/6407>

³ European Union (Withdrawal) Bill – Explanatory Notes, <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>, at paras 288 to 297.

Preparatory expenditure

11. Section 18 of the Bill corresponds to section 12(2) of the EUWB. It enables the Scottish Administration to incur expenditure in preparing for the use of the powers in the Bill. This section provides only an exceptional power for preparatory activities required in advance of provision being made in regulations under the Bill. It does not remove the requirement for the Budget Act processes under the Public Finance and Accountability (Scotland) Act 2000 to be followed. The definition of exceptional for each proposed item of expenditure will be approved utilising current accountable officer governance arrangements.

12. Expenditure incurred under the section 18 process will be required to be confirmed in the annual Budget (Scotland) Act or the regulations made under that Act for revisions to the budget as usual. Accountability and governance arrangements which are currently set out with regards regularity, propriety and value for money must continue to be adhered to.

13. Cover for exceptional expenditure may be required because of the uncertainty over how the powers in the Bill may be used, and the compressed timetable against which the Scottish Administration may have to prepare for UK withdrawal from the EU. Where, for example, an adjustment to a public body's responsibilities and functions is required, or where a new public body has to be established, then there may be the need to begin preparations for its possible assumption of those functions, or establishment, in advance of powers being used.

COSTS ON THE SCOTTISH ADMINISTRATION AND SPONSORED PUBLIC BODIES

14. As a framework Bill, intended to provide for continuity of law rather than substantial policy change, the Bill has very few immediate financial implications for the Scottish Administration and sponsored public bodies.

The programme of secondary legislation

15. There will be costs involved in the use of the powers under the Bill: for example, the preparation of what is anticipated to be a significant programme of subordinate legislation and the cost involved in progressing this legislation through the Scottish Parliament.

16. For the reasons given above, in advance of knowing in detail this scale and content of the programme of legislation required, it is difficult to quantify this cost. However, it can be anticipated there will not be significant additional costs from existing costs borne by the Scottish Administration of preparing a typical programme of legislation over a period. The Scottish Government has committed to sharing with the Scottish Parliament information about the anticipated level of legislation required and to keeping the Parliament updated as its knowledge about the level of legislation, and the financial implications of its preparation, develops.

Particular uses of powers under the Bill

17. Most uses of the powers can be expected to involve minimal cost. Updating legislative references such that they continue to function after UK withdrawal, adapting a reciprocal process based on EU membership, 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 have negligible cost implications.

18. Some possible uses of the powers would have more significant cost implications. The powers in the Bill could be used, for example, to transfer significant regulatory functions to existing public bodies in Scotland or to create new public bodies for the purpose of exercising functions currently discharged at the EU level.

19. Where the powers in the Bill are used to create a new public body, give functions to a new public body, or remove an existing function, an enhanced form of affirmative procedure is provided for. This requires the Scottish Ministers to consult before using their powers and to report on that consultation to the Parliament. Where regulations making this sort of provision are consulted on, the financial implications of the instrument would form part of the consultation.

Fees and charges

20. Sections 19 and 20 of the Bill provide the Scottish Ministers with the powers to make provisions relating to fees and charges. Where this function is used to impose a new fee or charge then it is subject to the affirmative procedure. Any fees and charges resulting from these powers would have to follow the guidance on fees and charges set out in the Scottish Public Finance Manual (SPFM).⁴

21. The standard approach to setting charges for public services (including services supplied by one public sector organisation to another) is full cost recovery. It normally means recovering 3.5% return on capital. The relevant Scottish Government Finance Business Partner (or equivalent) must be consulted in advance on the proposed provision and financial objectives of all services supplied by constituent parts of the Scottish Administration. Any financial objectives of less than full cost recovery, except in relation to routine information services, must also be approved in advance by the responsible Cabinet Secretary or Minister and cleared by the Cabinet Secretary for Finance and the Constitution.

22. Bodies sponsored by the Scottish Government are required, as appropriate, to follow procedures consistent with the SPFM. In addition any proposals by sponsored bodies to recover less than the full cost of providing a statutory service – or the full cost plus an appropriate rate of return for a commercial service provided in competition with the private sector – must be submitted to the sponsoring unit within the Scottish Government for approval. The sponsoring unit must consult its Finance Business Partner (or equivalent) and submit the proposal to the relevant Cabinet Secretary or Minister (and the Cabinet Secretary for Finance and the Constitution) for a decision.

⁴ <http://www.gov.scot/Topics/Government/Finance/spfm/feescharges>

The Queen's Printer for Scotland

23. The Queen's Printer for Scotland is part of the Scottish Administration (SI 1999/1127).⁵ Sections 23 and 24 require the Queen's Printer to perform certain duties relating to the publication of legislation.

24. At present, it is not possible to estimate the cost to the Queen's Printer for Scotland of discharging this duty. This is, in part, because the compressed timetable for introduction of this Bill has meant that early engagement with the Queen's Printer and Queen's Printer for Scotland is at an early stage. It is difficult to produce a reliable estimate at present given the uncertainty involved in the scale and content of the required programme of legislation and the extent to which the duty may be disapplied by ministerial direction. The decision to exempt the Queen's Printer from the duty to publish will depend on a number of factors unknown at present, including the extent of any legislation that will not be retained and therefore will be unnecessary to publish, and the extent of cooperation with the Queen's Printer (who is separately required to publish legislation under schedule 5 of the EUWB) which may make additional publication for Scotland unnecessary.

25. Work has begun to develop, with the Queen's Printer and Queen's Printer for Scotland, a better understanding of the likely cost of discharging this duty. When further details of the likely costs to the Queen's Printer of discharging the duty in the Bill are known, these will be shared with the Scottish Parliament.

COSTS ON LOCAL AUTHORITIES

26. The Scottish Government considers that it is unlikely that this Bill will result in significant additional costs for local government as most uses of the powers can be expected to involve minimal cost. Where the powers would have more significant cost implications, the Scottish Ministers will consult before using their powers. Where regulations making this sort of provision are consulted on, the financial implications of the instrument would form part of the consultation.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

27. The Scottish Government considers that it is unlikely that this Bill will result in significant additional costs for other bodies, individuals and businesses as most uses of the powers can be expected to involve minimal cost. Where the powers would have more significant cost implications, the Scottish Ministers will consult before using their powers. Where regulations making this sort of provision are consulted on, the financial implications of the instrument would form part of the consultation.

⁵ <http://www.legislation.gov.uk/ukSI/1999/1127/contents/made>

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

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