Finance and Constitution Committee

Implications of the Supreme Court Decision on the Continuity Bill

I have been asked to provide a briefing on the practical implications for the Scottish Parliament of the Supreme Court decision on the legislative competence of the European Union (Legal Continuity) (Scotland) Bill (the ‘Continuity Bill’) - *The UK Withdrawal From The European Union (Legal Continuity) (Scotland) Bill - A Reference By The Attorney General And The Advocate General* [2018] UKSC 64. I have attempted

**The Reference and the Supreme Court’s decision**

The reference posed four principal questions, and some subordinate questions:

1. Whether the Scottish Bill as a whole is outside the legislative competence of the Scottish Parliament (SP);
2. Whether section 17 of the Scottish Bill is outside the legislative competence of the SP;
3. Whether section 33 of and Schedule 1 to the Scottish Bill are outside the legislative competence of the SP;
4. Whether various provisions of the Scottish Bill are outside competence because (i) they are incompatible with EU law, (ii) modify section 2(1) of the European Communities Act 1972 (ECA), and/or (iii) are contrary to the rule of law.
5. Whether the Supreme Court can consider the effect of the UK Withdrawal Act in the context of this reference.
6. The effect of the UK Withdrawal Act on the legislative competence of the SP in relation to the Scottish Bill.

The Court’s decision may be summarised as follows:

1. The Scottish Continuity Bill as a whole was not outside the legislative competence of the SP.
2. Section 17 of the Bill is outside the legislative competence of the SP.
3. Section 33 of and two paragraphs of Schedule 1 to the Bill are outside the legislative competence of the SP.
4. Several provisions of the Bill which had been challenged on the basis that they were incompatible with EU law, modified ECA or were contrary to the rule of law were not outside the legislative competence of the SP.
5. As a result of the enactment of UK Withdrawal Act, certain provisions of the Bill would at least in part be outside the legislative competence of the SP.

**Provisions of the Bill outside competence**

This section of the briefing explains in more detail why certain provisions of the Continuity Bill were found to be outside competence.
In general, where the Continuity Bill departs from the approach taken in EUWA in a significant way, the relevant provision of the Continuity Bill was held by the Court to be beyond competence. The specifics are as follows.

**Section 17**

Section 17 states that subordinate legislation made by UK Ministers that changes the law on EU-related matters falling within devolved competence matters will require the consent of Scottish Ministers in order for it to be effective in Scotland. One of the practical effects of this would be to give Scottish Ministers a veto on subordinate legislation made by UK Ministers under the European Union (Withdrawal) Act 2018 (EUWA). Such a veto would restrict the power of the UK Parliament to legislate for Scotland. That is inconsistent with section 28(7) of the Scotland Act 1998 which states that the 1998 Act does not affect the power of the UK Parliament to legislate for Scotland. Therefore, section 17 is outside legislative competence.

The remaining provisions identified in this section of the briefing are provisions which have been held by the Court to amount to modifications of EUWA. Any provision modifying EUWA is beyond competence as EUWA has been added to the list of enactments protected from modification by Schedule 4 to the Scotland Act 2018 (see paragraph 1(2)(g) of Schedule 4).

**Section 2(2)**

Section 2(2) states that ‘Devolved EU-derived domestic legislation’ will continue to have effect in Scots law on and after exit day (the day that EU obligations cease to apply to the UK). The legislation that this provision applies to includes the European Communities Act 1972 (ECA) so it would continue ECA in effect after exit day. But EUWA repeals the ECA. Therefore, section 2(2) of the Continuity Bill amounts to a modification of EUWA and is invalid as EUWA is protected from modification by paragraph 1(2)(g) of Schedule 4 to the Scotland Act 2018 (see above).

**Section 5**

Section 5 states that the general principles of EU law and the Charter of Fundamental Rights continue to be part of Scots law on after exit day. This is inconsistent with EUWA which states that such principles cease to be part of UK law from exit day.

**Section 7(2)(b) and (3), 9A and 9B**

Sections 7(2)(b) and (3) remove the right in Scots law to challenge any retained (devolved) EU law on or after exit day on the basis that, immediately before exit day, an EU instrument was invalid. Paragraph 1(1) of Schedule 1 to EUWA is to similar effect as regards the UK as a whole, but there are minor differences between the two provisions. Sections 7(2)(b) and (3) are modifications of EUWA and, therefore, outside competence.

Section 9A provides for the scrutiny of regulations made under section 7(2)(b) and section 9B provides for consultation on draft proposals for such regulations. These provisions fall along with section 7(2)(b).

**Section 8(2)**

Section 8(1) states that there will be no right of legal action in Scots law on or after exit day to claim damages in accordance with the rule in the case of *Francovich (Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90)). That provision is materially identical to the
provision in paragraph 4 of Schedule 1 to the EUWA but there are some inconsistencies between the two. Section 8(1) is, therefore, outside competence as being a modification of EUWA.

Section 10(2), (3)(a) and (4)(a)
These provisions are all concerned with the interpretation of retained EU law which lies within the devolved area. They are all, to some degree, inconsistent with the provisions on the interpretation of retained EU law in EUWA and are, therefore, outside competence. To give one example, section 10 imposes on courts and tribunals which are considering the meaning of retained EU (devolved) law a duty to have regard where it is relevant to the post-Brexit case law of the European Court. Whereas, EUWA confers on courts a power rather than a duty to have regard to European Court case law.

Section 11
Section 11 permits the Scottish Ministers to remedy ‘deficiencies’ in retained (devolved) EU law arising from the withdrawal of the United Kingdom from the EU by making regulations. It is similar to section 8 of EUWA except that the latter confers this power on UK Ministers. Section 8 of EUWA also confers a power to make regulations for this purpose on the Scottish Ministers but the power is subject to the conditions and restrictions set out in Schedule 2. Those conditions and restrictions are not mirrored in section 11. Therefore, section 11 amounts to an attempt to modify EUWA and is invalid.

Section 13B
Section 13B requires the Scottish Ministers, when making regulations under section 11(1), 12 or 13(1), to have regard to the guiding principles on the environment and animal welfare which set out in subsection (3) of the section. To the extent that this provision applies to section 11(1) (which itself modifies EUWA it must also be a modification and is outside competence.

Sections 14, 14A 15 and 16
These sections provide for the scrutiny by the Scottish Parliament under various sections of the Continuity Bill, or require consultation before regulations are made, or require Scottish Ministers to make explanatory statements to the Parliament. So far as they apply to regulations made under section 11 these provisions are outside competence. However, they are within competence so far as they apply to regulations made under other sections of the Bill.

Section 19 and Section 22
Section 19 permits the Scottish Ministers to make regulations for Scottish public authorities to charge fees or other charges in connection with functions conferred on them by regulations made under sections 11(1), 12 or 13(1). So far as they apply to regulations made under section 11 this provision is outside competence. However, it is within competence so far as it applies to regulations made under the other sections.

Section 22 which relates to financial matters refers to section 11. The reference to section 11 must, therefore, fall.

Section 26A(6)
Section 26A imposes a duty on the Scottish Ministers to prepare proposals on how regard is to be had to the Bill’s guiding principles on the environment and on how to ensure that there
continues to be effective and appropriate governance relating to the environment after the UK withdraws from the EU. These principles – derived from EU law – are (a) the precautionary principle as it relates to the environment, (b) that preventative action should be taken to avert environmental damage, (c) that environmental damage should as a priority be rectified at source, and (d) that the polluter should pay to rectify environmental damage.

The problem comes in subsection (6) of section 26A which imposes a duty to interpret the environmental principles consistently with the interpretation given to them by the European Court. Subsection (6) is inconsistent with section 6(1)(a) of EUWA which states that a court or tribunal is not bound by those or any decisions made, on or after exit day by the European Court.

**Section 33 and Schedule 1 paragraphs 11(a) and 16**

The purpose of section 33 is to repeal spent references to EU law in the Scotland Act, i.e. those which would have no effect after leaving the EU, e.g. by removing the existing restrictions on the competence of the Scottish Parliament and Scottish Government in the Scotland Act 1998 which relate to compatibility with EU law. Subsection (1) removes the competence limitation on the Scottish Parliament. Subsection (2) removes the competence limitation on the Scottish Government. Subsection (3) activates Schedule 1 which makes a number of further amendments to the Scotland Act. Section 33 and paragraphs 11(a) and 16 of Schedule 1 involve modifications of EUWA and are, therefore, outside competence.

**Implications of the Judgment for the Continuity Bill**

As parts of the Bill are beyond competence, it is not possible for the Bill to be submitted for royal assent in its current form. However, if appropriate amendments were made, an amended Bill could be submitted for royal assent.

The Supreme Court has confirmed that the general purpose of ensuring the continuity of effect of EU law within the devolved areas is within competence of the SP so most of the provisions of the Bill directed to that end could remain. However, in order to make the Continuity Bill wholly within competence, all of the provisions identified as being outside the legislative competence of the Scottish Parliament would have to be removed from the Bill. This would have significant policy consequences.

It is clear from the Supreme Court’s decision that any substantial deviation from the provision made by EUWA for the effect of EU-derived laws after Brexit will be beyond competence. In particular, any revised Bill would be outside competence if it purported to:

- give Scottish Ministers a veto over any subordinate legislation made by UK Ministers changing the law on EU-related matters within devolved competence.
- keep in force any provisions of ECA on or after exit day.
- Make the general principles of EU law and the Charter of Fundamental Rights continue to be part of Scots law on or after exit day.
- make any provision for the interpretation of retained EU law inconsistent with the provisions on the interpretation of retained EU law in EUWA, e.g. by imposing on the courts a duty to have regard to European Court case law rather than merely a power to do so.
• give Scottish Ministers a power to make regulations remedying ‘deficiencies’ in retained (devolved) EU law arising from leaving the EU which is different from the equivalent power conferred on UK Ministers by EUWA.
• Impose on courts and tribunals a duty to interpret the principles consistently with the interpretation given to them by the Court of Justice of the European Union.

These are all things that the Scottish Continuity Bill purported to do.

Thus, whilst it would still be possible to enact a continuity Bill, it would not make any substantial difference to the way that legal questions related to the effect of EU-derived laws are resolved after Brexit.

**What might happen next**

*Reconsideration Procedure*

Reconsideration of Bills is governed by standing order 9.9. It would be for the Scottish Government member in charge of the Bill to initiate reconsideration by motion. There is no time specified by standing orders within which the relevant motion should be lodged. Should such a motion be lodged the Parliament would then consider whether it agrees that the Bill should be reconsidered. Proceedings at Reconsideration Stage must be taken at a meeting of the Parliament. Parliament should then consider and decide by division, on a motion of the member in charge of the Bill, the question whether to approve the Bill. It is to be expected that, if the Bill were to be presented for reconsideration, it would contain the changes necessary to ensure that it is within competence. A Bill may be amended at Reconsideration stage but amendments are admissible only if they are for the purpose of resolving the problem which was the subject of the decision of the Supreme Court.

*Substantive Questions*

The SP will have to decide whether there remains a sufficient justification for enacting a continuity Bill given (i) that EUWA already sets out rules for deciding how EU-derived laws will operate in Scotland after Brexit, and (ii) that it will not be possible for the SP to ensure that EU-derived laws have a different effect in devolved areas of policy from the effect they have in reserved areas of policy.

If the SP were to enact an amended continuity Bill that appeared to be within competence because its approach did not deviate substantially from that of EUWA, the UK Government and UK Parliament would have to decide what attitude to take to it.

The UK Government has up until now made it clear that it would prefer to have EUWA as the only legislation dealing with the domestic legal consequences of Brexit. The removal of the ‘different’ provisions would certainly make the Bill less problematic from the UK Government’s perspective and that might be a reason for doing nothing. However, The UK Government might still think that there was a risk of confusion and uncertainty from having two Acts dealing with the same subject matter. Given that the sovereignty of the UK Parliament continues to be the underlying legal principle of the UK constitution, it would be possible for the UK Parliament to legislate to nullify the effect of the Continuity Bill, thus leaving EUWA as the only legislation dealing with the effect of EU-derived laws after Brexit.
Such a Bill would normally require the consent of the Scottish Parliament under the Sewel convention as it would affect devolved matters. Such a step would be highly controversial and would be met by allegations that the UK Government had acted in breach of the Sewel convention. However, if the Scottish Parliament refused consent that would have no effect on the validity of the Bill once enacted.

Tom Mullen
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