

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

AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 1

In section 1, page 2, line 36

Leave out subsection (4)

Effect

This amendment deletes section 1(4)

Reason

Section 1(4) allows Scottish Ministers to make regulations which authorise any Scottish public authority which already exercises functions under an EU instrument to delegate those functions to another person or arrange for any of the functions to be carried out by another person or another Scottish public authority.

The Finance and Constitution Committee's Stage 1 report paragraphs 69-72 noted that the Delegated Powers and Law Reform Committee (DPLRC) raised the issue of whether this power to sub-delegate is 'appropriate when there is no equivalent provision in Section 2 (2) of the European Communities Act 1972'.

This power of delegation will apply to a future EU law (the content of which is unknown) and is inappropriate given the uncertainty of what that law may be. Accordingly, this probing amendment to remove the power from the bill provides the Scottish Government with an opportunity to explain the need for this provision.

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AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 2

In section 3, page 4, line 9

Leave out section 3 and insert —

<(1) No regulations may be made under section (1)(1) after the end of the period of 3 years beginning with the day on which section 1(1) comes into force.

(2) The Scottish Ministers may by regulations—

(a) extend the period mentioned in subsection (7) by a period of up to one year,

(b) extend any period of extension provided by regulations under this subsection by a further period of up to one year.

(3) The period during which regulations under section (1)(1) may be made may not be extended by regulations so as to last for more than 5 years in total.>

Effect

This amendment reduces the duration of the section 1(1) power to 3 years from the date on which the section comes into force.

Reason

Section 3 of the bill introduces a limitation on the regulation making powers by providing for the expiry of section 1 at the end of 10 years after it has been implemented (with the possibility of extending that period for a further total period of 10 years in two five-year increments).

This provision is more wide ranging than the analogous power in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (Legal Continuity bill).

The Legal Continuity bill section 13 — the equivalent to the section 1(1) power — provided:

(7) No regulations may be made under subsection (1) after the end of the period of 3 years beginning with exit day.

The Government should explain why the sunset provisions in the Bill differ so much from the provisions in the Legal Continuity) bill.

Subsection (1) of the amendment provides that the sunset provision is set at an initial period of 3 years. Subsection (2) of the amendment provides that the power to make regulations can be extended by up to 2 years in two 1 year increments. The power to make the regulations will no longer be available to Scottish

Ministers 5 years after their implementation. This follows the schematic which was provided for in the Legal Continuity bill.

The Stage 1 Report (paragraphs 121-122) provides comment on this issue from the DPLRC which highlighted the difference between the UK Withdrawal from the Legal Continuity bill and the current bill.

The Scottish Government responded to the DPLRC by stating that it felt 'it is necessary, sensible and pragmatic to ensure that these powers are available for a sufficient period of time to take account of the timescales for progress so far, and to recognise EU law has a development cycle that can take some years'.

It is true that EU legal developments can take some time from proposal to final legal instrument, accordingly we have sympathy with the point of view expressed by the Scottish Government but the legislative cycle of the EU was the same when the Legal Continuity bill was being considered in 2018. Providing in the bill for a sunset provision which allows for up to 20 years duration (the lifespan of four Parliaments) of the powers requires further justification.

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Amendment 3

In section 4, page 4, line 20

Leave out subsection (1) and insert –
<(1) Regulations which contain provision falling within subsection (2) are subject to super-affirmative procedure (see Schedule (Super-affirmative procedure)).>

Effect

This amendment applies the super-affirmative procedure to the section 1(1) powers in connection with the provisions referred to in section 4(2).

Reason

The section 1(1) powers allow Scottish Ministers to make regulations corresponding to EU regulations, tertiary legislation or decisions. The regulations will also be able to enforce these laws, implement directives or modify any retained EU law relating to implementation or enforcement. Section 1(6) provides that Regulations under subsection (1) may make any provision that could be made by an Act of the Scottish Parliament.

The Scottish Government's justifications for the powers in section 1 are contained in paragraphs 26 and 27 of the Policy Memorandum. The first justification is that -

“26...In order to ensure the effective operation of Scots law, to provide for the most flexible approach to regulation, and to reflect Scotland's desire to remain a European nation closely aligned to the EU (so far as within devolved competence), upon the ending of the implementation period, the Scottish Government considers it necessary to give Scottish Ministers the power to make secondary legislation to ensure that Scotland's laws may keep pace with changes to EU law, where appropriate and practicable...

27...If there is no other power to regulate in an area, the alternative could be considerable primary legislation, so it is pragmatic to legislate for a power to keep pace with post-withdrawal developments in EU law and ensure, as appropriate, continuity of law in certain devolved areas after the implementation period ends.”

Section 1 of the Bill is modelled upon section 2(2) of the European Communities Act 1972 which empowers regulations to be made to implement EU law but in the case of the Bill there is no legal necessity to implement EU law within a particular period of time. It is simply a policy decision to keep pace with EU law.

We appreciate that it is impractical to require all changes in EU law to be given effect by primary legislation because this would hold up the normal legislative programme.

However, some future changes in EU law could involve substantial policy considerations which would not have been subject, within the UK, to the usual EU consultation. This means that neither the UK nor Scottish Governments and stakeholders would have had the opportunity to influence those proposals or even to be familiar with them.

Sections 5 and 6 of the Bill make provision for Scottish Ministers, when laying a SSI, or a draft of it, to make a statement explaining, among other things, the instrument or the draft and why Scottish Ministers consider that there are good reasons for making it. In the case of proposals which involve substantial policy considerations it is not thought that such a statement, by itself and without extensive scrutiny, would make up for the absence of proper consultation and consideration.

In these circumstances, we suggest that the power to make regulations under section 1(1) which contain provisions referred to in section 4(2) should be subject to super-affirmative procedure.

The second justification put forward by the Scottish Government attempts to give a legal justification for the power in section 1. Paragraph 26 of the Policy Memorandum states that, in the event of the UK and EU reaching a trade agreement, there may be a requirement for a form of “dynamic alignment” with EU law and it is therefore prudent to legislate for a power to make regulations to achieve this alignment. However, it is uncertain whether there will ever be such a trade agreement which requires alignment with EU law and, even if there was, the implementing UK legislation would make provision for any necessary powers to achieve that alignment.

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AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 4

In section 4, page 4, line 34

At end insert –

<(f) requires a significant change to Scots law or Scottish Government policy.>

Effect

This amendment amends the terms of section 4(2).

Reason

Future changes in EU law could involve substantial policy considerations which would not have been subject, within the UK, to the usual EU consultation. This means that neither the UK nor Scottish Governments and stakeholders would have had the opportunity to influence those proposals or even to be familiar with them.

In these circumstances should a future Scottish Government wish to make regulations aligning Scots law with EU law which involves a significant change to Scots law or Scottish Government policy the regulations will be subject to super-affirmative procedure which as explained in the previous amendment exposes the regulations to consultation and greater parliamentary scrutiny.

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AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 5

In section 4, page 4, line 35

Leave out <the affirmative> and insert <the super-affirmative>

Effect

This is a consequential amendment following on amendment 3.

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AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 6

In section 7, page 5, line 40

Add at end—

<(2) The report in subsection (1) must include

- (a) detail concerning the EU regulations, EU tertiary legislation, EU decisions or EU directives which the Scottish Ministers have considered but have decided not to align with under section 1 (1) and
- (b) their reasons for that decision.>

Effect

This amendment requires additional information to be included in the report relating to the circumstances in which the section 1 (1) alignment power is not exercised.

Reason

The Finance and Constitution Committee in its Stage 1 report (paragraphs 40–42) raised issues in connection with the Cabinet Secretary's commitment to work with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. The Committee asked questions specifically about the role of the Parliament, stakeholders and the wider public in relation to the decision on whether or not to keep pace and early engagement in the policy development process. This amendment requires additional information to be included in the report to Parliament regarding the circumstances in which to section 1(1) alignment power is not exercised and the reasons for that decision. It therefore provides transparency about the decision-making process regarding a decision not to employ section 1(1) powers.

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AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 7

In section 10, page 8, line 24

Leave out subsection (2)

Effect

This probing amendment deletes section 10(2)

Reason

Section 10(2) seeks to require Ministers of the Crown, in developing policies (including proposals for legislation) so far as extending to Scotland to have regard to the guiding principles on the environment provided for under section 9.

It is unusual for the Scottish Parliament to legislate for duties to be imposed upon Ministers of the Crown particularly in developing proposals for legislation which is within the role of such Ministers. Section 10 of the Bill does not appear to condition the exercise of the UK Parliament's powers to legislate for Scotland and, moreover, the Scotland Act does not prevent the Scottish Parliament from conferring powers or imposing duties on Ministers of the Crown. However, some alternative views have been discussed (see below).

Accordingly, this probing amendment provides an opportunity for the Scottish Government to set out the justification for this provision.

In addition to section 10(2) sections 12 and 13 provide for duties in relation to the environmental guiding principles to apply to Ministers of the Crown.

These sections seek to ensure that when UK Ministers make environmental decisions in relation to Scotland which relate to devolved matters they have regard to the same standards as those imposed on devolved public authorities.

However, the Finance and Constitution Committee Adviser Professor Tom Mullen in his note to the Committee stated:

There is, however, a possible doubt over competence arising from the decision of the Supreme Court in the case on the first Continuity Bill, *The UK Withdrawal from The European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64. Section 17 of the first Continuity Bill purported to require UK Ministers exercising delegated legislative powers under UK legislation in relation to matters of retained EU law to obtain the consent of the Scottish Ministers before making regulations in devolved areas. The Supreme Court held that s 17 was ultra vires because it was an attempt to condition the future exercise of the UK Parliament's power to make laws for Scotland, and hence amounted to an unlawful modification of s 28(7)

of the Scotland Act 1998 which expressly confirms the power of the UK Parliament to legislate for Scotland.

Section 10(2) of the current Bill is different from s 17 of the first Bill in that it imposes only a duty to have regard to the guiding principles/guidance and it does not make the exercise of any decision-making power conditional upon compliance with those principles/guidance. However, it might be argued that the difference is one of degree only, because section 10(2) would permit legal challenges to the exercise of relevant UK Ministerial powers on the ground of failure to have regard to the guiding principles/guidance and so the UK Parliament would have to expressly set aside the duty in order to free UK Ministers from it.

This argument is discussed in more detail by McCorkindale, McHarg & Mullen in 'The Continuity Bill is Dead; Long Live the Continuity Bill – Regulatory Alignment and Divergence in Scotland Post Brexit'¹.

¹ <https://ukconstitutionallaw.org/2020/07/30/christopher-mccorkindale-aileen-mcharg-and-tom-mullen-the-continuity-bill-is-dead-long-live-the-continuity-bill-regulatory-alignment-and-divergence-in-scotland-post-brexite/>

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

AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 8

In section 10, page 8, line 34

Leave out <negative> and insert <affirmative>

Effect

This amendment will provide that regulations under section 10(4) will be subject to affirmative procedure.

Reason

Ensuring that regulations which concern matters or circumstances in or in relation to which the duties in section 10(1) and (2) do not apply are subject to affirmative procedure ensures a higher standard of Parliamentary scrutiny in the making of these regulations.

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AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 9

At section 47, page 26, line 7

At end insert –

<*Schedule (Super-affirmative procedure)*

In the case of regulations under section 1(1) —

(1) Scottish Ministers must consult about their proposals such persons as they consider appropriate.

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

(a) lay before the Parliament a document setting out their proposals,

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

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

(d) the Scottish Ministers must not lay before the Parliament for approval a draft of a Scottish statutory instrument containing the regulations unless they have consulted in accordance with paragraph 1; and

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

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

(a) dissolved, or

(b) in recess for more than 4 days.

Effect

This is a consequential amendment following on amendment 3.

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Amendment 10

Schedule 1, page 29, line 7

At end insert –

<() Prior to giving notice under sub-paragraph (1)(c), the Scottish Ministers must consult with the Chair of the Environmental Standards Scotland.>

Effect

This amendment would impose a duty on the Scottish Ministers to consult with the Chair of Environmental Standards Scotland prior to giving notice to remove a member.

Reason

Consultation provides for an additional layer of scrutiny. A requirement on the Scottish Ministers to consult with the Chair of Environmental Standards Scotland will help to ensure openness and transparency of the Scottish Ministers' actions.

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AMENDMENTS TO BE MOVED AT STAGE 2

Amendment 11

Schedule 1, page 29, line 15

At end insert –

<() A person shall be considered unable to carry out the member’s functions or unsuitable to continue as a member under subparagraph (2) if the Scottish Ministers are satisfied as regards any of the following matters –

(a) that the member becomes insolvent;

(b) that the member is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue as a member.>

Effect

The effect of this amendment is to define the meaning of “unable to perform the member’s functions, or unsuitable to continue as a member” in Schedule 1, subparagraph 5(2)(c).

Reason

Introducing a definition of “unable to perform the member’s functions, or unsuitable to continue as a member” would provide greater legal certainty as to the circumstances in which a person may be removed from office as a member of Environmental Standards Scotland. At present, the Bill does not provide further detail as to the basis for determining a member as unable to perform the member’s functions, or unsuitable to continue as a member. The amendment specifies that this will be the case where the member becomes insolvent or is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue as a member. This amendment will bring greater specificity to the provisions of the Bill while still providing sufficiently wide scope to take account of a range of circumstances.

There are similar appointee removal processes in relation to other bodies, for example The Scottish Police Services Authority (Police, Public Order and Criminal Justice (Scotland) Act 2006) and the Scottish Legal Complaints Commission (Legal Profession and Legal Aid (Scotland) Act 2007).

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Amendment 12

In schedule 2, page 32, line 37

Leave out lines 37 to 38 and insert –

<(ii) the exercise of functions by the Scottish Public Services Ombudsman, the Commissioner for Ethical Standards in Public Life in Scotland, Audit Scotland, the Scottish Information Commissioner or the UK Committee on Climate Change,>

Effect

This amendment will extend the list of bodies for which the Environmental Standards Scotland strategy must set out how it intends to exercise its functions in a way that respects and avoids any overlap with the exercise of the body's functions.

Reason

Schedule 2, paragraph 1(d) of the Bill currently provides that the Environmental Standards Scotland strategy must set out how it intends to exercise its functions in a way that respects and avoids any overlap with the exercise of functions of the Scottish Public Services Ombudsman or the Commissioner for Ethical Standards in Public Life in Scotland. This amendment expands that provisions to include the exercise of functions by Audit Scotland, the Scottish Information Commissioner or the UK Committee on Climate Change. This amendment was recommended by the Environment Climate Change and Land Reform Committee in its Stage 1 Report².

² https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf at paragraphs 140 and 165.