

T: 0300 244 4000
E: scottish.ministers@gov.scot

Graham Simpson MSP
Convener, Delegated Powers and Law Reform
Committee
Scottish Parliament
Edinburgh
EH99 1SP

6 March 2018

Dear Graham,

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

At this morning's meeting of the Delegated Powers and Law Reform Committee, I committed to writing to you on a number of points which were raised by committee members.

The reasons for seeking the Bill's passage before the EU (Withdrawal) Bill

I committed to giving further detail of the reasons why the Scottish Government considers it essential for the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill to pass before the EU (Withdrawal) Bill becomes law.

I explained in the Chamber on 1 March 2018, when the Parliament agreed to treat the Bill as an emergency Bill, that there are both principled and practical reasons for this approach.

The first arises from the legislative consent process. Though we continue to seek agreement over the EU (Withdrawal) Bill, if the Scottish Parliament does not consent to that Bill it is important that the UK Government should have sufficient opportunity to make suitable amendments to remove the devolved material and to ensure appropriate interaction with the Continuity Bill.

Secondly, the legislative work required to prepare for withdrawal is recognised as a substantial task. The UK Government is planning for the EU (Withdrawal) Bill to be passed in May so that secondary legislation can start to be made and laid before Parliament shortly thereafter, making full use of the period before the UK is due to leave the EU. We want to be able to co-ordinate those preparations where we can. We would not want the Scottish Parliament to receive less time than the UK Parliament is receiving to consider this programme of legislation. To achieve this it will be necessary for instruments to be put

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forward for scrutiny under the Bill while not taking effect in a way that is incompatible with EU law until the UK leaves the EU. To enable that to happen, just as is the case with the UK Bill, the relevant enabling powers come into force on Royal Assent and can be exercised immediately after that.

Finally, there are more technical reasons which relate to the potential interaction between the two Bills. When the UK leaves the EU, EU law will cease to apply and the EU law constraints on the powers of the Scottish Parliament and Scottish Ministers will cease to have any content. However, it is also the case that the UK Parliament can introduce new constraints on those powers subject to getting the approval of the Scottish Parliament under the Sewel Convention. The UK Bill, as it currently stands, potentially introduces such a constraint in clause 11. Additionally, as mentioned at Committee this morning, paragraph 19(2)(b) of schedule 3 of the UK Bill amends schedule 4 of the Scotland Act 1998. That would protect the Act which the UK Bill would become from modification by the Scottish Parliament. If those provisions were to be enacted in unmodified form, this could then be relevant to the competence and effect of this Bill.

Challenges to the validity of retained (devolved) EU law

My officials also committed to providing the Committee with further background on the rationale for section 7(2), which contains a delegated power allowing categories of challenge to retained (devolved) EU law to be specified in regulations on the basis that, immediately before exit day an EU instrument was invalid.

In Case 314/85, *Firma Foto-Froist v Hauptzollamt Lübeck-Ost*, the Court of Justice held that national courts could not decide for themselves whether provisions of EU law were invalid. Only the Court of Justice can perform that function. The grounds on which the validity of EU law can currently be challenged include incompatibility with the Charter of Fundamental Rights, or where it is contended that secondary EU law has no basis in the Treaties.

The UK Bill has an equivalent power in paragraph 1(2) of Schedule 1.

In removing the right to challenge retained EU law on the basis that an EU instrument was invalid, it is recognised in our Bill and the UK Bill that it would generally not be appropriate to create a new jurisdiction for the domestic courts in which they are required to, in effect, step into the shoes of the CJEU and consider questions such as whether the relevant EU institution misused its powers or complied with the applicable procedural requirements when making the instrument.

However, it is also 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. In particular, article 6 ECHR may be engaged in some cases. 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. It is expected that specific provision will be needed to set out who any such challenge should be brought against. As such under subsection (4) the regulations can provide (among other things) for

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the relevant challenge to be brought against a Scottish public authority instead of an EU institution.

If preparation of Scotland's devolved laws for EU withdrawal ultimately requires to be done under the Continuity Bill, then the Scottish Ministers would seek to make complementary provision in respect of devolved laws in relation to the equivalent provision made under the UK bill.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Michael Russell', written over a long horizontal line that extends to the right.

MICHAEL RUSSELL

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