

# The Civil Society Brexit Project: *Information*

## BREXIT AND SCOTTISH CONTINUITY BILL

### About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

[www.civilsocietybrexit.scot](http://www.civilsocietybrexit.scot)

### Who is this Civil Society Brexit Project: *Information* for?

This briefing is written for civil society organisations working in Scotland. For more information, contact [civilsocietybrexitscot@gmail.com](mailto:civilsocietybrexitscot@gmail.com)

## SUMMARY OF KEY POINTS

- In 2018, the Scottish Parliament passed a Continuity Bill to get Scots law ready to work properly after Brexit.
- However, most of this 2018 Continuity Bill was found by the Supreme Court to be outwith the Scottish Parliament's remit. This is because the Bill contained significant differences to Westminster's EU Withdrawal Act which had come into force in the meantime.
- For example, the Supreme Court found that the Scottish Continuity Bill could not include retention of the EU Charter of Fundamental Rights, or make post-Brexit EU Court of Justice case law binding.
- The Scottish Government plans to introduce a new Continuity Bill in 2020.
- This new Bill could include some elements of the 2018 Bill. For example, powers for Scottish Ministers to use secondary legislation to keep pace with new EU law; and duties around consulting on how to apply environmental and animal welfare guiding principles and have effective environmental governance.

## 1. Context: Brexit and domestic law

Once Brexit is completed, the UK will no longer be bound by EU law: it will no longer have to abide by the EU Treaties, and EU legislation will no longer apply in the UK. For this reason, the European Communities Act 1972 – which allows for EU law to take effect in the UK – will be repealed on Brexit day.<sup>1</sup>

Without further legislation, this repeal would however result in gaping holes in the statute book both at the UK-level and in Scotland. There are two main reasons for this: EU Regulations that currently apply directly in the UK – e.g. Regulation 261/2004 on Air Passenger Rights – would cease to have effect; and EU Directives that have been transposed into UK or Scots law by way of legislation – e.g. Directive 85/337 on Environmental Impact Assessments – on the basis of the European Communities Act, would also disappear.

There is thus a need for legislation that preserves EU law as it currently applies and that also allows for this EU legislation to be modified so that it applies properly in a post-Brexit scenario. For instance, any reference in such legislation to the EU institutions (e.g. powers of the EU Commission) would need to be taken out and replaced with a domestic UK or Scottish administrative body.

**In short: Brexit not only requires the completion of international negotiations with the EU, but also numerous adaptations to the UK statute book.**

## 2. What did the 2018 Continuity Bill try to achieve?

In March 2018 the Scottish Parliament passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018. This Bill had the purpose of ‘ensuring the effective operation of Scots law (so far as within devolved legislative competence) upon and after UK withdrawal [from the EU]’.

Three aspects of the 2018 Continuity Bill are of relevance for this briefing:

- first, the Bill would have kept the different types of EU law currently applicable in Scotland as ‘retained (devolved) EU law’;
- the Bill would have given powers to Scottish Ministers to amend such ‘retained (devolved) EU law’ in order to remove any ‘deficiencies’;
- and third, the Bill would have granted the Scottish Ministers powers to adopt secondary legislation to mirror new developments in EU law after Brexit (so far as within devolved competence). **That way, Scotland could have been able to keep pace with EU developments without having to go through a full legislative process.**

The political background to the 2018 Continuity Bill is also important. At the time of the passage of the 2018 Bill by the Scottish Parliament, the UK Government had introduced the European Union (Withdrawal) Bill into the UK Parliament (now the EU (Withdrawal) Act, on which more later).

The EU (Withdrawal) Bill pursued broadly the same aims as the 2018 Continuity Bill. It also dealt with devolved matters and so it required the legislative

1. See s. 1 European Union (Withdrawal) Act 2018.

2. Now laid down in s. 28 (8) Scotland Act 1998.

consent of the Scottish Parliament following the so-called Sewel Convention.<sup>2</sup> However, the Scottish Parliament refused to give this consent. This meant that the future of the EU (Withdrawal) Bill – whether it would be passed at all, or whether the UK Parliament would amend it so that it did not cover Scotland – was unclear. It was against this background that the Scottish Government saw the need to introduce a Scottish Bill to save EU legislation that was within devolved competence.

### 3. How does the 2018 Continuity Bill relate to the EU (Withdrawal) Act 2018?

#### What was the EU (Withdrawal) Act?

On 26 June 2018 the EU (Withdrawal) Act received Royal Assent. It had been passed by the UK Parliament without the legislative consent of the Scottish Parliament and covered devolved matters.<sup>3</sup> The EU (Withdrawal) Act 2018 keeps EU law currently in force in the UK as ‘retained EU law’. Retained EU law will be a new category of law that enjoys primacy over conflicting pre-Brexit legislation. It will continue to be interpreted in accordance with the pre-Brexit case law of the European Court of Justice. The EU (Withdrawal) Act contains certain exceptions to retention: in particular, the EU Charter of Fundamental Rights will not continue to be part of UK law after Brexit.

The EU (Withdrawal) Act contains a vast transfer of powers to the government to remedy ‘deficiencies’ in retained EU law. These powers are often called Henry VIII powers, i.e. government powers to amend Acts of Parliament, with a limited role for MPs. The

problem with the Henry VIII powers in the EU (Withdrawal) Act is not only that they are far-reaching but that their limits are not entirely clear. Furthermore, the parliamentary scrutiny processes envisaged by the Act have been criticised for being too weak.<sup>4</sup>

There are significant overlaps between the 2018 Continuity Bill passed by the Scottish Parliament and the UK Parliament’s EU (Withdrawal) Act. **Both enactments pursue the same aim of making the statute book ready for Brexit.** However there were also differences between them – the main differences were:

- 1) the 2018 Continuity Bill was restricted to devolved legislation whereas the EU (Withdrawal) Act covers both devolved and reserved matters;
- 2) the Continuity Bill contained a clause allowing the Scottish Government to pass secondary legislation to keep up with EU law developments after Brexit
- 3) the EU (Withdrawal) Act has different – and overall laxer – procedures for the scrutiny of the vast Henry VIII powers it gives to government
- 4) the 2018 Continuity Bill preserved the EU Charter of Fundamental Rights as ‘retained (devolved) EU law’ whereas the EU (Withdrawal) Act expressly does not retain it.<sup>5</sup>

### 4. What did the Supreme Court decide?

The UK Government questioned whether the Scottish Parliament had acted within its remit when passing the 2018 Continuity Bill and so challenged the Bill in the Supreme Court.

3. Note that the lack of legislative consent cannot invalidate an Act of the UK Parliament: the Sewel Convention is convention, which means it is not legally enforceable.

4. See e.g. Adam Tucker, ‘A First Critical Look at the Scrutiny of Delegated Legislation in the Withdrawal Agreement Bill’, UK Constitutional Law Blog, 24 October 2019, <https://ukconstitutionallaw.org/2019/10/24/adam-tucker-a-first-critical-look-at-the-scrutiny-of-delegated-legislation-in-the-withdrawal-agreement-bill/>.

5. Even though under the EU (Withdrawal) Act 2018 the general principles of EU law – which largely mirror the rights in the Charter – are retained, they cannot give a right of action, which means that they are largely relegated to being used in the interpretation of retained EU law, but cannot in themselves be the basis of a judicial review.

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This challenge was mainly based on inconsistencies with the EU (Withdrawal) Act 2018. The EU (Withdrawal) Act is a protected statute under Schedule 4 of the Scotland Act, and this means that the Scottish Parliament cannot pass any law which would change it. The Continuity Bill is therefore not law so far as it is inconsistent with the EU (Withdrawal) Act.

Before the case came to the Supreme Court, the EU Withdrawal Act 2018 had been enacted. Therefore, in December 2018 the Supreme Court decided that large parts of the Continuity Bill were outwith the Scottish Parliament's competences and could thus not become law. As a consequence the Scottish Government pulled the 2018 Continuity Bill even though parts of it could have been enacted.

Amongst others, the Supreme Court found that the following aspects of the 2018 Continuity Bill were inconsistent with the EU Withdrawal Act and therefore outwith the Scottish Parliament's competences:

- A requirement that Scottish Ministers must consent to secondary legislation made by UK Ministers if it concerns devolved matters.<sup>6</sup> The Supreme Court found that this would modify the Scotland Act, which the Scottish Parliament cannot do.
- The retention of parts of the European Communities Act 1972 given that the EU (Withdrawal) Act will repeal the entire European Communities Act.
- The retention of the Charter of Fundamental Rights and the retention of a right of action on its basis given that the EU (Withdrawal) Act does not retain them and expressly excludes a right of action on the basis of EU fundamental rights.
- The right to challenge the validity of retained (devolved) EU Law in cases specified by the

Scottish Ministers given that the EU (Withdrawal) Act excludes such a right in all circumstances. The same goes for the possibility of retaining the remedy of EU state liability in Scots law (Francovich damages).

- The duty of courts interpreting retained (devolved) EU law to have regard to decisions by the European Court of Justice handed down after Brexit. Under the EU (Withdrawal) Act, courts may, but do not have to, take post-Brexit case law into account. In addition, the Scottish Bill allowed Ministers to modify this duty, which is something that is not foreseen by the EU (Withdrawal) Act.
- The powers given to Scottish Ministers to remedy deficiencies in retained (devolved) EU law by way of secondary legislation were broader under the Continuity Bill than under the EU (Withdrawal) Act, which contained certain conditions and restrictions.
- This also meant that the Continuity Bill could not require Ministers to comply with the guiding principles on the environment and animal welfare when used to remedy deficiencies in retained (devolved) EU law. However, these guiding principles can be re-enacted in a future Continuity Bill as long as they are not in relation to this remedying power.
- That the guiding principles on the environment had to be interpreted in a manner consistent with the interpretation of their equivalents in EU law by the European Court of Justice. This was inconsistent with the EU (Withdrawal) Act which makes the post-Brexit case law of the Court of Justice expressly non-binding.
- Additional scrutiny of Government powers by the Scottish Parliament and additional consultation duties that deviated from the scrutiny processes envisaged by the EU (Withdrawal) Act so far as powers to remedy deficiencies in the Continuity Bill are concerned.

6. Contained in s. 17 of the Bill.

## 5. What has happened since the Supreme Court's judgment?

The EU (Withdrawal) Act 2018 is not the only piece of legislation dealing with the consequences of Brexit for domestic law. The Nuclear Safeguards Act 2018 and the Taxation (Cross-border Trade) Act 2018 are two further pieces of Brexit-related legislation already in force. Further bills will also need to be introduced, among them a Fisheries Bill, an Agriculture Bill, an Immigration Bill and a Trade Bill.

The EU (Withdrawal Agreement) Bill will be of great immediate importance. It had received second reading just before the 2019 General Election was called and the UK Parliament was dissolved. This means it will have to be re-introduced after the General Election provided that the new Government wants the UK to leave the EU on 31 January 2019.

The EU (Withdrawal Agreement) Bill implements the withdrawal agreement between the EU and the UK and will need to be passed so that the UK Government can ratify the withdrawal agreement. It modifies the EU (Withdrawal) Act in various places. Crucially, it pushes back most of the effects of the EU (Withdrawal) Act – with regard to ‘retained EU law’ – to the end of the implementation period. The implementation (or transition) period will last from Brexit day until 31 January 2020, but can be extended either to 31 December 2021 or 31 December 2022.

Furthermore, there is ongoing work on so-called common frameworks which may result in legislation at UK level on devolved matters.

Overall, the legal environment in which a new Continuity Bill and any other Scottish Brexit-related legislation would be adopted remains highly complex and continues to develop.

## 6. A new Continuity Bill?

The Scottish Government's Programme for Government 2019-20 promises to introduce a new Continuity Bill into the Scottish Parliament. The Scottish Government mentions two issues that a new Continuity Bill would facilitate: to keep pace with EU law and to maintain high environmental standards.

### a. Keeping pace

Given that the Supreme Court left the power to keep pace with EU law after Brexit contained in section 13 of the 2018 Bill untouched, it is likely that any provision in the new bill will closely resemble it.

Section 13 of the 2018 Bill granted powers to the Scottish Ministers to adopt secondary legislation corresponding to EU law (e.g. a new EU Regulation or a new EU Directive) and for its enforcement so far as that piece of EU law has effect after Brexit. The powers of the Scottish Ministers in this regard are (naturally) confined to devolved matters. Ministers would also be given the power to amend that specific piece of EU law adopted in order to keep pace so that it could be operational in a post-Brexit Scotland. For instance, Ministers can decree that a Scottish authority should exercise powers that were previously exercised by the EU Commission.

These powers are so-called Henry VIII powers as they allow ministers to make any provision that could be made by an Act of the Scottish Parliament.



They are far-reaching powers so that the **effective scrutiny** of such enactments is of particular importance. For example, section 13A of the 2018 Continuity Bill gave Scottish Ministers regular reporting duties: they had to report on how the powers under Section 13 had been used in any given reporting period. Furthermore, regulations made under the ‘keeping pace’ power were subject to the affirmative procedure. Under this procedure, Parliament cannot propose amendments – it can only either approve or not approve the proposed regulation in question.

In the 2018 Bill the power to keep pace with EU law was subject to a three year time limit, which could be extended to a maximum of five years. It will be interesting to see whether the new Continuity Bill contains a similar limit. The power is further circumscribed in that it could not be used to impose or increase taxation, make retrospective provision, create criminal offences, provide for the establishment of a public authority, etc.<sup>7</sup>

It should be noted that in the absence of a ‘keeping pace’ provision Scotland would still be able to keep up with legislative developments at the EU level so far as they come within devolved competence through passing legislation. The ‘keeping pace’ provision simply facilitates the process for doing so.

## b. Maintaining high environmental standards

The 2018 Continuity Bill also provided to maintain the EU’s guiding principles on the environment and animal welfare found in Articles 13 and 191 (2) of the Treaty on the Functioning of the EU. It contained

two duties in this regard: first, a duty to have regard to these principles where Scottish Ministers adopt secondary legislation under the Bill. After the Supreme Court judgment this would mainly relate to the ‘keeping pace’ power.<sup>8</sup>

In addition, the 2018 Bill put Scottish Ministers under a more general duty to consult on how regard is to be had to these guiding principles in developing policies, etc; and how to ensure that there continues to be effective and appropriate governance relating to the environment following Brexit. The bodies and persons to be consulted are Scottish public authorities and bodies representative of the interests of such authorities; as well as ‘such other persons as they consider appropriate’.

A new Continuity Bill could adopt these duties relating to the environment and animal welfare in much the same way as the 2018 Bill with one exception: that the European Court of Justice’s case law cannot be binding but only used to interpret post-Brexit legislation.

## c. What else could be included?

There are a number of other aspects that a new Continuity Bill might want to address. However, the limited competences of the Scottish Parliament – as spelled out by the Supreme Court judgment in particular – mean that not everything that may be desirable can be included.

There is very little scope for the inclusion of workers’ rights, for instance, given that employment is a reserved matter.

7. Full list in section 13 (5) of the 2018 Bill.

8. It would probably be redundant in this regard as it can be assumed that any new development under EU law complies with the EU’s environmental principles anyway.

9. See Continuity Bill Update, Letter by Constitutional Relations Secretary Mike Russell to the Presiding Officer of the Scottish Parliament of 5 April 2019, available at: <https://news.gov.scot/news/continuity-bill-update>.

There is also little scope for the inclusion of the Charter of Fundamental Rights given that the Supreme Court considered a provision to this effect in the 2018 Bill to be outwith the competence of the Scottish Parliament. However, the Scottish Parliament may legislate on fundamental rights in general. The National Task Force for Human Rights Leadership is currently working on a legislative framework for a Scottish Bill of Rights, which may well incorporate much of the substantive rights guaranteed by the EU Charter. Hence one can assume that no separate efforts by the Scottish Government to retain the EU Charter will be made in the Continuity Bill.<sup>9</sup>

Similar restrictions apply to the continued relevance of judgments of the Court of Justice of the EU. The framework for what is possible under Scots law has already been decided by the EU (Withdrawal) Act 2018. That Act makes the pre-Brexit case law of the Court of Justice binding so far as pre-Brexit legislation is concerned. Post-Brexit case law is not binding but can be used to interpret retained EU law. It is quite clear from the judgment of the Supreme Court that any provision in a new Continuity Bill that would go further than what the EU (Withdrawal) Act allows would be outside the competence of the Scottish Parliament.

Dr Tobias Lock  
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## SCOTLAND DECLARATION ON HUMAN RIGHTS

The Universal Declaration of Human Rights states:

**“All human beings are born free and equal in dignity and rights”**

We want equality and human rights to be at the heart of Scottish society. Whatever the Brexit outcome, we want to protect our rights. We want Scotland to be a world leader in rights protection and implementation.

Agree? Then civil society organisations are invited to sign up to support the Scotland Declaration on Human Rights at [www.humanrightsdeclaration.scot](http://www.humanrightsdeclaration.scot)

You can help send a clear message to policy makers, the public and the world that Scotland is actively committed to equality and human rights.



### WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at [civilsocietybrexitscot@gmail.com](mailto:civilsocietybrexitscot@gmail.com)

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