



Law Society
of Scotland

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Years
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The Law Society of Scotland

The Future Impact and Effect of Brexit

on Scots law and the Scottish legal system



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Foreword

In 2016 the United Kingdom voted to leave the European Union. In the three years since that historic vote there has been much debate on Brexit and the impact it will have throughout the UK and in Europe, however a great deal of uncertainty remains over our departure and future outwith the EU.

What we can be certain of is that leaving the EU will have a profound effect on Scots Law and on the legal profession.

We know that many of our members believe that Brexit is the single biggest issue facing them as a Scottish solicitor. While we cannot fully predict the impact of Brexit on the Scottish legal system, we believe there must be legal stability, maintenance of freedom, justice and security with respect for the rule of law, citizens' rights and the devolved arrangements.

Our paper, which provides an overview of the developments of Scots Law and the Scottish legal system, seeks to clarify on the legal processes of Brexit and shed light on the impact it is likely to have on the law, the legal system and on the rights of all those living and working in Scotland today. In the paper we also explore the challenges and opportunities that Brexit may present for the legal system and the profession.

We are very grateful to the Legal Education Foundation whose funding has allowed us to dedicate the time and resource necessary to undertake this significant piece of work.

I hope you find 'The future impact and effect of Brexit on Scots law and the Scottish legal system' a useful and informative read as we approach the biggest change in our constitutional make-up in over 40 years.



John Mulholland
President

Executive summary

On 23 June 2016, a referendum took place in the UK. The question on the ballot paper was "Should the United Kingdom remain a member of the European Union or leave the European Union?" The referendum result was 51.9% in favour of leaving and 48.1% in favour of remaining in the EU on a turnout of 72.2% of the electorate.

While at the time of writing the terms of the UK's departure are still uncertain, the decision to leave the EU will undoubtedly have a profound effect on the Scots law as a result of the transition of EU law into domestic UK and Scots law.

The Law Society published the results of its 2018 annual members' survey in March 2019. 17% of members who took part in the survey stated that Brexit was the single biggest issue facing them as a Scottish solicitor.

This paper seeks to provide some understanding as to the effect that Brexit will have upon the law of Scotland, the rights of people living and working in Scotland and the challenges and opportunities that Brexit will present to the legal system.

The approach to the paper is to provide a summary of the development of Scots law and the Scottish legal system, examine legislative developments arising from Brexit and the impact these legislative changes will have on the Scottish legal system and those studying and practising Scots law.

Rather than undertake the huge task of considering what every aspect of the UK's departure from the EU will have on every aspect of the law in Scotland and risk leaving out one or more areas that may develop distinctly in terms of Scottish Government policy, the methodology considers the definitions of Scots private law and Scots criminal law at section 126 of the Scotland Act 1998 and relates those definitions to EU law as it affects those areas.

The paper is divided into eight chapters

- 1** A brief history of the development of the Scottish legal system.
- 2** The courts and tribunals in Scotland. This chapter covers the distinct development of the Scottish courts adjudicating on Scots law. In particular, in terms of section 6(2) of the European Union Withdrawal Act 2018¹, a court or tribunal "may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal". Therefore, UK judges will no longer be bound to follow the judgments of the CJEU after exit day, but these cases will still be persuasive. The chapter also refers to research published in 2017² by Professor Barry Rodger of the University of Strathclyde School of Law which provided some analysis on the extent to which

¹ The European Union Withdrawal Act section 6 Interpretation of retained EU law 2018 - <http://www.legislation.gov.uk/ukpga/2018/16/section/6/enacted>

² The Application of EU Law by the Scottish Courts: An analysis of case law trends over 40 years - Barry Rodger The Juridical Review 2017 Part 2

EU law is considered and applied in order to assess its impact on the Scottish legal order. The impetus for this research was the then ongoing case of *Scotch Whisky Association and others v Lord Advocate and another*.³

3 The United Kingdom's decision to leave the European Union. This chapter provides some commentary on the history of the EU, the UK's part in its development, and how we got to the decision to hold a referendum in 2016 on whether the UK should remain in the EU or leave the EU.

4 The consequences of the United Kingdom leaving the European Union provides for a short analysis on each "legal stage" of the Brexit process.

The decision of the UK Supreme Court in the Miller case determined that article 50 of the Treaty of the European Union (TEU) cannot be triggered without legislation. The European Union (Notification of Withdrawal) Act 2017 provided the Prime Minister with the necessary authority to notify the European Council of the UK's intention to leave the EU. The consequences of service of the withdrawal notice on 29 March 2017 were that there should be a negotiation of an agreement between the UK and the remaining member states. Article 50 also provides for the cessation of the treaties to the UK either from the date of entry into force of this agreement or two years after date of notification unless the European Council, in agreement with the UK, unanimously agrees to extend this period. Exit day at present is 31 October 2019.

The European Union Withdrawal Act 2018 repeals the European Communities Act 1972 and incorporates and adopts EU legislation onto the UK statute book. It also provides for parliamentary approval of the UK government's negotiation with the EU (the meaningful vote).

The chapter also provides some commentary on the UK Supreme Court decision in the Continuity Bill case together with an analysis of the Withdrawal Agreement and the Political Declaration

5 The EU impact on Scots law. This chapter considers what EU law will and will not become UK law on exit day in terms of "retained EU law" It also provides a definition of Scots private law and Scots criminal law at sections 126(4) and 126(5) of the Scotland Act 1998

and looks at the intersection of these subsections with EU law. It also suggests some possible options for continued cooperation with the EU after exit day where legal issues have a cross border element.

6 Common frameworks. These will be needed either where there is no Withdrawal Agreement or when the transition or implementation period under the Withdrawal Agreement comes to an end on 31 December 2020. They are necessary to enable the functioning of the UK internal market.

*The Scottish Parliament Information Centre (SPICe) paper, Common UK Frameworks after Brexit (2 February 2018 SB 18-09), noted that: "The 1999 devolution settlements were designed on the principle of a binary division of power between what was reserved and what was devolved. This model had advantages in terms of clear accountability, but it meant the UK did not have to develop a culture of or institutions for 'shared rule' between central and devolved levels. The UK membership of the EU further contributed to the weakness of intergovernmental working, since many policy issues with a cross-border component (including environmental protection, fisheries management, and market-distorting state aid) were addressed on an EU-wide basis."*⁴

This chapter also considers the interaction between frameworks and the negotiation of new international agreements, acknowledging the role of the devolved administrations in this regard.

7 Teaching EU law in law schools post-Brexit. This chapter considers that retained EU law will have to be taught as it forms part of Scots law. Scottish Government has now expressed an intention to keep pace with EU law after exit day, so there will undoubtedly be an increased focus in the areas of both private international law and public international law.

8 Conclusions. This chapter considers in brief the effect that the UK's decision to leave the EU will have on the separate institutions of the Scottish legal system such as the Scottish Government, the Scottish Parliament, the courts and the legal profession.

³ *Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents) (Scotland)* [2017] UKSC76

⁴ SPICe Briefing- Common frameworks after Brexit - Akash Paun- 2nd February 2019 - <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2018/2/2/Common-UK-Frameworks-after-Brexit/SB%2018-09.pdf>

Introduction

This paper seeks to provide an in-depth study and analysis into how the United Kingdom’s decision to leave the European Union will impact upon the Scottish legal system.

We believe that such a study is necessary to understand the effect that Brexit will have upon:

- (a) The law of Scotland, its sources and its legal system
- (b) The rights of people living and working in Scotland
- (c) The challenges Brexit will present to the legal system
- (d) The opportunities Brexit will present to the legal system

This will assist the Law Society in developing its policy work and in reflecting on developments in the law and legal practice arising from the UK’s departure from the EU.

The approach to this paper

This paper is designed to:

- (a) Provide a brief summation of the development of Scots law and the Scottish legal system
- (b) Examine the process and legislative developments arising from the UK’s exit from the EU with particular reference to the Scottish legal system
- (c) Analyse the impact which these legislative changes will have on the Scottish legal system
- (d) Assess the impact these legislative changes will have on those studying Scots law, the Scottish solicitor profession and their clients, and the public at large.

This paper cannot consider every aspect of the impact that leaving the EU will have on every aspect of the law in Scotland. To do so would be an enormous exercise which would undoubtedly omit one or more areas that may develop distinctly in terms of Scottish Government policy, albeit within the constraints of intra-UK common frameworks or on reserved matters as set out at schedule 5 to the Scotland Act 1998. This paper focuses on the effect of Brexit on Scots law. The methodology considers the definition of Scots private law at section 126 (4) of the Scotland Act 1998 and the definition of Scots criminal law at section 126 (5) of the Scotland Act 1998 and relates those definitions to EU law as it affects those areas. This paper is primarily focused on devolved law, but it considers reserved areas within schedule 5 of the Scotland Act 1998 too where necessary.

The Law Society believes that, whatever impact Brexit has on the Scottish legal system, there should be legal stability, maintenance of freedom, justice and security with respect for the rule of law, citizens' rights and the devolved arrangements.

The Law Society published the results of its 2018 annual members' survey on 13 March 2019.⁵

In the survey, 17% of members stated that Brexit was the single biggest issue facing them as a Scottish solicitor, compared with 11% who considered their business's or organisation's financial sustainability to be the single biggest issue.

Also, those surveyed were more likely to think that Brexit would have a negative impact on their business than a positive one. Almost a quarter (24%) of those surveyed stated that Brexit had featured in advice given to clients.

It is the Law Society's intention to share this paper with the profession, the public and appropriate stakeholders in order to illuminate the impact and effect of Brexit on Scots law and the Scottish legal system.

It is anticipated that, thereafter, it will provide a platform for discussion as to how the Law Society will help make informed decisions about how policy work may be supported and also help shape legal education in considering how best to provide support for teaching law.

⁵ The Law Society of Scotland annual members' survey 2019 - <https://www.lawscot.org.uk/research-and-policy/research/research/>



1

Chapter

The development of the Scottish legal system

This part seeks to outline a brief history of the development of the Scottish legal system as a mixed common law/civil law system.

The law before the reign of King David I (1124-1153) was primarily based on custom. King David was influenced by Anglo-Norman legal and administrative developments and, with some adaptations, imported Norman concepts into Scotland.⁶

These included ideas such as the feudal system of land tenure and documents of title, or charters, a central state and administration of justice, the creation of royal burghs and the development of the church. English law was also an influence but due to hostilities between Scotland and England, both legal and state structures developed separately.

King Edward I of England (1272-1307) made various attempts to become overlord of Scotland. This culminated in 1314 when his son Edward II was defeated by King Robert I of Scotland (Robert the Bruce) at the Battle of Bannockburn. By 1320, Scotland had asserted its independence by the Declaration of Arbroath,⁷ submitted to Pope John XXII on 6 April 1320. By 1328, England had renounced all right to rule Scotland under the Treaty of Northampton.

The difficult relationship with England had led to a Scottish alliance with France. As a consequence of this alliance and the lack of universities in Scotland, Scottish students would study in continental Europe rather than at either Oxford or Cambridge or at the emerging courts of common law in London.

Those Scottish students who chose to go to Paris or Orleans would have learned Roman law and returned with this knowledge to Scotland, leading to the distinctive development of the Scottish legal system from its English counterpart.

The sixteenth century saw significant political and religious change in Scotland. On 17 May 1532, the Court of Session was established in Edinburgh as Scotland's central civil court. The Protestant Reformation reached its peak in 1560 and led to the abolition of papal authority in Scotland and, distinct from England where the monarch had become the head of the church, a Presbyterian form of church governance. Mary, Queen of Scots (1542- 1587), abdicated in favour of her infant son James VI of Scotland in 1567.

Elizabeth I of England died without an heir in March 1603. This resulted in the Union of the Crowns with Mary's son, James VI of Scotland, acceding to the English throne to also become James I of England.⁸

⁶ Scotland: An example of Constitutionalism - Michael P. Clancy - Drake Law Review Discourse-2015

⁷ Wars of Independence Declaration of Arbroath - http://www.bbc.co.uk/history/scottishhistory/independence/features_independence_arbroath.shtml

⁸ Debating Britain in Seventeenth-Century Scotland Multiple Monarchy and Scottish Sovereignty - Roger A. Mason. *Journal of Historical studies* 35.1 2015 1-24

The state apparatus in both Scotland and England remained separate even though James styled himself as King of Great Britain. Although in London, James maintained an interest in Scottish government. In 1604, he requested that both the Scottish and the English parliaments appoint commissioners to discuss a unification project. The commissioners reported in favour of a fuller union, but the proposals were rejected by both parliaments.

During the seventeenth century, the War of the Three Kingdoms between royalists and parliamentarians resulted in the execution of King Charles I in 1649 and a Commonwealth of England, Scotland and Ireland under Oliver Cromwell. During the Commonwealth occupation, the Scottish legal system was effectively suspended. All royal courts, the legal functions of the Privy Council and the Court of Session were taken over by seven commissioners, four Englishmen and three Scots.

The Commonwealth lasted until the Restoration of the monarchy by King Charles II (1660-1685). During his reign, the High Court of Justiciary was founded in terms of the Courts Act 1672.⁹

The expansion of the English empire left out Scotland as it was a separate kingdom with no access to the imperial markets. Scottish merchants tried to establish a colony on the Darien peninsula in modern-day Panama. The scheme was a failure. As a consequence, Scotland at the turn of the eighteenth century was almost bankrupt.

This was a major factor in the beginning of negotiations for a political union between the Scottish and English parliaments at the start of the eighteenth century. Also, the English Parliament passed the Act of Settlement in 1701¹⁰ as it was keen to ensure that Queen Anne would be succeeded by a Protestant monarch. English pressure on Scotland to accept the Act of Settlement was a major factor leading to the Treaty of Union in 1707.

This Treaty and the relative Acts of the Scottish and English parliaments established one Parliament for the United Kingdom of Great Britain. The Treaty also preserved the Scottish courts and expressly provided that no court in Westminster Hall should have jurisdiction in Scotland. The separate systems of law and

Scottish education, and the established Presbyterian Church of Scotland would continue. Many of the Treaty's terms were subsequently changed during the eighteenth century. The Treaty of Union 1707, although unpopular with some, maintained many aspects of Scottish culture and identity, and some of the apparatus of statehood.

The second half of the eighteenth century and the early nineteenth century saw the Scottish Enlightenment develop together with Scotland's universities, St Andrews, Aberdeen, Glasgow and Edinburgh. The Enlightenment was part of a larger European movement that included the French writer Voltaire and the Swiss philosopher Rousseau. Scottish contributors included David Hume and Adam Smith. The Scottish Enlightenment influenced both the US Declaration of Independence and the US Constitution.

A significant issue that Enlightenment theorists focused on was limited, representative government which was particularly important in the development of ideas concerning constitutional monarchy in the UK.

From 1745 until the 1880s, there was no Scottish representation in the UK Cabinet, except when the Lord Advocate (Scotland's senior law officer) was present. In 1881, Prime Minister William Gladstone made the Earl of Rosebery an undersecretary at the Home Office, but pressure mounted for the appointment of a Secretary for Scotland. The government created this office in 1885 and it was upgraded to Secretary of State for Scotland in 1926, investing in the minister a significant amount of administrative power.

By the early twentieth century, Scottish nationalism had developed into an organised political movement and, in 1945, the Scottish National Party won its first seat in the House of Commons at a by-election, although it lost its seat at a general election later that year.

⁹ Courts Act 1672 <http://www.legislation.gov.uk/aosp/1672/40/part/1>

¹⁰ Act of Settlement 1701 <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections/parliamentary-collections/act-of-settlement/>

During the 1960s and 1970s, a number of SNP members were returned to parliament. In 1979, parliament held a referendum on whether to establish a Scottish Assembly. Although the vote was in favour, it failed to reach the electoral threshold of 40%.

There was no appetite from the Conservative governments during 1979-1997 for further devolution plans.

The idea of a Scottish Parliament was mooted by the Scottish Constitutional Convention, which was established in 1989 as a group of political parties, trades unions, churches, representatives from civic society and individuals. However, it was not until 1997, with the election of Prime Minister Tony Blair's Labour government, that the process of constitutional change began.

In September 1997, the Scottish electorate voted in a referendum to determine whether they wanted to establish a Scottish Parliament. On a 60% turnout, 74.3% of those voting voted "yes" and a smaller 63.5% voted that the parliament should have tax-varying powers. This result enabled the UK Government to bring forward legislation which became the Scotland Act 1998.¹¹ The Act established a unicameral Scottish Parliament and a Scottish Executive (or Government), listing the powers that were to be reserved to the UK Parliament and Government. The Scottish Parliament, therefore, has the devolved power to legislate on health, education, housing, sports, arts, agriculture, forestry and fishing, emergency services, planning, social work, heritage, justice, some transport and tourism. The UK Parliament, however, has reserved power over, among other things, the constitution, defence, currency, immigration, foreign affairs, common markets, equalities, welfare and data protection.

The Scottish Parliament's election system is a form of proportional representation known as the Additional Member System, which allows the voter to be represented by eight members of the Scottish Parliament (MSPs). This system is designed to make it difficult for any one party to have an overall majority. The system returned a Labour/Liberal Democrat coalition in the first two sessions (1999-2003 and 2003-2007), an SNP minority administration in the third session (2007-

2011), an SNP majority administration in the fourth session (2011-2016) and an SNP minority administration in the fifth session (2016-2021). The legislative output has been significant. There have been 284 Acts of the Scottish Parliament since 1999.

In 2007, the minority SNP administration began a "National Conversation", which produced a White Paper, *Your Scotland, Your Voice*,¹² which set out options for constitutional reform in Scotland. During this period, the unionist Labour, Conservative and Liberal Democrat parties appointed a commission chaired by Sir Kenneth Calman¹³ to consider the existing devolution settlement in terms of the Scotland Act 1998 and proposals for its modification. The Conservative-Liberal Democrat UK coalition government implemented the Calman report by the Scotland Act 2012.¹⁴

In May 2011, the Scottish Parliament election resulted in a majority of seats for the SNP. One of the SNP manifesto commitments was to hold a referendum on Scottish independence.

The UK Government and the Scottish Government negotiated a way forward to ensure a legal, fair and decisive referendum which resulted in the Edinburgh Agreement. Under this, the UK Government agreed to propose an order under section 30 of the Scotland Act 1998,¹⁵ which would give the power to the Scottish Parliament to legislate for a referendum.

¹¹ Scotland Act 1998 introduction <https://www.legislation.gov.uk/ukpga/1998/46/introduction>

¹² Your Scotland Your Voice - A National Conversation - <https://www.webarchive.org.uk/wayback/archive/20170701182135/http://www.gov.scot/Publications/2009/11/26155932/16>

¹³ Commission on Scottish Devolution: publication of final report 15 June 2009 <https://www.gov.uk/government/speeches/commission-on-scottish-devolution-publication-of-final-report>

¹⁴ Scotland Act 2012 - <http://www.legislation.gov.uk/ukpga/2012/11/contents/enacted>

¹⁵ Devolution Guidance Note 14 Orders made under Section 30(2) of the Scotland Act (Alterations to Legislative Competence) - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/465294/Devolution_Guidance_Note_14_orders_made_under_section_30_2_of_the_scotland_act_alterations_to_legislative_competence.pdf

On 18 September 2014, the Scottish electorate voted no to independence from the UK. The vote was 55% for “no” and 45% for “yes”. Further, no effective challenge could be made under the Scottish Independence Referendum Act 2013.¹⁶

Following the referendum, the pro-Union parties agreed to the Prime Minister’s appointment of Lord Smith of Kelvin¹⁷ to undertake a review of additional powers to be devolved to the Scottish Parliament. The Smith Commission’s recommendations were included in the Scotland Act 2016.¹⁸

Debate has continued regarding Scotland’s position in the UK. The Scottish Government has responded to this debate by agreeing to promote a further referendum on the matter. The position on Scotland’s constitutional future to date is that on 28 May 2019, the Scottish Government introduced into the Scottish Parliament the Referendums (Scotland) Bill,¹⁹ which sets out the rules for further referendums. The First Minister, Nicola Sturgeon, has stated that a second independence referendum should take place, with UK agreement under the Scotland Act, by May 2021.

¹⁶ Scottish Independence Referendum Act 2013 - <http://www.legislation.gov.uk/asp/2013/14/contents>

¹⁷ The Smith Commission: Report of the Smith Commission for further devolution of powers to the Scottish Parliament 27 November 2014 - https://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf

¹⁸ Scotland Act 2016 - <http://www.legislation.gov.uk/ukpga/2016/11/contents/enacted>

¹⁹ Referendums Scotland Bill - <https://www.parliament.scot/parliamentarybusiness/Bills/111844.aspx>



2

Chapter

The courts and tribunals in Scotland

As the Scottish legal system developed, the courts adjudicating upon Scots law also saw distinct development.

The introduction of the feudal system in Scotland saw the development of a decentralised court structure for the administration of justice. Justice ayres or royal officers were attached to the provinces. Sheriffs maintained order and collected revenues in the king's name and baron and regality courts were presided over by a baron or his bailie. Also, prior to the Reformation in 1560, bishops in dioceses which the pope recognised as being exempt from metropolitan authority held their own consistorial courts.

Once the Court of Session had been established by the College of Justice Act 1532,²⁰ Scotland had a supreme civil court with jurisdiction over the whole of the country. The court is a collegiate court which sits permanently in Edinburgh as both a court of first instance and as an appellate court. The judges, with the exception of both the Lord President of the Court of Session and the Lord Justice Clerk, hold the title Senator of the College of Justice.

The Courts Act 1672 followed the recommendations of a commission set up in 1669 by Charles II to reform the Scottish courts by replacing ad hoc assessors appointed

by the king to hear criminal cases with a more permanent court. The Act provided that five of the existing Lords of Session, together with the Justice General and the Justice Clerk, form the High Court of Justiciary.

Both the Court of Session and the High Court of Justiciary were preserved "in all time coming" in terms of article XIX of the Treaty of Union 1707,²¹ subject always of course to "Acts of the Parliament of Great Britain".

The Scottish criminal courts First instance courts

The High Court of Justiciary²² is Scotland's highest criminal court and sits as a circuit court at various locations throughout Scotland. Its jurisdiction extends over the whole of Scotland. It has exclusive jurisdiction in relation to the most serious crimes, including murder, rape and treason. It sits as a trial court with a judge and jury under solemn procedure and has the power to impose sentences of up to life imprisonment.

Criminal prosecutions can also take place in Scotland in both the sheriff court sitting as a criminal court in respect of both solemn procedure for more serious offences (a sheriff sitting with a jury) and summary procedure for less serious offences (a sheriff sitting alone). Sentences imposed are up to five years' imprisonment and an unlimited fine in respect of solemn

²⁰ College of Justice Act 1532 - <http://www.legislation.gov.uk/aosp/1532/2>

²¹ Articles of Union - <https://www.parliament.uk/documents/heritage/articlesofunion.pdf>

²² About the High Court - <https://www.scotcourts.gov.uk/the-courts/supreme-courts/high-court/about-the-high-court>

procedure and one year and a maximum fine of £10,000 in respect of summary procedure.

Section 5 of the Courts Reform (Scotland) Act 2014²³ created the post of summary sheriff whose criminal competence and jurisdiction is set out at section 45 of the Act.

The justice of the peace, or JP, court was created by the Criminal Proceedings etc (Reform) (Scotland) Act 2007,²⁴ replacing the district courts, which were established under the District Courts (Scotland) Act 1975 and administered by local authorities. They are presided over by lay justices of the peace who are assessed by clerks who must be either solicitors or advocates. These courts sit only as criminal courts in respect of minor crimes and offences and have the power to impose a custodial sentence of up to sixty days and fines of up to £2,500, unless there is a lower or higher statutory maximum penalty prescribed for any particular offence.

Appeal courts

The Sheriff Appeal Court was set up in terms of section 46 of the Courts Reform (Scotland) Act 2014. It can deal with criminal appeals from both the justice of the peace court and the sheriff court under summary procedure, although its jurisdiction extends to sheriff solemn procedure in respect of bail appeals only.

The High Court of Justiciary as an appeal court is the final court of criminal appeal in Scotland. It can deal with appeals from the High Court and in relation to sheriff court solemn procedure cases as well as points of law from the Sheriff Appeal Court. However, appeals on either “devolution issues” (issues on whether an Act of the Scottish Parliament (or the provision of an Act) or a function of the Scottish Government relates to a reserved matter) or “compatibility issues” (issues as to whether a public authority has acted or proposes to act in a way that is incompatible with either any Convention right or EU law or whether any Act of the Scottish Parliament (or the provision of such an Act) is incompatible with either any Convention right or EU law) are dealt with by the UK Supreme Court.

The Criminal Procedure (Scotland) Act 1995, section 288ZB²⁵, provides the authority for reference of a compatibility issue in criminal proceedings to the High Court or to the Supreme Court. A compatibility issue

is defined for the purposes of EU law at section 288ZA (2) as a question arising in criminal proceedings as to whether a public authority has acted (or proposes to act) in a way that is incompatible with EU law or a question arising in criminal proceedings as to whether an Act of the Scottish Parliament, or any provision of an Act of the Scottish Parliament, is incompatible with EU law.

The Scottish civil courts

While the responsibility for criminal justice is devolved to the Scottish Parliament, there are certain aspects of civil justice which are reserved to Westminster, such as the Supreme Court and also the UK-wide specialist tribunals which operate in Scotland, such as the Employment Tribunal and the First Tier Immigration and Asylum Chamber. More importantly, for the purposes of this paper, it is anticipated that the UK’s decision to leave the EU may have much more of an effect on the decisions of tribunals and courts of special jurisdiction.

First instance courts

The Court of Session²⁶ sits permanently in Edinburgh and has jurisdiction over most civil matters in Scotland. While it has extensive concurrent jurisdiction with the sheriff court when sitting as a court of first instance, it does have exclusive jurisdiction for cases worth over £100,000 in terms of section 39 of the Courts Reform (Scotland) Act 2014 and applications for judicial review in terms of section 27 of the Court of Session Act 1988.²⁷ It is divided into two houses, with the Outer House being a court of first instance and the Inner House being a court of appeal. The Court of Session can make a reference to the Court of Justice of the European Union either at its own instance or at the instance of a party for a preliminary ruling in terms of chapter 65 of the Rules of the Court of Session 1994.²⁸

²³ Courts Reform (Scotland) Act 2014 - <http://www.legislation.gov.uk/asp/2014/18/contents/enacted>

²⁴ Criminal Proceedings etc. (Reform) (Scotland) Act 2007 section 59 - <http://www.legislation.gov.uk/asp/2007/6/section/59>

²⁵ The Criminal Procedure (Scotland) Act 1995 section 288ZB - <https://www.legislation.gov.uk/ukpga/1995/46/section/288ZB>

²⁶ About the Court of Session <http://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session>

²⁷ Special cases - <https://www.legislation.gov.uk/ukpga/1988/36/section/27>

²⁸ Court of Session Rules Chapter 65 references to the European Court of Justice - <http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap65.pdf?sfvrsn=8>

The sheriff court has exclusive jurisdiction over all civil cases with a monetary value up to £100,000.

There was substantial reform of the Scottish civil courts in terms of the 2014 Act, including the establishment of a Civil Justice Council for Scotland and the creation of the summary sheriff, as referred to above, whose civil competence and jurisdiction is set out at schedule 1 to the Act.

Section 41 of the Act also provided Scottish ministers with power by order to confer an all Scotland jurisdiction for the purposes of dealing with specified types of civil proceedings. The Sheriff Personal Injury Court was established on 22 September 2015 by the All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015.²⁹ This court sits at Edinburgh Sheriff Court and has exclusive competence over personal injury claims over £1,000 if it is a work-related accident, where the total amount claimed is over £5,000 or where a sheriff remits proceedings. It also has concurrent jurisdiction with the Court of Session for all personal injury claims over £100,000.

Appeal courts

Section 109 of the Act provides for the abolition of appeal in civil cases from the sheriff to the sheriff principal. Section 110 of the Act provides for an appeal to the Sheriff Appeal Court.

The Inner House of the Court of Session is divided into two divisions, which are of equal importance and jurisdiction. The First Division is presided over by the Lord President and the Second Division is presided over by the Lord Justice Clerk. The Inner House is a court of appeal from the Outer House, the Sheriff Appeal Court, certain tribunals and other bodies.

The UK Supreme Court

The UK Supreme Court replaced the Appellate Committee of the House of Lords and, for devolution issues, the Judicial Committee of the Privy Council. It was constituted in terms of section 23 of the Constitutional Reform Act 2005.³⁰ It is the final court of appeal in the UK for civil cases and for criminal cases from England, Wales and Northern Ireland. In relation to Brexit, it has to date decided a number of cases. In particular, reference will be made to the cases of Miller Dos Santos,³¹ the references by the Attorney General for Northern Ireland in the application by Agnew and others for judicial review and the reference by the Court of Appeal in Northern Ireland in the matter of an application by Raymond McCord for judicial review, and also the Continuity Bill case which will be discussed in detail later in this paper.

The Court of Justice of the European Union (CJEU)³²

As a result of the UK's decision to leave the EU, the UK jurisdictions, including Scotland, will no longer have a court dedicated to the interpretation of EU law. However, in terms of section 6(2) of the European Union Withdrawal Act 2018,³³ a court or tribunal "may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal". Therefore, UK judges will no longer be bound to follow the judgments of the CJEU after exit day, but these cases will still be persuasive.

Formerly the European Court of Justice, this court sits in Luxembourg. Its purpose is to determine all matters of EU law as referred to above and to ensure equal application of EU law in all member states of the European Union.

The CJEU has the following functions:

- (a) Interpreting EU law (preliminary rulings)
- (b) Enforcing EU law (infringement proceedings)
- (c) Annuling EU legal acts (actions for annulment)
- (d) Ensuring the EU takes action (actions for failure to act)
- (e) Sanctioning EU institutions (actions for damages)

²⁹ The All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015 - <http://www.legislation.gov.uk/ssi/2015/213/made>

³⁰ The Supreme Court - <http://www.legislation.gov.uk/ukpga/2005/4/section/23>

³¹ The Supreme Court Judgment in the Miller case - <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>

³² Court of Justice of the European Union (CJEU) - https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en

³³ The European Union Withdrawal Act section 6 Interpretation of retained EU law 2018 - <http://www.legislation.gov.uk/ukpga/2018/16/section/6/enacted>

Tribunals

There has been extensive reform of the tribunal system in recent years. The Tribunals (Scotland) Act 2014³⁴ established a statutory framework for tribunals in Scotland. The Act created two new tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland.

While most tribunals in Scotland are devolved, some are reserved and are administered not by the Scottish Courts and Tribunals Service, but by HM Courts and Tribunals Service.³⁵ These include the Immigration and Asylum Tribunal and the Employment Tribunal in Scotland.

The areas of law which these tribunals deal with are suffused with EU law.

Research was published in 2017³⁶ by Professor Barry Rodger of the University of Strathclyde School of Law which provided some analysis on the extent to which EU law is considered and applied in order to assess its impact on the Scottish legal order. The impetus for this research was the then ongoing case of *Scotch Whisky Association and others v Lord Advocate and another*.³⁷

Prior to the UK Supreme Court's determination in this case, a reference had been made to the CJEU by the Extra Division of the Inner House of the Court of Session. Previously, the Outer House had rejected the Scotch Whisky Association's application for a challenge for judicial review challenging the lawfulness of the Alcohol (Minimum Unit Pricing) (Scotland) Act 2012,³⁸ which sought to amend schedule 3 of the Licensing (Scotland) Act 2005³⁹ by imposing upon the premises licence holder a mandatory condition of premises licence that alcohol is not to be sold at a price below a statutorily determined minimum price per unit of alcohol. It was contended by the Scotch Whisky Association that minimum unit pricing of alcohol was disproportionate under EU law, in particular article 34 of the Treaty on the Functioning of the European Union (TFEU)⁴⁰ which provides that "*quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states*". Article 36 of TFEU states, however, that the provisions of articles 34 and 35 shall not "*preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public*

morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of commercial or industrial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states"

The CJEU determined the reference by way of an appropriateness and necessity test. It concluded that where a national court examines national legislation in light of the article 36 justification relating to protection of health, then an objective examination of whether it may be reasonably concluded from the evidence submitted by the member state that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures less restrictive of the free movement of goods.

The CJEU was satisfied that proposed minimum unit pricing did appear to be an appropriate means of attaining the objective it pursued, which was to increase the price of cheap alcoholic drinks, so reducing the consumption of alcohol and, in particular, the hazardous and harmful consumption of alcohol.

The case was returned from the CJEU to the First Division of the Inner House of the Court of Session for determination and the appeal was dismissed on 21 October 2016. With the permission of the First Division, the case was appealed to the Supreme Court.

The Supreme Court issued its judgment on 15 November 2017 and dismissed the appeal.

³⁴ Tribunals (Scotland) Act 2014 - <http://www.legislation.gov.uk/asp/2014/10/enacted>

³⁵ HM Courts & Tribunals Service - <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about>

³⁶ The Application of EU Law by the Scottish Courts: An analysis of case law trends over 40 years - Barry Rodger *The Juridical Review* 2017 Part 2

³⁷ *Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents) (Scotland)* [2017] UKSC76

³⁸ Alcohol (Minimum Unit Pricing) (Scotland) Act 2012 - http://www.legislation.gov.uk/asp/2012/4/pdfs/asp_20120004_en.pdf

³⁹ Schedule 3 to the Licensing (Scotland) Act 2005 - <http://www.legislation.gov.uk/asp/2005/16/schedule/3>

⁴⁰ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01 - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

Minimum unit pricing came into effect on 1 May 2018.

The 2017 research referred to 12 Court of Justice rulings in Scottish preliminary references culminating in the Scotch Whisky Association case on 23 December 2015. These references covered matters as diverse as payment entitlements under the Common Agricultural Policy in the case of *Feakins v Scottish Ministers*⁴¹ to disputes concerning VAT and the interpretation of Directive 77/388 (common system of value added tax and uniform basis of assessment) in the case of *Royal Bank of Scotland plc v Revenue and Customs Commissioners*.⁴²

Also, there was a reference from the House of Lords in a dispute involving equal treatment in the pregnancy-related dismissal of a woman which involved the interpretation of Directive 76/207 (prohibition of discrimination on the grounds of sex, particularly with reference to marital or family status in employment, including access to employment, promotion, vocational training and working conditions) in the case of *Brown v Rentokil Ltd*.⁴³

In the criminal context, there have been references from the High Court of Justiciary in the cases of *Mehlich v Mackenzie*,⁴⁴ in the case of *Walkingshaw v Marshall*,⁴⁵ and in the case of *Wither v Cowie*.⁴⁶ These cases all related to breach of fisheries regulations.

In the case of *Hamilton v Whitelock*⁴⁷, there was an alleged breach of rules on the use of tachographs.

The research also referred to 534 Scottish civil court judgments where EU law had been considered since the UK joined the European Community in 1973 until the end of 2015. This included all Scottish courts and also the Employment Appeal Tribunal. A total of 271 cases, or just over half, referred to Court of Session Outer House judgments. Also of note was the increase in the number of judgments over the years, with only two in the period 1974-79, up to 227 in the period 2010-2015. While there was no strong focus on success of cases or relevance of EU law to these cases, it was stated that 37.8% of EU law cases were successful or partially successful on the basis that the court preferred the overall arguments of the party pleading EU law, albeit that this figure should be treated with some caution.

This research noted that there was evidence that EU case law being argued before the UK Supreme Court was increasing and litigants were increasingly more likely to ask the Scottish courts to make a reference to the CJEU, although those attempts have been generally unsuccessful. Of particular interest is the subject matter. The two most frequent areas of EU case law involved private law disputes: delict (including health and safety), with 93 cases, and employment law, with 90 cases. The third most frequent subject matter reflected the impact of EU law on private law disputes in Scottish courts (58 cases), which covers the civil and commercial rules of international private law. Immigration and asylum law (42 cases) and environmental law (40 cases) were the two next most frequent areas of EU law.

Some cross-tabulation on subject matter and period disclosed, among other matters, that there had been a considerable increase in delict (civil wrongs) and employment law case law since 1998.

The research identified the influence of EU law on judicial review; 111 cases, or just over one-fifth of the total, are set in judicial review proceedings. This means that EU law was important in the decision-making process and that parties' lawyers had identified there was an EU point of law. It remains to be seen whether similar cases in the future will be brought before domestic courts which will have an analogous reference to retained EU law.

Legal profession in Scotland

The Scottish legal profession is divided into solicitors and advocates who provide a range of services to their clients and are subject to a specific regime of EU law regarding provision of services within the EU as detailed at page 72.

⁴¹ *Feakins v Scottish Ministers* 41(C-335/13) 2013

⁴² *Royal Bank of Scotland plc v Revenue and Customs Commissioners* (C-448/07) EU C;2008;750 [2008] ECR I-10409,

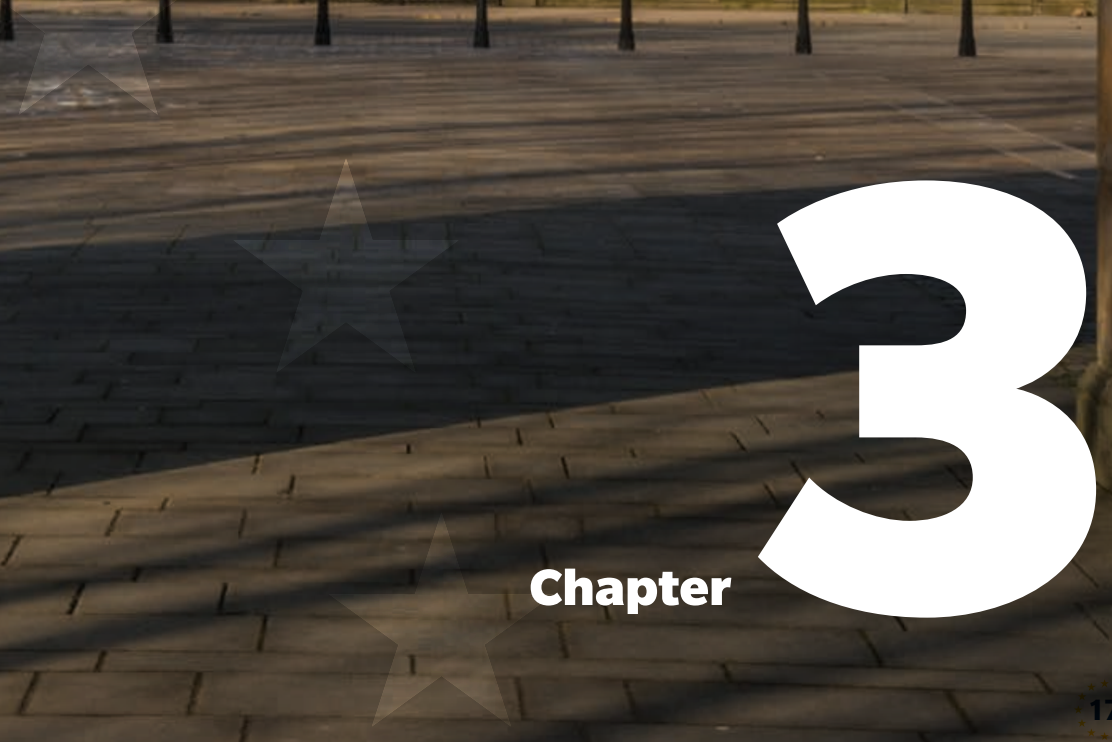
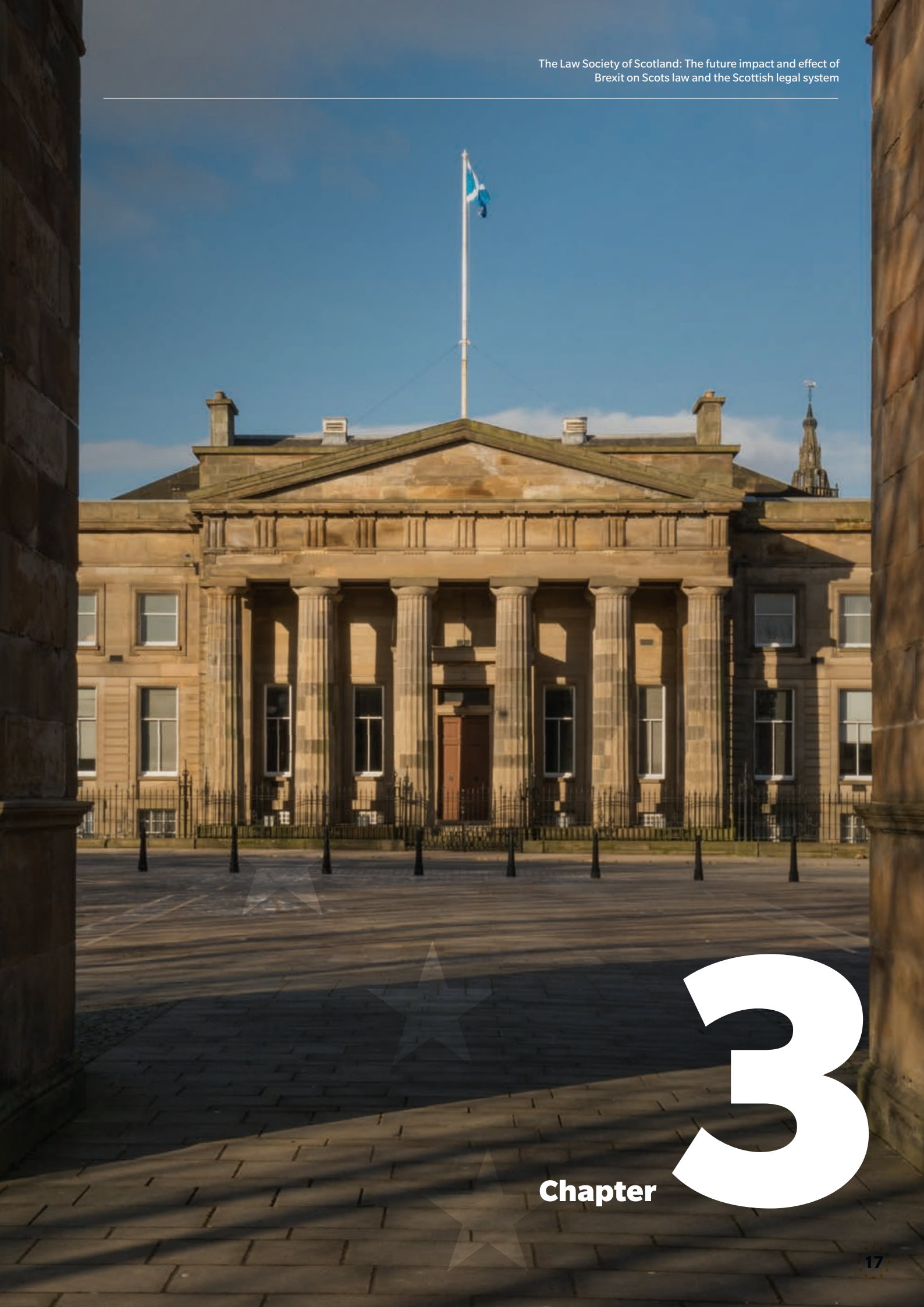
⁴³ *Brown v Rentokil Ltd* (C-394/96) EU;C:1998;331 [1998] 2 CMLR 1049

⁴⁴ *Mehlich v Mackenzie* (C24/83) 1984 SLT 449

⁴⁵ *Walkingshaw v Marshall* (C-370/88) [1991] 1 CMLR 419

⁴⁶ *Wither v Cowie* 1994 SLT 363.

⁴⁷ *Hamilton v Whitelock* (C79/86) EU;C: 1987;246 [1987] 3 CMLR 190



Chapter

3

The United Kingdom's decision to leave the European Union

This chapter will provide some commentary on the history of the EU, the UK's part in its development, and how we got to the decision to hold a referendum in 2016 on whether the UK should remain in the EU or leave the EU.

The EU was created by the Maastricht Treaty on 1 November 1993⁴⁸, which established a political and economic union between 12 European countries (following enlargement, now 28 member states) that sets policies concerning the members' economies, societies, laws and, to some extent, security.

The EU is a result of gradual integration, set up by various treaties in order to promote certain aims. In this way, the EU can be said to have been formed by the demands of its member states.

After the Second World War ended in 1945, Europe's post-war nations were not just seeking a way of establishing peace, but also sought solutions to economic problems in Europe, such as raw materials being in one country and the industry to process them being in another.

The Schumann Declaration⁴⁹ was presented by French Foreign Minister Robert Schumann on 9 May 1950. It began by stating:

"World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it."

Schumann believed that, in addition to making peace a reality in Europe, the creation of the treaties and institutions ensured the merging of economic interests, which would help raise living standards and be the first step towards a more united Europe.

Six countries agreed in the Treaty of Paris,⁵⁰ which came into effect on 26 July 1952, to form an area of free trade for several resources, including coal, steel and iron ore. This body was called the European Coal and Steel Community (ECSC). The ECSC comprised Germany, France, Belgium, the Netherlands, Italy and Luxembourg. The UK did not join the ECSC, concerned at the prospect of giving up power and more or less content with the economic potential offered by the Commonwealth of Nations.

In 1957, the Treaty of Rome⁵¹ created the European Economic Community (EEC) or Common Market and also the European Atomic Energy Community (Euratom), the latter to pool knowledge of atomic

⁴⁸ Treaty on European Union Maastricht Treaty - <http://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/maastricht-treaty>

⁴⁹ The Schumann Declaration - https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en

⁵⁰ Treaty of Paris - <http://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-paris>

⁵¹ Text of the Treaty of Rome 1957 - https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf

energy and the former to create a common market among its members. The four freedoms set out in the Treaty (freedom of movement of goods, services people and capital) aimed to contribute towards economic growth and avoid protectionist policies of pre-war Europe. By 1970, trade within the Common Market had increased five-fold. In 1961, the UK applied to join the EEC. Prime Minister Harold Macmillan undertook that the UK would not join unless its Commonwealth and other obligations could be reconciled, for otherwise “the loss would be greater than the gain”.⁵² At that time, however, the French President Charles de Gaulle voiced the main objection to the UK joining the EEC. The basis of this objection was that the UK’s entry would lead to an Atlantic Community, rather than a European Community, which would be led by the United States. President de Gaulle considered that the UK was an Atlantic power before a European one and that ties with the United States mattered at least as much the ties with Continental Europe. Following another unsuccessful attempt by the UK in 1967 to join the EEC, the UK eventually acceded to the Treaty of Rome in 1972. The UK joined the European Communities in accordance with the Treaty of Accession in 1972.⁵³ The European Communities Act 1972 (ECA)⁵⁴ ratified the Treaty and sanctioned EEC law into UK law. In enacting the ECA, the UK joined the supranational legal order and accepted the supremacy of EEC law and the authority of the Court of Justice.

The Labour government led by Prime Minister Harold Wilson held a referendum on continuing membership of the EEC on 5 June 1975, two-and-a-half years after the UK’s accession.⁵⁵ This was the first ever national referendum to be held in the UK and the “yes” vote won by 67.23% to 32.77% on a 65% turnout. Development of the Community slowed in the 1970s. Attempts were made to create an economic and monetary union, but these were put in check by a declining international economy. This began to change in the 1980s as the USA, under President Ronald Reagan’s administration (1980-88), was moving away from Europe and preventing EEC members from forming links with communist countries in an attempt to bring those countries closer to democracy.

It was during this period that some UK politicians were becoming ambivalent about ambitions towards an

increasingly federal Europe. By the time of Conservative Prime Minister John Major’s premiership (1990-1997), increasing Euroscepticism within the Conservative Party culminated in difficulties over the UK’s ratification of the Maastricht Treaty.

The Treaty of the European Union (TEU) was signed in Maastricht, the Netherlands, on 7 February 1992. The Treaty’s objective was to further European integration. This Treaty founded the EU and established the pillar structure which remained in place until the Lisbon Treaty came into force on 1 December 2009. The TEU also greatly expanded the competences of the EU and led to the creation of a single European currency, the euro. The TEU also reformed and amended the treaties establishing the European Communities, the EU’s first pillar. It renamed the European Economic Community, the European Community, to reflect its expanded competences beyond economic matters. The TEU also created two new pillars of the EU on (i) common foreign and security policy and (ii) police and judicial cooperation on criminal matters (the second and third pillars), which replaced the former informal intergovernmental cooperation bodies named TREVI and European Political Cooperation on EU Foreign Policy. A significant UK opt-out was membership of the euro.

The TEU has subsequently been amended by the Treaty of Amsterdam (1997),⁵⁶ the Treaty of Nice (2001)⁵⁷ and the Treaty of Lisbon (2007).⁵⁸ Today, it is one of two treaties forming the constitutional basis of the EU, the other being the Treaty on the Functioning of the European Union (TFEU).

⁵² <https://www.theguardian.com/world/2016/aug/01/eec-britain-membership-european-economic-community-1961-archive>

⁵³ Treaty of Accession of Denmark, Ireland and the United Kingdom (1972) - <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-accession.html#new-2-9>

⁵⁴ The European Communities Act 1972 - <http://www.legislation.gov.uk/ukpga/1972/68/contents>

⁵⁵ <https://www.theguardian.com/politics/2016/feb/25/britains-1975-europe-referendum-what-was-it-like-last-time>

⁵⁶ Treaty of Amsterdam - <http://europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>

⁵⁷ Treaty of Nice - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12001C/TXT>

⁵⁸ Treaty of Lisbon - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT>

The ratification of the TEU was an important moment in UK politics. The UK had an opt-out from the Treaty's social provisions, but this was opposed in parliament by the opposition Labour and Liberal Democrat MPs. The Treaty itself was opposed by a number of Conservative MPs, who became known as the "Maastricht rebels". These Maastricht rebels exceeded the Conservative Party majority in the House of Commons and the government therefore came close to losing the confidence of the House. In accordance with the UK constitution, with particular reference to parliamentary sovereignty, ratification of the Maastricht Treaty in the UK was not subject to approval by referendum as was the case in other member states.

The Labour government which came to power in May 1997 pursued a European policy which departed from that of the previous Conservative government. During 1997-2007, successive Labour governments sought to establish a British "leadership" within the EU. The 1997 manifesto made two pledges for an incoming Labour government: to hold a referendum on participation in the single currency and to lead reform in the EU. Although European policy was important to the Labour government, this commitment was never fully carried out. Chancellor Gordon Brown set out five economic tests which should be met before joining the euro. A further assessment was published on 9 June 2003.⁵⁹

While the Labour government remained positive in its view of the euro, this report opposed euro membership because four out of the five tests could not be passed. This report noted that there had been considerable progress in meeting the five tests and the desirability of making long-term benefits to be gained from euro membership.

The EU changed shape through enlargement during the Tony Blair administration and adopted a more neo-liberal orientation, also giving the EU institutions powers where a policy solution could not be offered at national level. There was also significant UK input into the Lisbon Treaty.

Labour's efforts in explaining the benefits of further EU integration to the UK electorate were unsuccessful. Economic competitiveness, climate change and internal security were just some of the government objectives that would by now require active complementary action by the EU.

A spring 1997 Eurobarometer report disclosed that 36% of respondents in the UK considered EU membership to be a good thing and 26% a bad thing. By autumn 2007, 34% considered it a good thing and 28% a bad thing.⁶⁰

While the Labour government did deliver a more constructive European policy, culminating in the Lisbon Treaty, it did so without the basis of strong domestic support. This lack of strong domestic support⁶¹ was to continue after the 2010 general election, following which the Conservative Party formed a coalition government with the Liberal Democrats.

In a speech given on 22 January 2013, Prime Minister David Cameron stated that if the Conservatives won the next general election, they would seek to renegotiate the UK's relationship with the EU before giving the UK electorate the "simple choice" between remaining in the EU or leaving the EU⁶². This speech was set against a background of polls which suggested that support for the principal "leave" party, the United Kingdom Independence Party (UKIP), was at 10%.

Following the 2015 UK general election, the Conservative Party government was elected, with a manifesto commitment to renegotiate UK membership of the EU:

*"We will legislate in the first session of the parliament for an in-out referendum to be held on Britain's membership of the EU before the end of 2017. We will negotiate a new settlement for Britain in the EU. And then we will ask the British people whether they want to stay in on this basis or leave. We will honour the result of the referendum whatever the outcome."*⁶³

⁵⁹ <https://web.archive.nationalarchives.gov.uk/20100429141035/http://www.number10.gov.uk/archive/2003/06/chancellors-euro-statement-in-full-3839>

⁶⁰ http://ec.europa.eu/commfrontoffice/publicopinion/archives/eb/eb57/eb57_highlights_en.pdf

⁶¹ Simon Bulmer *New Labour and the European Union 1997-2007 A constructive partner?* Research Unit EU Integration March 2008

⁶² <https://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>

⁶³ Conservative Party Manifesto 2015- <http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf>

As the European Union Referendum Bill made its parliamentary progress at Westminster, David Cameron sought approval from other EU leaders for reforms in advance of the referendum. On 18-19 February 2016, following negotiations in Brussels, the EU 27 were prepared to agree to a package of reforms. Among the reforms that Mr Cameron managed to secure were an exemption from “ever closer union” and a four-year ban on in-work benefits for EU arrivals. The Prime Minister claimed that the negotiated deal would tackle the UK public’s frustrations with the EU and ensure that the UK will never be part of an EU “superstate”. Eurosceptics, however, believed that this deal did nothing to tackle perceived high levels of immigration and taking back powers from Brussels.

The European Union Referendum Act 2015⁶⁴ provided for a referendum to be held no later than 31 December 2017. The referendum result required a simple majority vote of the UK and Gibraltar. The Act did not specify any consequences that would arise as a result of the referendum.

The referendum took place on 23 June 2016 to gauge support for the country remaining a member of, or leaving, the EU.

The question that appeared on the ballot paper in this referendum before the electorate in terms of section 1(4) of the Act was: “Should the United Kingdom remain a member of the European Union or leave the European Union?”

The alternative answers in terms of section 1 (5) of the Act were: “Remain a member of the European Union” or “Leave the European Union”.

The referendum resulted in a majority result of 51.9% being in favour of leaving and 48.1% being in favour of remaining in the EU on a turnout of 72.2% of the electorate. The UK Government had, in terms of its manifesto commitment, promised to honour the outcome.⁶⁵

In order to do so, the UK Government was required in terms of article 50 (2) of the TEU⁶⁶ to notify the European Council of its intention.

The question of whether this could be done without recourse to parliament was determined in the UK Supreme Court in the case of *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (the Miller decision). The court held that an Act of parliament was necessary to initiate the withdrawal process. The European Union (Notification of Withdrawal) Act 2017⁶⁷ was subsequently passed to provide the parliamentary authority to serve the article 50 notice.

Prime Minister Theresa May served the notice on Donald Tusk, President of the European Council, on 29 March 2017, which put the UK on course to leave the EU by 29 March 2019, after a period of negotiations as required under article 50 of the TEU.⁶⁸

While this paper does not seek to elaborate upon the UK Government’s negotiations to leave the EU, but rather consider the impact upon the Scottish legal system once the UK has left the EU, the position to date can be summarised as follows:

- 1 A Withdrawal Agreement between the United Kingdom of Great Britain and Northern Ireland and the European Union and the European Atomic Energy Community (the EU Withdrawal Agreement) was agreed at negotiators’ level on 14 November 2018 and endorsed by EU member state leaders at a special European Council summit on 25 November 2018.⁶⁹
- 2 If the Withdrawal Agreement is not approved by the UK Parliament, or if either the European Parliament or the EU Council do not endorse the EU Withdrawal Agreement, then under article 50 the EU treaties will no longer apply to the UK at the date of exit.

⁶⁴ European Union Referendum Act 2015 - <http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted>

⁶⁵ https://www.bbc.co.uk/news/politics/eu_referendum/results

⁶⁶ The Daily Telegraph Business Reporter Text of article 50, the mechanism for leaving the EU 29/3/17 - <https://www.business-reporter.co.uk/2017/03/29/text-article-50-mechanism-leaving-european-union/#gsc.tab=0>

⁶⁷ The European Union (Notification of Withdrawal) Act 2017 - <http://www.legislation.gov.uk/ukpga/2017/9/contents/enacted>

⁶⁸ Prime Minister Theresa May’s letter to Donald Tusk triggering Article 50 29/3/2017 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf

⁶⁹ Withdrawal Agreement and Political Declaration on the future relationship between the UK and the EU as endorsed by leaders at a special meeting of the European Council on 25 November 2018 - <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>

- 3 The Withdrawal Agreement sets out the terms governing the UK's departure from the EU over a transitional period running until 31 December 2020. Both sides have also published an outline Political Declaration on a future trading relationship after the transitional period has ended, although formal negotiations on the terms of that relationship are yet to begin.
- 4 The UK Parliament has yet to agree the terms of the Withdrawal Agreement. As a result of further negotiations with the EU, exit day is now provisionally 31 October 2019.

The interaction between Brexit legislation and litigation can be summarised as follows:

- 1 The UK Supreme Court in the Miller decision held by a majority of eight to three that an Act of parliament is required to authorise ministers to give notice of the decision of the UK to withdraw from the EU.
- 2 The European Union (Notification of Withdrawal) Act 2017 provided the Prime Minister with the power to notify under article 50(2) of the Treaty on European Union, the UK's intention to withdraw from the EU. The article 50 notice was served on 29 March 2017.
- 3 The European Union (Withdrawal) Act 2018⁷⁰ received royal assent on 26 June 2018. This Act repeals the European Communities Act 1972, but retains after "exit day" the *Acquis Communautaire*, which is the accumulated legislation, legal acts and court decisions which constitute the body of EU law and is almost all UK laws which have been derived from the UK's membership of the EU (formerly the

European Communities). In essence, section 1 of the Act repeals the European Communities Act 1972 on exit day, but section 2 continues in force "all direct EU legislation", being EU regulations, decisions and tertiary legislation into domestic law. Section 3 converts all direct EU legislation, being EU regulations, decisions and tertiary legislation into domestic law, and section 4 converts all other "rights, powers, liabilities, obligations, restrictions, remedies and procedures" recognised and available by reason of section 2(1) of the ECA into domestic law.

- 4 The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill⁷¹ was passed by the Scottish Parliament on 22 March 2018. This Bill's purpose was to make provision for Scotland in connection with the withdrawal of the UK from the EU. The Bill sought to implement the Scottish Government policy that EU-derived devolved law should continue to operate on the day after exit as it did before exit. To achieve this, the Bill retains EU-derived devolved law and gives Scottish ministers the powers needed to ensure that it continues to operate effectively after UK withdrawal. It also gives Scottish ministers the power to, where appropriate, ensure that Scotland's devolved laws keep pace, after UK withdrawal, with developments in EU law. The introduction of this Bill raised issues of the Scottish Parliament's legislative competence. These issues were focused on from the moment of the Bill's introduction when the Lord Advocate gave an opinion that the Bill was within the parliament's competence to legislate upon. However, the Scottish Parliament's Presiding Officer disagreed with that view.

⁷⁰ European Union (Withdrawal) Act 2018 - <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>

⁷¹ The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - <https://www.parliament.scot/parliamentarybusiness/Bills/107725.aspx>

- 5 The decision of the Court of Justice of the European Union in the case of *Wightman v Secretary of State for Exiting the European Union* on 10 December 2018⁷²

In that case, the court ruled that article 50 of the Treaty of the European Union (TEU) must be interpreted as meaning that, where a member state had notified the European Council, in accordance with that article, of its intention to withdraw from the EU, that article allows that member state – for as long as a withdrawal agreement concluded between the member state and the EU has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired – to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the member state concerned has taken the revocation decision in accordance with its constitutional requirements.

The purpose of that revocation is to confirm the EU membership of the member state concerned under terms unchanged as regards its status as a member state, and that revocation brings the withdrawal period to an end.

- 6 The decision of the UK Supreme Court in the case of *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.⁷³

This decision set out the position regarding which parts of the Continuity Bill were, and which parts of the Bill were not, within the legislative competence of the Scottish Parliament. It also reaffirmed the concept of UK parliamentary sovereignty, albeit it did not resolve the fundamental question of what “parliamentary sovereignty” actually means.

⁷² *Wightman v Secretary of State for Exiting the European Union* C-621/18 - <http://curia.europa.eu/juris/document/document.jsf?docid=208636&doclang=en>

⁷³ *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill- A reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64 - <https://www.supremecourt.uk/cases/docs/uksc-2018-0080-judgment.pdf>



4

Chapter

The consequences of the United Kingdom leaving the European Union

Explaining the consequences requires a short analysis on each “legal stage” of the Brexit process as follows:

1 Article 50 of the Treaty of the European Union

Article 50 sets out the procedure for a member state that wishes to leave the European Union.

The text is:

“(1) Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.

(2) A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

(3) The treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement

with the member state concerned, unanimously decides to extend this period.

(4) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing member state shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with article 238(3)(b) of the Treaty on the Functioning of the European Union.

(5) If a state which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in article 49.”

Article 50 frames the legal process for leaving. Prior to 29 March 2017, this legal process had never been invoked.

The UK Government took the view initially that, as this was a matter of leaving an international treaty, the action of leaving should proceed on the exercise of the royal prerogative and that intimation did not require parliamentary approval.

As noted above, article 50(1) states that a member state may decide to leave the EU in accordance with its own constitutional requirements. This raised the question: what are the UK’s constitutional requirements?

2 The Miller decision

The intention of article 50 was that it should not be a matter for the EU as to how a member state reaches its decision as to how to withdraw from the EU. Initially, the UK Government had decided that it could trigger article 50 without the need for an Act of parliament. In the case of *R (Miller and another) v Secretary of State for Exiting the European Union*, the Supreme Court by a majority of eight to three dismissed the Secretary of State's appeal. In a joint judgment of the majority, the Supreme Court held that an Act of parliament is required to authorise ministers to give notice of the decision of the UK to leave the EU.

In the Miller case, the court also had to determine references from Northern Ireland, namely the reference by the Attorney General for Northern Ireland in the matter of an application by Agnew and others for judicial review⁷⁴ and the reference by the Court of Appeal (Northern Ireland) in the matter of an application by Raymond McCord for judicial review and interventions by the Lord Advocate on behalf of the Scottish Government and the Counsel General for Wales for the Welsh Government. These references raised the additional issues of whether the terms on which powers have been statutorily devolved require consultation with, or agreement of, the devolved legislatures before notice is served, or otherwise operate to restrict the government's power to do so (the devolution issues).

On these devolution issues, the court unanimously held that neither section 1 nor section 75 of the Northern Ireland Act 1998 are of any assistance. The court also held unanimously that the Sewel Convention, now on a statutory footing in section 28(8) of the Scotland Act 1998, does not give rise to a legally enforceable obligation.

Once the court had decided that legislation was required to trigger, or to authorise the triggering of, article 50, then the following questions arose:

*"(1) Does this legislation fall within the Sewel Convention?
(2) If the answer to question (1) is yes, is the Sewel Convention justiciable by the court?
and
(3) Has the Sewel Convention been made justiciable by being transformed into a legal requirement by virtue of section 16 of the Scotland Act 2016?"*

In answer to these questions, the court answered questions (2) and (3) in the negative and therefore declined to answer question (1).

The court took the view that conventions such as the Sewel Convention are political, rather than legal. Particular reference is made to paragraph 151 of the judgment where the court held that, while the Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures, the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.

Section 28(8) is read with section 28(7)

"(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

The Supreme Court held that section 28(8) did not convert the Sewel Convention into a rule which can be interpreted, let alone enforced. The purpose of putting a convention on a statutory footing was to entrench it as a convention.

⁷⁴ <https://www.supremecourt.uk/cases/uksc-2016-0201.html>

In terms of impact on the Scottish legal system, this part of the judgment was important. Had the court determined that the law required that devolved consent was required before legislation to trigger Brexit, there would have been profound constitutional implications given the referendum result in Scotland, where the share of the vote for remain was 62%. However, the Supreme Court's judgment did provide some focus on section 28(8) of the Scotland Act 1998 in that putting a convention on a statutory footing did not change that it is still a convention and is therefore not justiciable.

While the Miller case determined that article 50 cannot be triggered without legislation, the Scottish Government identified that, in terms of the Sewel Convention, there was a political obligation on the UK Government to consult with the devolved administrations regarding the legislation required to trigger article 50.

3. The European Union (Notification of Withdrawal) Act 2017

After the UK Government's appeal was dismissed, the then Secretary of State for Exiting the EU, David Davis MP, formally introduced the European Union (Notification of Withdrawal) Bill on 26 January 2017. The Bill was enacted without amendment on 16 March 2017 as the European Union (Notification of Withdrawal) Act 2017. The Act's long title states its purpose:

"To confer power upon the Prime Minister to notify, under article 50 (2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."

The Act has two sections, of which only section 1 is relevant for this discussion:

"1. Power to notify withdrawal from the EU

(1) The Prime Minister may notify, under article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.

(2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment."

The UK Government's position was that this was not a Bill that required a legislative consent motion because the Bill was outwith the legislative competence of the Scottish Parliament. On 7 February 2017, the Scottish Parliament voted in favour of a motion that the Scottish Parliament should not consent to the Bill.⁷⁵

It was clear, however, that the Bill would give the Prime Minister a power in terms of section 50 (2) TEU that, once exercised, would alter the devolved competence of Scottish ministers and the legislative competence of the Scottish Parliament. In this respect, the Sewel Convention was engaged, although not applied.

The Act received royal assent on 16 March 2017. It is interesting to note that, while the Act provided the Prime Minister the necessary authority to notify the European Council of its intention to withdraw from the EU, the prior question of whether the UK had actually arrived at a decision to leave the EU had not been addressed by the Act.

4. The withdrawal notice and its consequences

As referred to earlier, the Prime Minister notified the European Council of the UK's intention to withdraw from the EU in terms of article 50 (2) TEU on 29 March 2017.

This notification began the negotiation process for the UK's exit from the EU.

Article 50(2) states that there shall be a negotiation and conclusion of an agreement between the member state (in this case the UK) and the EU and article 50(3) provides for the cessation of the treaties to the member state (UK) either from the date of entry into force of the agreement or two years after the date of notification (29 March 2019) unless the European Council, in agreement with the member state (UK), unanimously agrees to extend this (two-year) period.

Article 218 of the Treaty on the Functioning of the European Union (TFEU) sets out the process for dealing with the negotiation of the UK's future partnership with the EU along with its current withdrawal from the EU. David Davis MP, Secretary of state for Exiting the European Union, commenced negotiations on 19 July 2017 with Michel Barnier, the chief negotiator appointed by the European Commission.

⁷⁵ House of Lords Library Note Nicola Newson 15/2/2017 - <https://researchbriefings.files.parliament.uk/documents/LLN-2017-0009/LLN-2017-0009.pdf>

The serving of the article 50 notice also started the two-year period at the end of which, as originally intended, exit day would have occurred on 29 March 2019, being two years after the date of notification.

5. The UK Government's White Paper, *Legislating for the United Kingdom's Withdrawal from the European Union, May 2017 (CM9446)*⁷⁶

This White Paper, otherwise known as the Great Repeal Bill White Paper, set out the UK Government's position on the legal implications of the UK leaving the EU.

This followed the Prime Minister's Lancaster House speech on 17 January 2017, at which she set out the government's negotiating objectives for exiting the EU.

The main provisions of the "Great Repeal Bill" set out in the paper were:

Chapter 1 – Delivering the referendum result

The paper highlighted a clear instruction from the people of the UK to leave the EU on the basis of the referendum result and that, as a general rule, *"the same rules and laws will apply after we leave the EU as they did before."*

Chapter 2 – Our approach to the Great Repeal Bill

The paper set out that nothing should change on exit day, the intention being to convert the existing body of EU legislation into UK law, but at the same time repealing the European Communities Act 1972.

While this approach sought to ensure stability and continuity in the law, it did not provide for reciprocal agreements, in particular, in terms of both criminal justice and civil justice matters, in order to preserve rights, uphold the rule of law and maintain the proper administration of justice in the UK and in the EU. It should be noted, however, that the conversion of EU law into UK domestic law needs a change to the legislative competence provisions of the Scottish Parliament and the executive competence of Scottish ministers and the Sewel Convention would accordingly be engaged.

This chapter, at paragraph 2.12, also deals with ending the jurisdiction of the Court of Justice of the European Union. In the UK, arrangements would therefore have to be made to secure the rights of parties with pending cases.

Chapter 3 – Delegated powers in the Great Repeal Bill

This chapter brought into focus the requirement for a *"power to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU"* and that this would be done using secondary legislation.

It also highlighted that legislation made by devolved ministers or enacted by devolved legislatures would have to be corrected.

Chapter 4 – Interaction with the devolution settlements

This chapter took into account that the current devolution settlements were agreed after the UK joined the EU, and that the current devolved settlements were premised on EU membership. Accordingly, all three devolved administrations and legislatures have the power to make law in devolved policy areas as long as that law is compatible with EU law.

The position prior to exit day is that the devolved administrations and legislatures are responsible for implementing the EU common frameworks. It is the UK Government which represents the whole of the UK's interests in the setting of common frameworks which apply across the EU (including the UK).

This will change when the UK leaves the EU as the power the EU exercises at present in terms of common frameworks will return to the UK. The UK Government's position on this was that intra-UK common frameworks would have to be created in order to protect the freedom of businesses operating across the UK and also to allow the UK Government to be in a position to strike trade deals with third countries. It was the UK Government's intention, therefore, to work with the devolved administrations in order to set out these new common frameworks.

⁷⁶ DEXEU The Great Repeal Bill White Paper March 2017 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604514/Great_repeal_bill_white_paper_print.pdf

It was also recognised that legislation within the competence of devolved administrations giving effect of EU law would have to be amended and that the Bill will have to take this into account.

Chapter 5 – Crown dependencies and overseas territories

This chapter highlighted a commitment from the UK Government to engage with the Crown dependencies, Gibraltar and other overseas territories in order to represent their interests as the UK leaves the EU. The White Paper also covered, among other matters, immigration control, the protection of workers' rights, free trade with European markets, the securing of trade agreements with other countries, and cooperation in the fight against crime and terrorism.

6. The European Union Withdrawal Act 2018

A UK general election was held on 8 June 2017 and resulted in a hung parliament. The Conservative Party formed a minority government with the support of the Democratic Unionist Party and Theresa May MP remained Prime Minister.

The Conservative Party had launched its manifesto on 18 May 2017, which made the following commitment:

“As we leave the European Union, we will no longer be members of the single market or customs union but will seek a deep and special partnership including a free trade and customs agreement.”⁷⁷

To satisfy this commitment, the European Union (Withdrawal) Bill was introduced into the House of Commons by David Davis MP, the Brexit Secretary, on 13 July 2017 and received royal assent on 26 June 2018.

Once EU law has been converted into domestic law and the UK has left the EU, the UK Parliament will be able to pass legislation to amend, repeal or improve any piece of EU law it chooses, as will the devolved legislatures, where they have the power to do so.

The main provisions of the Act are:

- (i) Repeal of the European Communities Act 1972 ending the supremacy of EU law in the UK.
- (ii) Exit day was fixed at 11pm on 29 March 2019 (but could be amended by subordinate legislation).
- (iii) The incorporation and adoption of EU legislation onto the UK statute book by the conversion of directly applicable EU law (EU regulations) into UK law.
Preservation of all laws that have been made in the UK to implement EU obligations
The continuation of the availability in UK law of the rights in EU treaties that are relied on directly in court by an individual.
- (iv) The creation of powers to make commencement orders and other secondary legislation under statutory instrument.
- (v) Parliamentary approval of the outcome of the UK Government's negotiations with the EU under article 50 (2) TEU in terms of section 13 of the Act (the meaningful vote).

Section 1 of the Act repeals the European Communities Act 1972 (ECA).

Section 2 of the Act provides for the saving of EU-derived legislation as it has effect in domestic law on or after exit day. The authority for legislation to enact EU directives is the ECA. Section 2 of the European Union Withdrawal Act 2018, however, ensures that laws made in terms of the ECA continue to have effect.

Section 3 provides for a different approach in relation to direct EU legislation (as defined at s 3(2)). This law has effect in the UK by virtue of the UK being a member state. As there is no derivation, this law would not apply after exit day without this provision. In terms of section 3, therefore, “direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on or after exit day.”

Section 4 provides for rights etc under section 2(1) of the ECA. This means that the rights, powers, liabilities, obligations and restrictions from time to time provided for by or under the treaties continue on or after exit day. Again, as there is no derivation, these rights would not apply after exit day without this provision.

⁷⁷ The Conservative Party Manifesto May 2017-<https://www.conservatives.com/manifesto>

Section 5 (1) states that “*the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made after exit day*”.

While this would appear to be a necessary provision, section 5 (2) provides the qualification:

“Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.”

This appears to mean that, to some extent at least, the principle of the supremacy of EU law will still apply after exit day in relation to any enactment passed prior to exit day.

Section 5 (4) of the Act states that the Charter of Fundamental Rights⁷⁸ is not part of domestic law on or after exit day, although this does not affect the retention in domestic law of any fundamental rights or principles which exist irrespective of the Charter.

Section 6 deals with the interpretation of retained EU law. While domestic courts will not be bound by post exit CJEU decisions, they may have regard to it.

Also, any question of validity, meaning or effect of retained EU law must be decided in accordance with any retained case law and any retained general principles of EU law. In terms of section 6 (7), “retained case law” is defined as including both retained domestic case law and retained EU case law, which is to say, both pre-exit domestic case law that relates to retained EU law and pre-exit CJEU decisions that relate to retained EU law.

This now provides some clarity as to the domestic courts’ approach to both pre- and post-exit CJEU decisions.

Also, section 6 (4) states that the Supreme Court is not bound by any retained EU case law (pre-exit CJEU decisions that relate to retained EU law) and the High Court of Justiciary is not bound by retained EU law when sitting as a court of appeal (unless it is either a compatibility issue or a devolution issue) or sitting on a reference under s 123(1) of the Criminal Procedure (Scotland) Act 1995 (Lord Advocate’s reference).

This section is of particular relevance to Professor Rodger’s research, as outlined at Chapter 2. Particularly so given that we have seen 12 references to the CJEU and some 534 judgments by Scottish courts where EU law was considered.

The position after exit day will result in no more references to the CJEU. Also, there will be no need for either the Supreme Court or the High Court of Justiciary (except as provided for above) to apply or have regard to retained EU case law. This is the position at present as the Supreme Court is not bound by its own previous judgments. Also, no court or tribunal will be bound by any retained domestic case law that it would not otherwise be bound by.

Section 7 relates to the status of retained EU law. This provides for pre-exit day EU-related primary legislation to keep its original status.

By way of example, any delegated legislation made in terms of ECA will remain as delegated legislation.

The issue is that retained direct EU legislation can be afforded no domestic status, i.e. it cannot be either primary or secondary legislation. There is, however, a distinction between retained direct principal EU legislation at s7(2) and retained direct minor EU legislation at s7(3). Definitions are provided at s7 (6).

Section 8 of the Act deals with deficiencies arising from withdrawal. Because a lot of EU law is based on the UK being a member state, it will not apply after exit day. The powers afforded to UK ministers will allow them to amend domestic legislation, including retained EU law, to address any deficiencies which result because of Brexit. This is particularly controversial as, subject to certain exceptions, it allows UK ministers to do anything they consider appropriate by regulation that would

⁷⁸ Charter of Fundamental Rights of The European Union 2012/C 326/02 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

ordinarily be done by Act of parliament. Significant concern was expressed, not least by the devolved administrations, as to the scope of section 8, although section 8 (7) prevents the creation of regulations to, among other things, increase tax, create criminal offences or establish a public authority. Notably, it also prevents the making of regulations which would amend or repeal the Scotland Act 1998.

Section 9 of the Act provides for the implementation by regulation of the Withdrawal Agreement, subject always to the prior enactment of a statute by parliament approving the final terms of withdrawal of the UK from the EU.

Section 11 gives effect to schedule 2 of the Act, which confers powers to make regulations involving devolved authorities which correspond to the powers conferred by sections 8 and 9. This provides the devolved administrations with the power to make regulations similar to those that can be made by UK ministers under sections 8 and 9, but within the context of devolved competence, although section 11 powers can still be exercised by UK ministers “acting jointly with a devolved authority”.

Section 12 provides for the retention of EU restrictions in devolution legislation.

Section 12 (2) inserts section 30A into the Scotland Act 1998. Initial concerns regarding section 12 as drafted were expressed by the Scottish Government as it provided for an Act of a devolved legislature not being able to modify retained EU law unless the modification would have been within the legislative competence of the devolved legislature before exit day. In effect, retained EU law would be devolved by Westminster rather than passing to the devolved administrations. While the reason given for this by the UK Government was that these powers were needed until the necessary common frameworks to preserve the UK single market were operational, the argument advanced by the Scottish Government was that powers repatriated from Brussels should be devolved to them rather than Westminster.

The position is now that section 30A of the Scotland Act 1998 as inserted by section 12 provides for a presumption that an Act of the Scottish Parliament can modify EU retained law unless regulations are made by UK ministers, with the onus on them to specify what should not be modified by the devolved administrations. Also, the devolved administrations are afforded 40 days to make a “consent” decision before a draft of a statutory instrument is laid before parliament.

On the basis that – although amended, section 12 still allows the UK Government to limit devolved powers – the Scottish Parliament refused to grant legislative consent to the Bill.

The European Union Withdrawal Act 2018 has therefore provided some focus on the UK constitution and, as part of this, the devolution settlement. During the parliamentary progress of the 2018 Act, the Scottish Government introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill into the Scottish Parliament.

7. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (the Continuity Bill) was introduced on 27 February 2018 as a result of a dispute between the Scottish Government and the UK Government over the repatriation of the powers contained in the EU Withdrawal Bill.

Because the Scottish Parliament had not consented to the EU (Withdrawal) Bill, the Scottish Government was concerned that the Bill could be amended to exclude Scotland. This would have implications for the Scottish legal system and therefore there was a need for an Act of the Scottish Parliament that would ensure continuity of EU law in Scotland after exit day. The Withdrawal Bill amended the Scotland Act 1998 so that the EU (Withdrawal) Act 2018 could not be modified by the Scottish Parliament by making the EU (Withdrawal) Act protected legislation under schedule 4 of the 1998 Act.

The Continuity Bill was controversial from its introduction. For the first time since the inception of the Scottish Parliament in 1999, the Presiding Officer did not provide a statement under the Scotland Act 1998 that the Bill was within the Scottish Parliament's legislative competence. The Lord Advocate, however, stated that the Bill had been "carefully drafted so that it is not incompatible with EU law".⁷⁹

The Bill was passed on 21 March 2018, just over three weeks after it had been introduced. Following this, the UK law officers for the first time referred the question of whether the Bill was within the legislative competence of the Scottish Parliament to the UK Supreme Court.

8. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A reference by the Attorney General and the Advocate General for Scotland [2018] UKSC 64

The Supreme Court received written submissions and heard oral argument on 24 and 25 July 2018 and delivered its judgment on 13 December 2018.

The subject matter of the reference was:

"Does the Scottish parliament have power to legislate for the continuity of laws relating to devolved matters in Scotland which are now the subject of European Union (EU) law, but which will cease to have effect after the United Kingdom withdraws from the EU?"

By the time the case was heard, the EU Withdrawal Act 2018 had received royal assent, which meant that it was now an Act that could not be modified by the Scottish Parliament in terms of schedule 4 paragraph 1 of the Scotland Act 1998.

The UK Supreme Court answered the reference unanimously.

The Supreme Court rejected the UK Government's argument that the Bill related to international relations (which is a reserved matter under schedule 5 part 1 paragraph 7 the Scotland Act 1998) but held that the Bill "simply regulates the legal consequences in Scotland of the cessation of EU law as a source of domestic law relating to devolved matters, which will result from the withdrawal from the EU".

They held that the whole of the Bill would not be outwith the legislative competence of the Scottish Parliament because it does not relate to international relations. Accordingly, the UK Government challenge to the Bill fell, with the notable exception of section 17..

Section 17 –The requirement for Scottish ministers' consent to certain subordinate legislation provides for secondary legislation made by the UK Government under UK legislation and affecting retained (devolved) EU law to be of no effect unless the consent of Scottish ministers was obtained before it was made, confirmed or approved.

This has to be read with section 28(7) of the Scotland Act 1998:

"This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."

Section 28(7) of the Scotland Act 1998 was previously thought to simply be a declaration of the UK Parliament's power to make laws for Scotland. While the court held that section 17 of the Continuity Bill did not affect UK parliamentary sovereignty on the basis that this provision could be repealed by subsequent UK legislation, it did take the view that section 17 was inconsistent with section 28 (7) of the Scotland Act 1998 in that it sought to modify the future exercise of Westminster's power. The Scotland Act 1998 is a protected statute under schedule 4, paragraph 4 of the same Act. Accordingly, the Supreme Court held that section 17 of the Continuity Bill was not law.

It should be borne in mind that a distinction should be drawn between section 17 of the Bill being invalid in that it modifies the Scotland Act 1998, which is a protected statute on the one hand, and that, within legislative competence, the Scottish Parliament can still legislate to amend or repeal UK legislation within the devolved areas on the other.

⁷⁹ Introduction of the Continuity Bill: statement by the Lord Advocate 28/2/2018 - <https://www.gov.scot/publications/introduction-of-the-continuity-bill-statement-lord-advocate/>

Also, the Bill was passed on 21 March 2018, just over three weeks after having been introduced. The Supreme Court confirmed that, at that time, as it was not a reserved matter, it was mostly within the legislative competence of the Scottish Parliament. However, after the reference to the Supreme Court, the EU (Withdrawal) Bill was amended to ensure, as an Act, it came within the scope of protected enactments which cannot be modified by an Act of the Scottish Parliament under schedule 4 of the Scotland Act 1998.

The Supreme Court also highlighted the distinction between protected statutes in schedule 4 and reserved areas in schedule 5. Accordingly, the Scottish Parliament is entitled to legislate in so far as matters are not reserved in terms of schedule 5 but can also legislate in the same policy fields as Westminster in terms of the protected statutes at schedule 4 paragraph 1 so long as that Holyrood legislation is not inconsistent with Westminster legislation.

The Lord Advocate, on behalf of Scottish ministers, contended that the question of legislative competence should be determined when the Bill was passed on 21 March 2018. The Supreme Court rejected this argument on the basis that the court must have regard to how things stand at the date they decided the questions in the section 33 reference. The hearing took place once the European Union (Withdrawal) Act 2018 had received royal assent. Therefore, the schedule 4 amendment was in play.

The Lord Advocate conceded that the much of the Bill would therefore not be considered to be law as it was modifying the Withdrawal Act, which was now a protected statute under schedule 4 paragraph 1 of the Scotland Act 1998.

The court then went on to determine which provisions of the Bill were, and which were not, within legislative competence. A notable example is the court's striking out section 5 of the Bill, "General principles of EU law and Charter of Fundamental Rights", which seeks to retain the Charter as part of Scots law after exit day. This is an attempt to disapply section 5 (4) of the European Union Withdrawal Act 2018, which states that the

Charter of Fundamental Rights is not part of a domestic law on or after exit day, regarding Scotland.

It is important to note that there are certain provisions of the Bill which were held not to be outside the legislative competence of Scottish Parliament because they were not considered to be modifications of the Withdrawal Act 2018, but rather were either identical to, or supplemented by, the Withdrawal Act.

In particular, section 13 of the Bill allows Scottish ministers, subject to devolved competence, to make provision corresponding to EU law after exit day. There is no corresponding provision in the Withdrawal Act. Accordingly, Scottish ministers could decide to keep pace with EU law after exit day.

The judgment reaffirmed the legislative supremacy of the UK Parliament, notwithstanding the legislative competency of the Scottish Parliament, and also that UK legislation can be enacted in areas of devolved competence without the need for a legislative consent motion.

The position at present is that the Continuity Bill cannot receive royal assent in its current form. It is now understood that the Scottish Government will not amend the Bill. It is anticipated that new legislation will be introduced by the Scottish Government in order to enable devolved laws to keep pace with EU law.

9. The Withdrawal Agreement and the Political Declaration

Section 13 of the European Union (Withdrawal) Act 2018 provides for parliamentary approval of the Withdrawal Agreement and Political Declaration, what has become known as "the meaningful vote". The UK Government had originally planned to hold the meaningful vote on 11 December 2018. Following three days of debate, on 10 December Prime Minister Theresa May stated in the House of Commons that, on one issue, the Northern Ireland backstop, there remained widespread and deep concern and that if the vote went ahead (on 10 December), it would be rejected by a significant margin. The Prime Minister decided to defer the vote to enable time for further discussion with MPs.

The UK Government thereafter sought parliament's approval on 15 January 2019 and was defeated by a majority of 230 votes.⁸⁰

Between January and April there was a series of votes and, to date, no parliamentary majority has been secured in the House of Commons as to how to proceed.

If the UK does not ratify the Withdrawal Agreement with the EU setting out the terms of the UK's departure from the EU and the Political Declaration on the framework for their future relationship then, as provided for in terms of article 50 (2) TEU, the UK will leave the EU with no agreement and the EU treaties will no longer apply to the UK.

As a result of there being no majority in parliament to approve the terms of the Withdrawal Agreement, a formal request to the European Council was made by the Prime Minister in order to extend the two-year negotiation period under article 50.⁸¹ It is worth noting that no extension has been made to the transition or implementation period under the Withdrawal Agreement. Essentially, therefore, all "extensions" are being borrowed from the transition or implementation period, which is now 14 months on the basis that exit day is now 31 October 2019.

On 22 March 2019, an initial extension was agreed. On the basis that the Withdrawal Agreement could not be approved by parliament, then the UK would leave without an agreement on 12 April 2019. If the Withdrawal Agreement was approved, then the UK would leave the EU on 22 May 2019. Both the House of Commons and the House of Lords agreed to the statutory instrument changing exit day to 12 April in the event of no deal and 22 May in the event of a deal. On 28 March 2019, this was approved.

On 29 March 2019, the Withdrawal Agreement was voted upon again by the House of Commons, but once more there was no majority. The government lost by 344 votes to 286, a margin of 58. The UK was now scheduled to leave the EU on 12 April 2019 without a deal.⁸²

At a special European Council summit held on 10 April 2019, the UK and EU27 leaders agreed to extend the article 50 withdrawal process until 31 October 2019, although this extension can be terminated if the Withdrawal Agreement is ratified.⁸³

The Council conclusions were as follows:

"If the Withdrawal Agreement is ratified by both parties before 31 October 2019, the withdrawal will take place on the first day of the following month."

They also stated that the Withdrawal Agreement will not be renegotiated and that the "extension cannot be allowed to undermine the regular functioning of the Union and its institutions", adding that the UK committed "to act in a constructive and responsible manner throughout the extension in accordance with the duty of sincere cooperation".

The UK took part in European Parliament elections, which were held on 23 May 2019.⁸⁴

The extension has allowed further negotiations to take place between the UK Government and the opposition in order to establish a consensus.

This has not been forthcoming. At the time of writing, the UK is therefore due to leave the EU without an agreement in place on 31 October 2019.

⁸⁰ <https://www.parliament.uk/business/news/2019/parliamentary-news-2019/meaningful-vote-on-brexit-resumes-in-the-commons/>

⁸¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793058/PM_letter_to_His_Excellency_Mr_Donald_Tusk__1_.pdf

⁸² <https://www.parliament.uk/business/news/2019/march/mps-debate-and-vote-on-the-withdrawal-agreement-with-the-european-union/>

⁸³ Special European Council (Art.50), 10/04/2019 - <https://www.consilium.europa.eu/en/meetings/european-council/2019/04/10/>

⁸⁴ European elections 23-26 May 2019 http://www.europarl.europa.eu/unitedkingdom/en/european-elections/european_elections.HTML

(i) The Withdrawal Agreement

Although this paper is predicated upon the future impact and effect of Brexit on Scots law on the basis that the Withdrawal Agreement is not in place, as this supposition can at least provide some more certainty as to the impact and effect, it is however worth providing some commentary on the Withdrawal Agreement, albeit it has not yet been ratified by parliament.

On 13 November 2018, both the UK and the EU considered that decisive progress had been made in the negotiations. On 14 November 2018, the European Commission and the UK Government published the draft agreement, together with three protocols (on the border between Ireland and Northern Ireland, the UK's sovereign base in Cyprus, and Gibraltar) and nine annexes. On 25 November 2018, the negotiated text of the draft Withdrawal Agreement as well as the Political Declaration on the framework for future UK-EU relations, were endorsed by EU leaders at a specially convened European Council meeting.

The Withdrawal Agreement is an agreement between the UK and EU which governs the process of terminating the UK's membership of the EU.

The structure of the negotiated Withdrawal Agreement is:

Part 1 – Common provisions

Part 2 – Citizens' rights

Part 3 – Separation provisions

Part 4 – Transition

Part 5 – Financial provisions

Part 6 – Institutional and final provisions

Protocol on Ireland/Northern Ireland and annexes to Ireland/Northern Ireland protocol

Protocol on sovereign base areas of UK in Cyprus

Protocol on Gibraltar

Annex 1 on social security coordination

Annex II on provisions of EU law referred to in article 41 (4) (animal health)

Annex III on time limits for situations or customs procedures

Annex IV on list of networks, information systems and databases referred to in articles 50,53,99 and 100

Annex V on Euratom

Annex VI on list of administrative cooperation procedures referred to in article 128(6)

Annex VIII on rules of procedure of the joint committee and specialised committees

Annex IX rules of procedure for dispute settlement

Part 1 – Common provisions

This sets out the common clauses for the paper's understanding and operation of the Withdrawal Agreement.

Part 2 – Citizens' rights

These provisions were agreed by the UK Government and the EU in the draft agreement of March 2018.

In the draft at present, there are no substantive changes or additions, except in the provisions on the rights of nationals of Iceland, Liechtenstein, Norway and Switzerland.

Freedom of movement will continue until the end of the transition (or the implementation) and EU and UK citizens will continue to be able to move to either the UK or member states as is the position permitted by EU law at present. EU citizens living in their host state before the end of the transition will have permanent withdrawal

rights, subject to certain requirements. Under this part of the draft agreement, the UK and EU have discretion under the Withdrawal Agreement to require UK residents to apply for a new residency status.

The UK will implement a scheme requiring EU citizens to apply for a new residency status known as settled or pre-settled status.

On 19 December 2018, the UK Government published an Immigration White Paper, *The UK's future skill-based immigration system*.⁸⁵

This outlines proposals for the future border and immigration system which will follow the implementation period. The UK Government will introduce the Immigration and Social Security Coordination (EU Withdrawal) Bill to end freedom of movement, protect the status of Irish citizens once free movement ends and amend existing arrangements around the support for EU citizens entering the UK.⁸⁶

Immigration is one of the most significant areas where there has been an increased call from the Scottish Government for devolution of reserved powers in order to allow divergence from the UK to ensure that future EU citizens coming to Scotland enjoy the same freedom of movement in order to continue to live and work in Scotland.

Part 3 – Separation provisions

These provisions should ensure a smooth winding down of current arrangements and provide for an orderly withdrawal. They provide for goods placed on the market before the end of the transition to continue to their destination. Existing intellectual property rights include geographical indications (GIs).

There will be the winding down of ongoing police and judicial cooperation in criminal matters and other administrative and judicial procedures, the use of data and information exchanged before the end of the transition period, issues relative to Euratom and other matters.

With particular reference to a number of separation provisions which impact upon devolved competence, the following should be noted.

(1) Ongoing police and judicial cooperation in criminal matters

The UK participates in approximately 40 EU measures to support and enhance internal security and policing and judicial cooperation in criminal matters. The most prominent of these measures is the European Arrest Warrant (EAW).

(2) Ongoing judicial cooperation in civil and commercial matters

The UK participates in certain matters designed to facilitate judicial cooperation in civil, family and commercial matters. These concern the choice of court to be used to determine disputes, the applicable law, and the automatic recognition and enforcement of legal decisions in different member states.

(3) Agriculture

The UK Government introduced an Agriculture Bill on 12 September 2018.⁸⁷

The Bill has introduced measures for new UK agricultural support schemes. The Withdrawal Agreement disappplies EU state aid rules that continue to apply to the UK. This will allow the UK to operate agricultural support schemes during the transition period. Although existing EU Common Agricultural Policy (CAP) rules will not apply, the UK's 2020 scheme must be equivalent to CAP. Expenditure should be equivalent and expenditure on schemes during the transition period are limited to CAP spending levels.

Part 4 – Transition

The transition period is also known as the implementation period and is designed to bridge the period between the date of the UK's exit from the EU and the coming into force of yet to be negotiated future EU-UK arrangements. Transition runs until 31 December 2020. It can be extended for a period of up to two years, but a decision on extension must be taken by 1 July 2020.

⁸⁵ The UK's future skills-based immigration system - <https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system>

⁸⁶ Immigration and Social Security Co-ordination (EU Withdrawal) Bill - <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/18309.pdf>

⁸⁷ Agriculture Bill (HC 292) - https://publications.parliament.uk/pa/bills/cbill/2017-2019/0292/cbill_2017-20190292_en_1.htm

The position at present is that, while the EU Withdrawal Agreement was endorsed by EU member state leaders at a special European Council summit on 25 November 2018, it has been robustly debated in the UK Parliament and has now, along with the Political Declaration on the future UK-EU relationship, been put to the meaningful vote in terms of section 13 (1) (b) of the EU Withdrawal Act 2018 on 23 January, 12 March 2019 and 29 March 2019. At the time of writing, the House of Commons has not yet approved it and exit day is now 31 October 2019, when the UK is due to leave the EU without an agreement.

During the transition period, the UK will continue to apply EU law, with a few exceptions, notably the Fundamental Charter of Human Rights, as if it were still a member state. The UK will, however, have no institutional representation and no role in decision-making. The EU's institutions will continue to exercise their powers under EU law in relation to the UK. The CJEU will have jurisdiction in relation to the UK and to the interpretation of the Withdrawal Agreement.

Part 5 – Financial provisions

The UK and the EU set out an agreed approach to the financial settlement in December 2017. This sets out the financial commitments that will be covered, the methodology for calculating the UK's share and the payment schedule. The Withdrawal Agreement has now set this out into legal text and provides for further negotiations on the UK's contribution on the basis that there is an extension to the transition period. If there is an extension, this will not affect the financial settlement, which would continue as agreed.

Part 6 – Institutional and final provisions

This part sets out the institutional arrangements to ensure the effective management, implementation and enforcement of the agreement and includes appropriate dispute settlement mechanisms.

The UK and the EU have agreed on the direct effect and the supremacy of the Withdrawal Agreement under the same conditions as those which apply at present under EU law. The CJEU will remain the ultimate arbiter for matters relating to EU law. One of the key changes from the March 2018 draft of the Withdrawal Agreement relates to disputes regarding the Withdrawal

Agreement itself. Initially, the European Commission had proposed that the CJEU should resolve any issues which could not be resolved by a joint committee, which will have representatives from both the UK and the EU. The position set out in article 170 of the agreement is that any disputes not resolved in the joint committee will be taken to an independent arbitration panel established under article 171, which will issue a binding decision on the dispute. Where the dispute requires the interpretation of EU law, the arbitration panel will be obliged in terms of article 174 of the agreement to refer those to the CJEU for a binding interpretation of those concepts or provisions of EU law which the panel must then apply.

If compliance still cannot be achieved, the agreement allows the parties to suspend proportionately the application of the agreement itself, "with the exception of citizens' rights" or parts of other agreements between the EU and the UK. This suspension will be subject to review by the panel.

(ii) The Political Declaration

The Political Declaration is a framework document which sets out the future relationship between the UK and the EU. Unlike the Withdrawal Agreement, it is not binding, but merely considers how the UK and the EU may work together beyond the transition period in order to "*safeguard the rules-based international order, the rule of law and promotion of democracy...free and fair trade and workers' rights, consumer and environmental protection, and cooperation against internal and external threats to their values and interests.*"

The main topics of the Political Declaration are:

Part I – Initial provisions

These provisions agree that the future relationship should be "underpinned by shared values such as the respect for and safeguarding of human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation."

In particular, the UK expresses a continued commitment to respect the European Convention on Human Rights (ECHR) framework.⁸⁸

⁸⁸ Convention for the Protection of Human Rights and Fundamental Freedoms

There is also a commitment by the UK Government to make sure that transfer of personal data to the EU is facilitated to ensure a high level of personal data protection.

Part II – Economic partnership

The UK and the EU have agreed to develop *“an ambitious, wide-ranging and balanced economic partnership which should ensure no tariffs, fees, charges or quantitative restrictions across all sectors.”*

This commitment has generated significant comment from those who consider that such an economic partnership may restrict the UK Government’s ability to strike trade deals with other non-EU countries.

Part III – Security partnership

Both the UK and the EU should establish a *“broad, comprehensive and balanced security partnership and the future relationship will provide for comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters.”*

While this topic will be discussed in more detail in the next chapter, reciprocation in future arrangements remains a challenge given the present levels of mutual recognition, particularly in the field of police and criminal justice cooperation.

Part IV – Institutional and other horizontal arrangements

This sets out the basis for how the future UK/EU relationship will be set out, *“while recognising the precise legal form of this future relationship will be determined as part of formal negotiations.”*

Part V – Forward process

This sets out a two-stage process for the development of legal agreements which will give effect to the future relationship, namely *“before withdrawal”*, which obliges both parties to engage in preparatory organisational work, including the drawing up of a schedule of work programme, and *“after withdrawal”*, which obliges both parties to agree a programme including structure and format and schedule of negotiating rounds.

Negotiations in terms of the Political Declaration can only take place once the UK leaves the EU.



Chapter

5

The EU impact on Scots Law

The question of whether the UK leaves the European Union without an agreement will impact upon the future of Scots law.

In terms of article 50, a member state can only leave the EU either with or without an agreement in place. The UK Government has already made considerable preparations for leaving the EU without an agreement in place. There has, for example, been the introduction of the Fisheries Bill,⁸⁹ the Trade Bill⁹⁰ and various technical notices.⁹¹

The various departments of the European Commission have also issued notices of preparedness on how Brexit would change law and policy in their areas of work.

The European Union Withdrawal Act 2018 is predicated on the UK leaving without an agreement, in which case “retained EU law” will become UK law on exit day, but not all EU law will become retained EU law on exit day.

In particular, the following areas will not apply:

1. The Charter of Fundamental Rights – section 5 of the EU Withdrawal Act 2018
2. EU citizenship
3. Police and criminal justice cooperation
4. Civil judicial cooperation

The result of the UK Government, in its negotiations with the EU, wishing to end the jurisdiction of the Court of Justice of the European Union, has in effect meant that current instruments which require mutual recognition will not port from the EU legal order to the UK legal order.

To focus on the effect that Brexit will have on Scots law it would be helpful to define what is meant by Scots private law and Scots criminal law. In terms of the Scotland Act 1998, section 126(4) Scots private law refers to the following areas of civil law:

1. “(a) *the general principles of private law (including private international law)*
(b) *the law of persons (including natural persons, legal persons and unincorporated bodies)*
(c) *the law of obligations (including obligations arising from contract, unilateral promise, delict, unjustified enrichment and negotiorum gestio)*
(d) *the law of property (including heritable and moveable property, trusts and succession), and*
(e) *the law of actions (including jurisdiction, remedies, evidence, procedure, diligence, recognition and enforcement of court orders, limitation of actions and arbitration)”*
2. Section 126(5) provides that Scots Criminal law refers to “*criminal offences, jurisdiction, evidence, procedure and penalties and the treatment of offenders.*”⁹²

⁸⁹ Fisheries Bill (HC Bill 305) - https://publications.parliament.uk/pa/bills/cbill/2017-2019/0305/cbill_2017-20190305_en_1.htm

⁹⁰ Trade Bill (HL Bill 167) - https://publications.parliament.uk/pa/bills/lbill/2017-2019/0167/lbill_2017-20190167_en_1.htm

⁹¹ <https://www.gov.uk/government/publications/uk-governments-preparations-for-a-no-deal-scenario/uk-governments-preparations-for-a-no-deal-scenario>

⁹² Scotland Act 1998 section 126 Interpretation <http://www.legislation.gov.uk/ukpga/1998/46/section/126>

In considering these provisions in turn, it is worth looking at the intersection of each with both EU law and the law of actions at section 126(4) (e).

1. The general principles of private law (including private international law)

Family law encompasses areas of Scots private law which are captured in section 126(4) (a) (b) and (e) of the Scotland Act 1998.

With reference to substantive family law in Scotland, it is anticipated that there will be a limited impact. Historically, the EU has had little input into how family law in Scotland has developed. There is no doubt, however, that EU membership has had a significant impact on issues around jurisdiction and enforceability of judgments in cross-border cases. This has been of great importance to EU citizens as more and more cases in recent times have had a cross-border element. Furthermore, its political resonance has been acknowledged in the future framework for the relationship between the UK and the EU. The Political Declaration specifically identified this area at paragraph 58.

“58. The parties will explore options for judicial cooperation in matrimonial, parental responsibility and other related matters”.

Scotland has a long history of distinctive development in family law, with very little legislation covering both Scotland and the other jurisdictions of the UK.

Family lawyers are now accustomed to the Brussels II Regulation (EC) NO 2201/2003 (Brussels IIA)⁹³ on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. In summary, this regulation sets out:

- 1. Rules which determine which member state is responsible for dealing with matrimonial matters and parental responsibility in disputes involving more than one country**
- 2. Rules making it easier to recognise and enforce judgments issued in one EU country in another EU country**

- 3. A procedure to settle cases in which a parent abducts a child from one EU country and takes them to another EU country**

The regulation does not deal with substantive family law matters which are the responsibility of individual member states.

After exit day, Brussels IIA will cease to have effect in the UK. In falling back on domestic legislation, there are numerous Acts of both the UK and Scottish parliaments and international treaties such as the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

The UK has enacted two important EU exit statutory instruments:

(i) The Jurisdiction and Judgments (Family) (Amendment etc) EU Exit Regulations 2019⁹⁴

This will revoke Brussels IIA, one of the main EU provisions on family law, to reflect the fact that the reciprocity required for Brussels IIA to operate effectively would no longer exist in terms of paragraph 3 of these regulations.

(ii) The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same-Sex Couples) (EU Exit) (Scotland) (Amendment etc) Regulations 2019.⁹⁵

When same-sex relationships were formalised in Scotland in terms of part 3 of the Civil Partnership Act 2004 and the Marriage and Civil Partnership (Scotland) Act 2014, civil domestic provisions were made to mirror, so far as possible, Brussels IIA. The legislation amended in terms of these regulations relates to jurisdiction and recognition of judgments in matrimonial matters for both opposite and same-sex couples and for civil partners.

⁹³ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 - <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML>

⁹⁴ The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 - <http://www.legislation.gov.uk/ukSI/2019/519/made>

⁹⁵ The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 - <http://www.legislation.gov.uk/sdsi/2019/9780111040652>

It is also the intention of the Scottish Government to rely where possible on international conventions such as the Hague Convention on Divorce 1970⁹⁶ and the Hague Convention on Parental Responsibility 1996.⁹⁷

Professor Eric Clive, in his paper, Brexit and family law from May 2016, maintained that it was only in the area of jurisdiction and recognition and enforcement of judgments that the UK's decision to leave the EU would have any effect on Scots family law. Outside this restricted area, the decision to leave the EU would have an extremely limited impact.⁹⁸

Regarding the area of jurisdiction and the recognition and enforcement of judgments, the UK had been an active and influential participant. In fact, not only is this area of family law heavily influenced by EU law, but UK representatives have helped shape this law.

The Brussels IIA Regulation has been considered successful at a time when more and more people are living, working, marrying and having children in member states other than their home state. When it no longer applies, it could not simply be continued by converting it into an Act of the Scottish Parliament as its provisions are framed by reference to other member states.

Professor Clive suggests that a new Act of the Scottish Parliament on jurisdiction and judgments complying with the UK's obligations under the Hague Conventions, in particular the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, could be considered. The Brussels IIA Regulation follows very closely the 1996 Hague Convention and future Scottish legislation could therefore follow Brussels IIA closely.

⁹⁶ Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations - <https://www.hcch.net/en/instruments/conventions/full-text/?cid=80>

⁹⁷ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children - <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>

⁹⁸ Eric Clive: Brexit and family law - Scottish Legal News 13 May 2016

⁹⁹ The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 - <http://www.legislation.gov.uk/ukxi/2018/1124/made>

¹⁰⁰ Convention of 30 June 2005 on Choice of Court Agreements - <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>

In relation to recognition and enforcement, previous Hague Conventions could be relied upon, but the 1970 Hague Convention on the Recognition of Divorces and Legal Separations has not been ratified by all EU member states, notably France, Germany, Spain and Greece and operates under less stringent mechanisms than the EU rules.

Professor Clive therefore goes on to suggest that:

"It would be desirable to have negotiations on an arrangement for reciprocal recognition and enforcement with the EU with a view to replacing Brussels IIA. The prospects of a successful negotiation would be improved, if, as suggested above, our own rules on jurisdiction mirrored those in Brussels IIA."

Some consideration should also be given here to other aspects of civil judicial cooperation regarding the jurisdiction and enforcement of judgments in civil and commercial matters.

Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018⁹⁹

The Hague Convention on Choice of Court Agreements 2005 (the 2005 Hague Convention) provides rules in relation to commercial choice of court agreements for both jurisdiction and enforcement and recognition of judgments.¹⁰⁰

These regulations make provision in relation to the directly effective rights etc derived from the 2005 Convention in domestic law, both in relation to choice of court agreements that will lose the benefit of the Convention upon exit day and in relation to choice of court agreements to which the 2005 Hague Convention will once again apply now that the UK has acceded to that Convention in its own right.

This is clearly an area where the prospect of having no reciprocity, particularly so given that the UK as a member state has a prominent legal sector, will be highly problematic. The UK has been considered to be one of the leading centres by parties worldwide for the resolution of disputes, either in court or in arbitration.

The UK Government published a technical notice on 13 September 2018 which outlined the position on handling civil legal cases that involve the EU if the UK leaves the EU without an agreement.¹⁰¹

In that instance, the position would be that the existing civil judicial cooperation rules would be repealed and the domestic rules which Scotland would apply at present in relation to third countries would now apply in relation to EU countries. There would also be an application of existing international agreements, such as the Hague Conventions referred to above. Arrangements would therefore have to be made to enable the UK to participate in this Convention in its own right.

The three basic rules of the 2005 Hague Convention are:

- “1. The chosen court must in principle hear the case.*
- 2. Any court not chosen must in principle decline to hear the case.*
- 3. Any judgment rendered by the chosen court must be recognised and enforced in other contracting states, except where a ground for refusal applies.”*

The UK Government has stated in its technical notice that it would be seeking to rejoin the 2005 Hague Convention in its own right and that this will come into effect as soon as possible after exit day. Since publication of the technical notice, the UK joined the 2005 Hague Convention in its own right on 28 December 2018. This came into force on 1 April 2019.¹⁰²

It should be noted, however, that while the 2005 Hague Convention protects the validity of exclusive jurisdiction clauses, its worldwide relevance is limited in that it has only been ratified by Mexico, Singapore and the EU.

The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 are designed to ensure that the 2005 Hague Convention rules will work effectively between the existing contracting parties, which includes the EU.

The differences between the 2005 Hague Convention and Brussels IA are that:

The Hague Convention deals with international cases where there is an exclusive choice of court agreement concluded in civil or commercial matters, apart from certain well-defined matters such as consumer and employment contracts. The scope of the 2005 Hague Convention is limited to exclusive choice of court agreements, but contracting states have the possibility of extending its scope to cover non-exclusive choice of court agreements.

Brussels IA,¹⁰³ however, goes further as it regulates jurisdiction and recognition and enforcement of judgments in civil and commercial matters. It binds all the EU member states. Its provisions on jurisdiction are based on the principle that jurisdiction is usually based on the domicile of the defender. There are, however, alternative grounds of jurisdiction based on a close connection between the court and the action, such as disputes concerning land ownership where exclusive jurisdiction is held by the courts where the land is situated. Also, parties can depart from the provisions of Brussels IA by a choice of court agreement.

When consent was given to the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, it was noted by the Scottish Government Justice Secretary in his letter dated 13 September 2018 to the Scottish Parliament’s Justice Committee Convener that, without continued participation in the 2005 Hague Convention, there would “no longer be effective international agreements between Scotland and other countries” for the enforcement of choice of court agreements, which could result in “costly and time-consuming legal action”.

The Scottish Parliament’s Justice Committee agreed to recommend to the Scottish Parliament that it gives consent to the UK Parliament to pass these regulations at its meeting on 2 October 2018.¹⁰⁴

¹⁰¹ UK Government Technical notice 13/9/18 - <https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-there-is-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-there-is-no-brexit-deal>

¹⁰² <https://www.hcch.net/en/states/hcch-members/details1/?sid=75>

¹⁰³ Regulation (EU) No. 1215/2012 of the European Council and P on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>

¹⁰⁴ Minute of Meeting of the Justice Committee of the Scottish Parliament 2/10/18 https://www.parliament.scot/S5_JusticeCommittee/Minutes/Minutes20181002.pdf

2. Criminal offences, jurisdiction, evidence, procedure and penalties and treatment of offenders

The purpose of this section is to consider the impact of the UK leaving the EU on Scots criminal law as defined in the Scotland Act 1998 section 126(5) in relation to the provisions at chapters 4 and 5 of part V of the Treaty of the Functioning of the European Union TFEU.

Title V of TFEU covers the area of freedom, security and justice (AFSJ). This area contains the rules on judicial cooperation in civil justice, asylum, immigration and police and judicial cooperation in criminal matters (PJCCM).

Title V is set out as follows:

Chapter 1 – General provisions

Chapter 2 – Policies on border checks, asylum and immigration

Chapter 3 – Judicial cooperation in civil matters

Chapter 4 – Judicial cooperation in criminal matters

Chapter 5 – Police cooperation

In terms of article 10(4) of protocol 36 to the Lisbon Treaty, the UK Government had until 31 May 2014 to determine whether it wished to continue to be bound by approximately 130 police and criminal justice measures which applied before the Treaty of Lisbon came into force. The UK subsequently opted out of all pre-Lisbon instruments and simultaneously negotiated individual opt-ins to 35 pre-Lisbon instruments, including Eurojust, Europol and the European Arrest Warrant (EAW).¹⁰⁵

Prior to the Treaty of Lisbon, the UK took part in what was known as post-Maastricht “third pillar”, which was then known as justice and home affairs. The Maastricht Treaty established three pillars of the European Union, which were:

1. **First pillar** – European Community (EC), European Coal and Steel Community (ECSC), European Atomic Energy Committee (EAEC or Euratom)
2. **Second pillar** – Common foreign and security policy (CFSP)
3. **Third pillar** – Cooperation in the fields of justice and home affairs (JHA)

The first pillar was created from the three existing European communities (EEC, ECSC and Euratom), over which the EU’s supranational institutions of the European Commission, European Parliament and European Court of Justice (now CJEU) had most influence.

The second and third pillars of common foreign and security policy (CFSP) and justice and home affairs (JHA) were considered more intergovernmental, with decisions being made by committees composed of member states’ politicians and officials.

Under the third pillar, measures were adopted, but these measures did not come within the body of European Community law and had only the optional jurisdiction of the then European Court of Justice. The European Commission could not, therefore, bring enforcement action against any member state for failing to implement third pillar measures.

The Treaty of Lisbon abolished the pillar system. PJCCM measures were then grouped together creating the area of freedom, security and justice (AFSJ) referred to above, subject to CJEU jurisdiction.

These provisions provide the legal basis for the EU to adopt instruments on:

1. **Approximation of rules of substantive and procedural law.** The UK has opted out of almost all these instruments. However, a number of important directives adopted since the Lisbon Treaty defining offences relative to human trafficking and sexual abuse of children have been opted in to.
2. **Instruments of mutual recognition.** This is an area where there is significantly more engagement between member states, in particular the EAW, victim protection orders, pre-trial supervision orders (Eurobail), confiscation of assets and freezing orders, and the effect of previous sentences or other judgments so that previous convictions from one member state can be taken into account in considering sentence in another.

¹⁰⁵ HM Government - Decision pursuant to Article 10(5) of Protocol 36 TFEU - Cm 8897 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf

3. Harmonisation of criminal procedure. There are six directives covering this area. The UK has opted in to the following two directives:

(i) Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.¹⁰⁶ This has been introduced into Scots law in terms of the Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014,¹⁰⁷ which, among other things, require that interpretation assistance be provided to a person who does not speak or understand English or who has a hearing or speech impediment, when the person is in police custody, attending voluntarily at a police station or elsewhere for police questioning, or is the subject of criminal proceedings before a court.

(ii) Directive 2012/13/EU on the right to information in criminal proceedings.¹⁰⁸ This has been introduced into Scots law in terms of the Right to Information (Suspects and Accused Persons) (Scotland) (Regulations) 2014.¹⁰⁹ These regulations require, among other things, that those in police custody are provided with information about their rights, verbally or in writing, to satisfy articles 3 and 4 of the Directive. Article 3 provides for the following information:

- (a)** the right of access to a lawyer
- (b)** any entitlement to free legal advice and the conditions for obtaining such advice
- (c)** the right to be informed of the accusation
- (d)** the right to interpretation and translation, and
- (e)** the right to remain silent

Article 4 provides for a letter of rights which should contain the following information as it applies to national law:

- (a)** the right of access to materials of the case
- (b)** the right to have consular authorities and one person informed
- (c)** the right of access to urgent medical assistance, and

(d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority

The UK has not opted in to the remaining four directives.

(i) Directive 2013/48 EU on the right to a lawyer in criminal proceedings and in EAW proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.¹¹⁰ The UK Government did not opt in on the basis that it believed that a number of provisions in this proposal went substantially beyond the requirements of ECHR and would have an adverse impact on the UK's ability to effectively investigate and prosecute offences.

(ii) Directive 2016/343 EU on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings.¹¹¹ The UK Government did not believe the case had been made for EU action in this area.

(iii) Directive 2016/800EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings.¹¹² The UK Government did not believe the proposal would improve on the support and protection of young people in the UK under existing legislation.

¹⁰⁶ Directive 2010/64/EU of 20th October 2010 on the right to interpretation and translation in criminal proceedings. ¹⁰⁶ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>

¹⁰⁷ The Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014 - <http://www.legislation.gov.uk/ssi/2014/95/contents/made>

¹⁰⁸ Directive 2012/13/EU of 22nd May 2012 on the right to information in criminal proceedings. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0013>

¹⁰⁹ The Right to Information (Suspects and Accused Persons) (Scotland) (Regulations) 2014. http://www.legislation.gov.uk/ssi/2014/159/pdfs/ssi_20140159_en.pdf

¹¹⁰ Directive 2013/48 EU on the right to a lawyer in criminal proceedings and in EAW proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0048>

¹¹¹ Directive 2016/343 EU on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0343>

¹¹² Directive 2016/800EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings. ¹¹² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0800>

(iv) Directive 2016/1919 EU on legal aid for accused persons and suspects in criminal proceedings.¹¹³ The UK Government considered that rules on legal aid were most appropriately determined by member states themselves rather than at EU level.

4. Police cooperation. The UK participates in the Schengen Information System (SIS), but only in relation to law enforcement cooperation, with all member states and also with Liechtenstein, Switzerland, Norway and Iceland.

The second-generation Schengen Information System (SISII)¹¹⁴ is a European-wide IT system which helps facilitate European cooperation for law enforcement, immigration and border control purposes. The UK connected into SISII on 13 April 2015 but only participates in the law enforcement aspects as the UK maintained control of its borders.

SISII enables participating countries to share and receive law enforcement alerts in real time for:

- (i) Persons wanted for arrest for extradition purposes, for which a warrant has been issued
- (ii) Missing persons who need to be placed under police protection or in a place of safety, including minors and adults not at risk
- (iii) Witnesses, absconders, or subjects of criminal judgments to appear before the judicial authorities
- (iv) People or vehicles requiring specific checks or discreet surveillance

(v) Objects that are misappropriated, lost, stolen and which may be sought for the purposes of seizure or for use as evidence (e.g. firearms, passports etc)

The UK also participates in the Customs Information System Council Regulation (EC) No 515/97 of 13 March 1997.¹¹⁵ Its purpose was to set up a computer system centralising customs information in order to prosecute and investigate breaches of customs and agricultural legislation more effectively.

Also, the “Prum” decision (Council Decision 2008/615/JHA)¹¹⁶ on the stepping up of cross-border cooperation in combatting terrorism and cross-border crime contains rules for, among other things, “the automated transfer of DNA profiles, dactyloscopic data and certain national vehicle registration data.”

All member states are connected to the European Criminal Records Information System (ECRIS),¹¹⁷ which was established in April 2012 in order to improve the exchange of information on criminal records throughout the EU.

5. Establishment of specialised EU agencies such as Europol and Eurojust. Eurojust¹¹⁸ is a body of the EU competent to act in investigations and prosecutions relating to serious crime in at least two member states. Its role is to promote coordination between competent authorities in the member states and to facilitate the implementation of international mutual legal assistance and of extradition requests.

Europol¹¹⁹ is the EU’s law enforcement agency, headquartered in The Hague. Europol assists the 28 EU member states in their fight against serious international crime and terrorism by:

- Facilitating the exchange of information between Europol and Europol liaison officers (ELOs), who are seconded to Europol by the member states as representatives of their national law enforcement agencies. ELOs are not under the command of Europol and its director. They act in accordance with their national law.

¹¹³ Directive 2016/1919 EU on legal aid for accused persons and suspects in criminal proceedings. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L1919>

¹¹⁴ Home Office second generation Schengen Information System (SISII) General Information 13th April 2015. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/421540/SISII_General_Information_document.pdf

¹¹⁵ Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters - <https://publications.europa.eu/en/publication-detail/-/publication/d4dab0f9-0612-4b34-891b-47eba06c3771/language-en>

¹¹⁶ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008D0615>

¹¹⁷ https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecris_en

¹¹⁸ <http://eurojust.europa.eu/Pages/home.aspx>

¹¹⁹ <https://www.europol.europa.eu/>

- Providing operational analysis and support to member states' operations.
- Providing expertise and technical support for investigations and operations carried out within the EU, under the supervision and the legal responsibility of the member states.
- Generating strategic reports (e.g. threat assessments) and crime analysis on the basis of information and intelligence supplied by member states or gathered from other sources.

Europol has no executive powers, and its officials are not entitled to arrest suspects or act without prior approval from competent authorities of EU member states.

On 1 May 2017, the new Europol Regulation (EU) 2016/794,¹²⁰ which was adopted by the European Parliament on 11 May 2016, came into force, taking effect in all member states, including the UK. The regulation updates Europol's existing powers in combatting terrorism, cybercrime and other serious forms of crime.

The UK is bound by mutual recognition instruments such as the European Arrest Warrant (EAW) and the European Investigation Order. It also opted into the Directive on the European Investigation Order after the 23 June 2016 referendum in terms of the Criminal Justice (European Investigation Order) Regulations 2017.¹²¹

This suggests that Brexit will have the largest impact in relation to mutual recognition, exchange of information and participation in EU agencies as these measures require the active participation of other member states. The replacement of these existing measures may prove difficult as a matter of future negotiation between the UK and the EU.

This approach would be difficult and could take a considerable period of time, but existing Council of Europe agreements could be considered as a fallback. In particular, there is the Council of Europe Convention on Extradition 1957,¹²² which must be considered in the absence of the EAW. It is under this agreement that the UK cooperates with countries within the Council

of Europe and was the basis for extradition between member states prior to the EAW.

In Ireland, the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 was passed on 17 March 2019. Part 13 of the Act provides for amendments to the Extradition Act 1965 in the context of the application of the provisions of the Council of Europe Convention 1957¹²³ to extradition arrangements between Ireland and the UK when the provisions of the EAW no longer apply.

These agreements are not as effective as the current PJCCM measures. Article 6 1 a of the 1957 Council of Europe Extradition Convention states that "a contracting party shall have the right to refuse extradition of its nationals", which is not the case under the EAW.

This is of some considerable importance with reference to some of the cases in recent years where member states have extradited their own nationals to face trial in Scotland.

An example would be case of Slovakian national Marek Harcar, who was brought back to Scotland on an EAW to be tried for the murder of Moira Jones in a Glasgow park in 2008. Harcar was convicted of the murder of Ms. Jones and sentenced to a period of imprisonment of 25 years.¹²⁴

¹²⁰ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0794>

¹²¹ The Criminal Justice (European Investigation Order) Regulations 2017 2017 No. 730 - <http://www.legislation.gov.uk/uksi/2017/730/contents/made>

¹²² European Convention on Extradition Paris, 13.XII.1957 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117678/european-convention-extradition.pdf

¹²³ Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 - <http://www.irishstatutebook.ie/eli/2019/act/8/enacted/en/html>

¹²⁴ BBC News Website Moira Jones murder investigation 8th April 2009 - <http://news.bbc.co.uk/1/hi/scotland/7990261.stm>

In terms of member states not extraditing their own nationals, reference is made to article 16.2 of the German constitution:

*“No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or an international court, provided that the rule of law is observed”.*¹²⁵

In relation to the instruments which do not require reciprocity as referred to above, they could of course be retained, amended or repealed post-exit day as these measures will in the main fall within the legislative competence of the Scottish Parliament.

The Law Society, in its response to the House of Lords EU Home Affairs Sub-Committee’s call for written evidence for its inquiry into Brexit and the future of EU-UK security and police cooperation, highlighted the need to maintain the closest possible ties with regard to Europol and Eurojust, the Schengen Information System (SIS), the EAW and the European Investigation Order (EIO) in order to maintain consistent application of the law.¹²⁶

In this response, particular reference was made to the important differences between the EAW and the 1957 Convention:

1. The EAW is a transaction between judicial authorities where the role of the executive is removed. By contrast, applications under the 1957 Convention would have to be made via diplomatic channels with secretary of state approval being required at a number of points in the process. For example, the final surrender decision and consideration of bars to extradition.

Regarding the EAW, it is of note that the CJEU ruled on 27 May 2019 in the joined cases of C-508/18 OG (Public Prosecutor’s office of Lubeck) and C82/19 PPU PI (Public Prosecutor’s office of Zwickau) and in the case of C-509/18PF (Prosecutor General of Lithuania) that German public prosecutors are not independent when prosecuting cases and, accordingly, will no longer be permitted to issue EAWs. This could considerably increase the work of the German courts in future.

2. *The streamlined EAW framework imposes strict time limits at each stage of the process. By contrast, the 1957 Convention does not impose the same time limits.*

3. Article 6 1 a of the 1957 Convention provides that a contracting party shall have the right to refuse extradition of its nationals. The EAW abolished this exemption based on the concept of EU citizenship.

An example can be found in terms of the German constitution, which has strict limits to the extradition of its own nationals. Exemptions to this are for requests from other EU countries in terms of the EAW or to an international court.

Reference is made to article 16.2 of the German constitution above.

Additional differences are that the new bars to extradition introduced by sections 156 and 157 of the Anti-social Behaviour, Crime and Policing Act 2014, which amended the Extradition Act 2003, would not apply under the 1957 Convention.¹²⁷

These additional bars prevent extradition on the following grounds:

- (a) where there has been no prosecution decision in the requesting territory in terms of section 156 and
- (b) proportionality in terms of section 157

The implications of the UK leaving the EU for criminal justice cooperation would of course depend on the nature of future arrangements. It is worth bearing in mind that current mutual recognition instruments are predicated on freedom of movement of EU citizens and the jurisdiction of the CJEU.

¹²⁵ The Federal Government Basic Law Basic Rights Article 16 [Citizenship; extradition] - <https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510>

¹²⁶ House of Lords EU Home Affairs Sub-Committee Brexit the future of EU-UK security and police co-operation inquiry - The Law Society of Scotland’s response October 2016

¹²⁷ Anti-social Behaviour, Crime and Policing Act 2014 section 156 156 Extradition barred if no prosecution decision in requesting territory Section 157 Proportionality - <http://www.legislation.gov.uk/ukpga/2014/12/contents>

This would, accordingly, make any future model of cooperation in the case of a third-country agreement with the EU more difficult. The 1957 Convention provides for an option for all parties to refuse to extradite their own nationals and a “political offence” exception. There is also the added difficulty that both Norway and Iceland are Schengen members and the UK may not be in a position to secure a similar agreement with the EU as the UK is not part of the Schengen border-free area.

As Scotland has its own criminal justice system, there would require to be agreement regarding mutual recognition instruments between the Scottish and UK governments with a view to finalising the UK’s position. Agreement would be necessary where measures may not fall exclusively into either the devolved or reserved sphere, but touch upon both. An example of this would be the Directive 2012/13/EU Right to Information in Criminal Proceedings as implemented by the Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014 as referred to above.

While these regulations apply to Police Scotland, they do not apply to authorities carrying out reserved functions such as HM Revenue & Customs. It was for that reason that the UK Government had to issue a code of practice for HMRC criminal justice working practice for those arrested in Scotland by HMRC¹²⁸ in order to ensure that those suspects would be entitled to like information referred to in the Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014. This would therefore ensure that there is an effective application of EU law across the UK in relation to suspects’ right to information.

To mitigate these effects there is scope for:

1. A UK-EU agreement on PJCCMs.
2. Bilateral agreements on PJCCMs between the UK and individual member states.
3. A fallback on to the instruments adopted within the Council of Europe where neither of the above are possible.

But any new approach will present difficulties, as already explained, in maintaining the level of PJCCM that exists at present.

Preparations for Brexit have already had an impact regarding the EAW. The Irish Supreme Court, in the case of *Minister for Justice v O’Connor*, referred to the CJEU the question of whether Ireland should refuse to surrender an EU citizen subject to a UK EAW in circumstances where the accused would be imprisoned after exit day.¹²⁹

The Scottish Government produced a report in June 2018 outlining its position on maintaining its close relationship with the EU in relation to security, law enforcement and justice.¹³⁰

That report stated that it valued greatly the regime of criminal justice cooperation and added that, if this could not be secured, it would look to keep as many of the existing measures as possible.

The Scottish Government supported the UK Government’s aim of agreeing a deep and special partnership with the EU to ensure that current levels of security, law enforcement and criminal justice cooperation can continue.

The Political Declaration at paragraphs 82, 83 and 84 sets out the proposals for a future relationship between the UK and the EU which should provide for comprehensive, close, balanced and reciprocal law enforcement. It does, however, note that the UK will be a non-Schengen country and that there will be no free movement of persons and so the existing regime will not apply.

¹²⁸ Statutory guidance HMRC Code of Practice for EU Directive 2012/13/EU: the right to information in criminal proceedings Published 11 February 2016 - <https://www.gov.uk/government/publications/hmrc-eu-directives-code-of-practice-for-eu-directive-201213eu/hmrc-code-of-practice-for-eu-directive-201213eu-the-right-to-information-in-criminal-proceedings>

¹²⁹ *Minister for Justice -v- O’Connor*, [2018] IESC 3 (2018) - <https://ie.vlex.com/vid/minister-for-justice-v-702017777>

¹³⁰ Scottish Government, *Scotland’s place in Europe, security, judicial cooperation and law enforcement* - <https://www.gov.scot/publications/scotlands-place-europe-security-judicial-co-operation-law-enforcement/pages/5/>

3. The law of persons (including natural persons, legal persons and unincorporated bodies)

This is an area of Scots private law with little EU law interaction. However, the EU Regulation 2016/1191 on Simplifying the Requirements for Presenting Public Documents does have an impact on proof of civil status, including birth, marriage or dual partnership and death.¹³¹

This regulation came into force on 16 February 2019. Its effect is that public authorities throughout the EU will now have to accept prescribed civil status documents such as birth, death and marriage certificates without any legal formality such as the “Apostille” process where a document to be presented in another EU country would have to be translated by a certified translator, and confirmed by special confirmation issued by a member state’s foreign affairs ministry (in the case of the UK, the Foreign and Commonwealth Office). This procedure could take several days with additional costs.

The regulation helps to maintain the area of freedom, security and justice and ensures free movement of persons. The regulation ensures the free circulation of public documents within the EU and simplifies previous administrative requirements relating to the presentation in a member state of certain public documents issued by the authorities of another member state.¹³²

After UK exit, Scottish civil status documents which require to be presented in EU member states will revert to the Apostille process. The Scottish Parliament could, however, enact legislation concerning civil status documents in such form and layout as that prescribed by the regulation, even if no reciprocity is given by EU member states. There may be an EU/UK bilateral agreement in order to implement the terms of the regulation but, as freedom of movement is one of the

reasons for the regulation, and that will not apply in future, any agreement may not be forthcoming.

Equality law is another area where there is an intersection of Scots law and EU law.¹³³

In particular, section 5 (4) of the European Union Withdrawal Act 2018 states the Charter of Fundamental Rights will not apply. This is to be read with section 5 (5) of the Act, which states that the disapplication of the Charter is without prejudice to the retention in domestic law on or after exit day of any fundamental principles which exist irrespective of the Charter.

“(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day.

(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)”

As referred to above, the UK Supreme Court view was that provision to retain the Charter under section 5 of the Continuity Bill would have been within the legislative competence of the Scottish Parliament when introduced but changes to the EU (Withdrawal) Bill meant that it was now protected legislation and, accordingly, section 5 of the Continuity Bill was outwith legislative competence.

The disapplication of the Charter of Fundamental Rights has the most significant effect on equality. Title III of the Charter entitled “Equality” covers: article 20, equality before the law; article 21, non-discrimination; article 22, cultural, religious and linguistic diversity; article 23, equality between women and men; article 24, the rights of the child; article 25, the rights of the elderly; and, article 26, integration of persons with disabilities. The principal legislation in the UK is the Equality Act 2010.¹³⁴ After exit day, there would be no barrier to repeal of this legislation which, among other things, protects against unlawful discrimination in respect of age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex and sexual orientation.

¹³¹ Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1191>

¹³² Simplifying the requirements for presenting certain public documents in the European Union - Lenka Moravkova - Attorney at law Rutland and Partners - 15th October 2018

¹³³ The Impact of Brexit on Equality Law Sandra Fredman and others - Oxford Human Rights Hub - <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2017/11/The-Impact-of-Brexit-on-Equality-Rights.pdf>

¹³⁴ Equality Act 2010 - http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf

The Equality (Amendment and Revocation) (EU Exit) Regulations 2019 were introduced on 13 February 2019.¹³⁵ Scottish ministers' reasons for consenting to this statutory instrument were that the amendments are relatively small and it saves Scottish parliamentary time to make them at Westminster.¹³⁶

The Scottish Government agreed with the proposed changes to section 21(6) of the Gender Recognition Act 2004 and to section 216(4) of the Civil Partnership Act 2004 as these changes do not alter the effect of these provisions, merely substituting retained EU law for "enforceable EU right". Also, any changes to retained EU law in these areas in relation to Scotland would be for Scottish ministers, as recognition in Scotland of overseas gender recognition and of overseas civil partnerships which are devolved.

The UK's departure from the EU means that the UK will leave the European Institute for Gender Equality (EIGE).¹³⁷

The EIGE is an autonomous body of the EU which was established by the EU to strengthen the promotion of gender equality and to raise EU citizens' awareness of gender equality.

However, the Scottish Government could still cooperate with EIGE in the devolved areas.

Spouses, children

Reference is made to the comments at the general principles of private law above. It is worth considering the approaches taken by both the CJEU and the European Court of Human Rights (ECtHR) in relation to the development of same-sex couples' rights.

In the UK, marriage is devolved and, accordingly, the status of same-sex marriage is different in Scotland from the position in England and Wales and from the position in Northern Ireland.

The position in Scotland is that, while same-sex marriage is permitted in terms of the Marriage and Civil Partnership (Scotland) Act 2014,¹³⁸ unlike in England and Wales, a civil partnership in Scotland cannot be converted into a marriage.

Same-sex marriage is not recognised in Northern Ireland.¹³⁹

Same-sex marriage and its derivative rights, such as succession rights and the right to parenthood, are not universally recognised throughout the EU. At present, 14 of the 28 EU member states, including the UK, (with the exception of Northern Ireland) recognise same-sex marriage.

The Brussels IIA regulation applies in matrimonial matters and matters of parental responsibility. It was based on the assumption that each member state has its own legal framework to guarantee, among other matters, valid marriages where there are shared values. There are at present no shared values throughout the EU regarding same-sex marriage and, accordingly, the EU cannot legislate on same-sex marriage, nor can the CJEU rule on same-sex marriage recognition within the EU.

While most of the current case law regarding same-sex union in Europe focuses on the European Convention on Human Rights (ECHR) and, in particular, article 8 (right to respect for private and family life) and article 14 (prohibition of discrimination), there is no right to marry for same sex couples. In the case of *Rees v UK*¹⁴⁰ the court stated that "*the right to marry guaranteed by article 12 refers to the traditional marriage between persons of opposite biological sex*". Case law developed to such an extent that the right to marry became dependent on "social sex" as opposed to "biological sex", which allowed transsexuals to marry, as was the case in *Christine Goodwin v UK*.¹⁴¹

While neither CJEU nor ECtHR recognises the right to marry for same-sex couples, in terms of derivative rights, some consideration should be given to the case

¹³⁵ The Equality (Amendment and Revocation) (EU Exit) Regulations 2019 No.305 - <http://www.legislation.gov.uk/uksi/2019/305/contents/made>

¹³⁶ Scottish Government; letter from the Cabinet Secretary for Social Security and Older People to the Equalities and Human Rights Committee Convener dated 15th November 2018. The Equality (Amendment and Revocation) (EU Exit) Regulations 2018- Protocol with Scottish Parliament

¹³⁷ The European Institute for Gender Equality - <https://eige.europa.eu/>

¹³⁸ Marriage and Civil Partnership (Scotland) Act 2014 <http://www.legislation.gov.uk/asp/2014/5/contents/enacted>

¹³⁹ <https://www.independent.co.uk/news/uk/home-news/northern-ireland-same-sex-marriage-not-recognise-legal-belfast-high-court-lgbt-rights-gay-lesbian-a7898531.html>

¹⁴⁰ *Rees v UK* 9532/81 (1987) 9 EHRR 56 [1986] ECHR 11 <http://www.worldlii.org/eu/cases/ECHR/1986/11.html>

¹⁴¹ *Goodwin and I v UK* - <https://www.libertyhumanrights.org.uk/news/press-releases/transsexuals-win-historic-rights-ruling-european-court>

of *Relu Adrian Coman and Others v Inspectorial General Pentru Imigrari and Others*.¹⁴² In this case, Coman, a Romanian citizen, legally married Claiburn Hamilton, a US citizen, while residing in Brussels. Both wanted to move to Romania. Hamilton applied for a residence permit as spouse of an EU citizen, in accordance with Directive 2004/38/EC on the rights of citizens of the EU and their family members to move and reside freely within the territory of the member states. Hamilton was denied the residence permit by the Romanian immigration authority as he was not recognised as a spouse under Romanian law, which does not provide for either same-sex marriage or recognise a same-sex marriage entered into abroad.

The Romanian Constitutional Court requested a preliminary ruling before the CJEU to determine whether “spouse” includes a same-sex spouse from a state which is not a member state of the EU, of a citizen of the EU to whom that citizen is lawfully married in accordance with the law of a member state other than the host member state. The CJEU followed the opinion of the Advocate General in that case in holding that the concept of spouse in Directive 2004/38/EC should be interpreted to include “same-sex spouse” and that the same-sex spouse should be entitled to reside for more than three months in the member state in which his EU citizen spouse is exercising his freedom of movement.

Although member states are free to authorise, or not, marriage between persons of the same sex, they may not impede the freedom of residence of an EU citizen by refusing to grant his or her spouse of the same sex, a national of a non-EU country, a right of permanent residence in their territory.

While this case has no immediate implications as it is based primarily on freedom of movement, it brings into focus the consequences of the UK leaving the EU and falling back on ECHR where distinct standards regarding same-sex marriage are guaranteed.

Partnerships/companies

The necessary changes required to the existing company law framework are set out in the Companies, Limited Liability Partnerships (Amendment etc) (EU Exit) Regulations 2018.¹⁴³ These regulations fall into two categories:

- (i) Those that make technical and consequential changes so that the Companies Act 2006 and secondary legislation, together with other legislation such as the Insolvency Act 1986 and the Scottish Partnership (Register of People with Significant Control) Regulations 2017,¹⁴⁴ can all operate in the same way as before exit day.

and

- (ii) Those that make changes so that preference is not given to EEA countries after exit day. This is needed to ensure that the UK does not provide preferential treatment to EEA companies or EEA states as this would breach the World Trade Organization’s (WTO) most-favoured nation rules.

This area is reserved to the UK in terms of the Scottish Partnership (Register of People with Significant Control) Regulations 2017, which were introduced to extend beneficial ownership registration requirements to Scottish limited partnerships and certain Scottish general partnerships. These changes are, however, minor and technical in nature. They simply take into account the fact that the UK will not be part of the single market.

¹⁴² Case C-673/16: Request for a preliminary ruling from the Curtea Constituțională a României (Romania) lodged on 30 December 2016 — *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării* - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CN0673>

¹⁴³ The Companies, Limited Liability Partnerships (Amendment Etc.) (EU Exit) Regulations 2018 - <http://www.legislation.gov.uk/ukxi/2019/348/made>

¹⁴⁴ The Scottish Partnerships (Register of People with Significant Control) Regulations 2017 - <http://www.legislation.gov.uk/ukxi/2017/694/contents/made>

4. The law of property (including heritable and moveable property, trusts and succession)

There may be little interaction with Scots law of property and complementarity of Scots succession law and EU law, but there is an intersection in the law of trusts in the context of the Fourth Anti-Money Laundering Directive EU 2015/849¹⁴⁵ and in the area of succession in the context of the EU Succession Regulation (EU650/2012), known as Brussels IV.¹⁴⁶

Trusts

As a requirement of the EU's Fourth Anti-Money Laundering Directive, the UK Government introduced a non-public register of beneficial ownership for trusts in July 2017. This was implemented by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017).¹⁴⁷

Paragraph 45 of the regulations provides for a Register of Beneficial Ownership to be maintained by HMRC.

Trustees can register their trust online with the Trust Registration Service (TRS), a division of HMRC, and provide information on the beneficial owners of the trust. The information is only available to law enforcement bodies and the UK Financial Intelligence Unit.

All professional UK trustees are obliged to maintain accurate up-to-date records in writing of all beneficial owners of a trust, and also of any potential beneficiaries, as well as details of Scottish settlors and protectors. Trustees must provide information to HMRC on an annual basis.

As a result of the Fifth Anti-Money Laundering Directive (EU) 2018/843 (5MLD),¹⁴⁸ the register will be expanded by requiring trustees or agents of all UK and some non-EU resident express trusts to register those trusts with the TRS, whether or not the trust has incurred a UK tax consequence. It also requires the UK Government to share data from the register with a range of persons under certain circumstances.

The position to date is that the UK Government issued a consultation in April 2019 inviting views on the steps that it proposes to take to meet the UK's obligation to transpose the Directive into national law.

It is therefore anticipated that these requirements are to remain after exit day in terms of retained law.¹⁴⁹

It is worth, however, bearing in mind that there are unique aspects of Scottish trust law.

- 1 Differences in law underlying similarities in terminology (e.g. life interest, trustor, settlor).
- 2 Trustees own the assets within the trust fund.
- 3 Unlike English law, there is no concept of "beneficial ownership" in Scots law.
- 4 Beneficiaries usually only have a personal right against trustees, e.g. to claim remedy for breach of trust.
- 5 Scots trusts have a stricter time limit for accumulation of income.
- 6 Trusts are often used in succession for minor beneficiaries (age of majority is 16 in Scotland).
- 7 Separate rules on charitable trusts.
- 8 Trust law is also affected by rules on bankruptcy, land law, succession and family law.

It is, however, unlikely that these unique aspects will be affected by Brexit.

¹⁴⁵ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance) - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>

¹⁴⁶ Regulation 650/2012 of 4th July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession - <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:0134:EN:PDF>

¹⁴⁷ The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 - http://www.legislation.gov.uk/uksi/2017/692/pdfs/ukxi_20170692_en.pdf

¹⁴⁸ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance) - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018L0843>

¹⁴⁹ Transposition of the 5th Money Laundering Directive consultation: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795670/20190415_Consultation_on_the_Transposition_of_5MLD_web.pdf

Succession law

The EU Succession Regulation (EU650/2012) referred to above was introduced with the aim of unifying succession laws across the EU. It applies to deaths after 17 August 2015. While the UK, along with Ireland and Denmark, decided not to opt into this regulation, it will affect those UK citizens who may have a second home in another EU member state.

The regulation's effect is, unless expressed otherwise, that the law of the country where the deceased was habitually resident at time of death will govern the succession of the estate.

The position in Scots law is that a person who makes a will (a testator) can bequeath his or her heritable property (land and buildings) to whoever the testator wants. The position is not the same for moveable property (personal effects, money, goods) in that there is a reserved part which can be claimed by the deceased's spouse and children. Importantly, the spouse and children can claim either the reserved part or their bequest in terms of a will, but not both. This differs materially from the position in England and Wales where there is no reserved part, but the family of the deceased may make a claim in court for provision from the estate in terms of the Inheritance (Provision for Family and Dependents) Act 1975.¹⁵⁰

It is also quite different from the position in France and other EU jurisdictions where forced heirship rules apply in that the forced estate is left to next of kin and the free estate can be disposed of by a will.

By way of an example, a Scottish-domiciled individual dies in Scotland, owning a second home in France. If the UK had opted into the regulation, then Scots law would apply to the succession of the second home. French law would apply at present unless the individual previously made an election in the will that the law of the closest

jurisdiction in that individual's country of nationality, i.e. Scots law, should apply.¹⁵¹

In the example above, that may present the practical difficulty, absent the regulation, of a court in France not recognising that Scots law should apply to the succession of the holiday home in France due to "forced heirship" laws in that jurisdiction.

Despite not opting into the regulation, there are still clear consequences for those domiciled in Scotland with property abroad.

While Brexit may not be entirely relevant regarding a regulation which the UK has not opted in to, a solution to the uncertainty around which jurisdiction's law of succession should apply to property owned abroad would be to enact Scottish legislation which would have the same effect as the European Certificate of Succession. This could be done by way of provision similar to that envisaged in section 13 of the Continuity Bill to make provision corresponding to EU law after exit day. In his letter dated 5 April 2019 to the Scottish Parliament's Presiding Officer on the Continuity Bill, the Scottish Government's Cabinet Secretary for Government Business and Constitutional Relations stated that, while the Scottish Government would not move for this Bill's reconsideration, it was the Scottish Government's intention to bring back the provisions on keeping pace with EU law in new legislation.¹⁵²

On this basis, such a certificate could be applied for from the sheriff court at the same time as, or after, issue of confirmation is granted. Confirmation is the document from the sheriff court giving the executor in terms of the will the authority to uplift any money or other property belonging to a deceased person from the holder of that property and administer and distribute it.¹⁵³

The certificate could stipulate that the law of Scotland is to apply in relation to all the deceased's property, both heritable and moveable, situated outside Scotland.

The sheriff court could provide and issue a publication setting out the applicable succession law of Scotland for the benefit of those authorities in other jurisdictions seeking such a statement. The certificate could also be supported by a translation in the languages of the EU member states.

¹⁵⁰ Inheritance (Provision for Family and Dependents) Act 1975 - <https://www.legislation.gov.uk/ukpga/1975/63>

¹⁵¹ The EU Succession Regulation now in force - how will it affect you? Anna Metadger Kingsley Napley 20th August 2015

¹⁵² Scottish Government - Continuity Bill Update - <https://news.gov.scot/news/continuity-bill-update>

¹⁵³ The UK and the European Succession Regulation: Fog over the Channel - Potential Pitfalls for the Unwary James A. McLean - Edinburgh Law Review, January 2018, vo. 22, No. 1 : pp. 86-93

Heritable property

Aside from the interaction as referred to in the law of succession, the use of heritable property has an interaction with environment law and should be considered as having an impact due to Brexit. In May 2019, the Law Society responded to the Scottish Government's consultation, Principles and Governance in Scotland.¹⁵⁴

The consultation considered how effective environmental governance would be following exit day.

The Law Society, in its response, supported proposals to maintain a role for the EU environmental principles in developing future devolved environmental policy. In December 2018, the UK Government published a draft Environment (Principles and Governance) Bill in accordance with the Secretary of State's duty to do so in terms of section 16(1) of the European Union Withdrawal Act 2018.

The Scottish Government's consultation followed a recent inquiry on the draft Bill.

In terms of this consultation, the Scottish Government outlined a commitment to ensure the EU environmental principles established by the TFEU and, in particular, the four specific environmental principles in article 191(2) TFEU are "at the heart of environmental policy and law in Scotland".

Article 191(2) is:

"(European) Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing member states to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union."

The Law Society outlined in its response the different approaches that could be taken in relation to these environmental principles, stating that environmental protection could be strengthened by placing on Scottish ministers a requirement to "act in accordance" with the principles contained in article 191(2).

As a result of the loss of supranational environmental governance mechanisms when the UK leaves the EU, including the governance functions of the European Commission, CJEU jurisdiction and the European Environment Agency (EEA), there has to be proper consideration of governance (including enforcement provisions) which will replace supranational oversight.

Some consideration should therefore be given to the establishment of a new environmental body which would be to hold Scottish ministers to account.

Moveable property

Moveable property is subject to the free movement of goods within the EU. EU law promoting free movement will no longer apply.

The main provisions dealing with free movement of goods are set out at articles 28, 29 and 30 TFEU which are:

Article 28

1. *The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.*
2. *The provisions of article 30 and of chapter 3 of this title shall apply to products originating in member states and to products coming from third countries which are in free circulation in member states.*

Article 29

Products coming from a third country shall be considered to be in free circulation in a member state if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that member state, and if they have not benefited from a total or partial drawback of such duties or charges.

¹⁵⁴ The Law Society of Scotland Environmental Law Sub-Committee Response to Scottish Government Consultation Environmental Principles and Governance in Scotland May 2019 - <https://www.lawscot.org.uk/media/362627/19-05-11-env-consultation-sg-environmental-principles-and-governance.pdf>

Article 30

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between member states. This prohibition shall also apply to customs duties of a fiscal nature. “

If there is no post-exit agreement in place, then an agreement will have to be negotiated between the UK and the EU to regulate free trade between the UK and the EU. This is a political matter outwith the scope of this paper, but there has been substantial commentary on this topic which has been central to the whole debate around leaving the EU.

If no trade agreement is negotiated, then trade would operate on the basis of standard WTO rules.¹⁵⁵ The tariffs applied by each party would be those set out in the relevant schedules to the General Agreement on Tariffs and Trade (GATT). There would also be regulatory implications with the loss of mutual recognition of rules on product standards. Border controls and consequent administrative requirements would arise in the context of both trade and standards. These would operate in the same way as currently applies to imports and exports to third countries with which the EU has no additional or preferential agreements in place

5. The law of obligations (including obligations arising from contract, unilateral promise, delict, unjustified enrichment and negotiorum gestio)

There appears to be little interaction between the law of obligations in Scotland and EU law but the EU Services Directive (Directive 2006/123/EC)¹⁵⁶ sets out a framework for cross-border provision of services.

This Directive was introduced into UK law by the Provision of Services Regulations 2009.¹⁵⁷ The Directive makes it easier for businesses to provide cross-border services with other EEA countries by lowering non-tariff barriers to trade. As preparation for leaving without a Withdrawal Agreement, the UK Government introduced the Provision of Services Regulations (Amendment etc) (EU Exit) Regulations 2018¹⁵⁸ in order to address deficiencies arising as a result of no-deal withdrawal.

These regulations come into force on exit day. Their purpose is to protect UK businesses and consumer rights by maintaining obligations on UK competent authorities to ensure that their regulation of service activity is proportionate and is justified in the public interest.

When the UK leaves the EU, the Services Directive will no longer apply.

Correcting these deficiencies should ensure that the UK will meet its commitments under WTO rules, in particular, the “most-favoured nation” principle, which prevents countries from discriminating between their trading partners outside of negotiated deals.

The 2018 regulations change the scope of recipients under the Services Directive from an individual who is a national of an EEA state, or a legal person who is established in an EEA state to an individual who is a national of the UK, or a business undertaking established in the UK.

The 2018 regulations also change the definition to providers of a service from an individual who is a national of, and is established in, an EEA state, or a legal person who is established in an EEA state, to a provider of a service who is established in the UK and is either an individual who is a national of the UK or a business undertaking.

¹⁵⁵ World Trade Organization- principles of the trading system - https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

¹⁵⁶ DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0123>

¹⁵⁷ The Provision of Services Regulations 2009 - <http://www.legislation.gov.uk/ukdsi/2009/9780111486276/contents>

¹⁵⁸ The Provision of Services (Amendment etc.) (EU Exit) Regulations 2018 - <http://www.legislation.gov.uk/uksi/2018/1329/contents/made>

A “business undertaking” is identified as any entity, (whether or not a legal person) which is a body corporate, a corporation sole and a partnership or other unincorporated association, engaged in trading for profit, incorporated under the law of any part of the UK.

The reason for this change is because, as the 2009 regulations stand at present, preferential treatment would be afforded to the UK services market to EEA/EU individuals and businesses after exit day without a trade agreement in place. This would therefore put Scotland and the rest of the UK in contravention of the General Agreement on Trade in Services (GATS) under WTO rules. If this change were not made, the UK could be taken to dispute resolution action by other WTO members.

As the regulations relate to both reserved and devolved matters, even if the Scottish Government amended the law, there would have to be separate UK Government regulation in respect of the reserved areas.

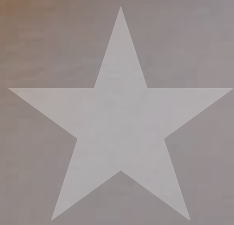
EU law has been important in the field of private law because it has supplanted Scots private international law in a number of areas and that situation will change when the UK leaves the EU.

Although parliament could always choose to enact legislation to give domestic effect to international conventions, it is only since EU membership that the content of Scots private law has been open to direct change as a result of trading obligations entered into with other member states. This has led to reform of the law relating to consumer contracts, and to a wider recognition of the principle of good faith. This has seen significant impact in areas of commercial law such as agency and in employment law (for example, in the field of equal pay claims, working time and protection of employee rights on the transfer of the employer’s business). Many of the regulations on health and safety in the workplace now derive from requirements of EU law.

In leaving the EU, the UK is no longer obliged to follow EU legal developments, but it may choose to do so by keeping pace for commercial purposes, maintenance of commercial standards and ease of access to EU markets and labour.



6



Chapter

Common frameworks

Common frameworks will be needed where is no Withdrawal Agreement or when the transition or implementation period under the Withdrawal Agreement comes to an end on 31 December 2020.

If there is no Withdrawal Agreement and the UK's membership of the EU ends on exit day on 31 October 2019, the treaties (and EU law) will not apply in the UK. The supranational legal order will deconstruct and the national legal order as envisaged by the European Union (Withdrawal) Act 2018 will require to be in place in order to maintain a functioning statute book and apply EU retained law. In these circumstances, the intergovernmental agreement as agreed by the Joint Ministerial Committee (EU negotiations) JMC(EN) in October 2017 and the terms of the European Union (Withdrawal) Act 2018 will apply.

Similar circumstances would apply on 31 December 2020 at the end of the transition or implementation period under the Withdrawal Agreement when the European Union (Withdrawal) Act 2018 will be brought into effect.

The intergovernmental agreement and common frameworks

In October 2017, the JMC(EN)¹⁵⁹ agreed that common frameworks should be established where necessary. The communique stated:

“The following principles apply to common frameworks in areas where EU law currently intersects with devolved competence. There will also be close working between the UK Government and the devolved administrations on reserved and excepted matters that impact significantly on devolved responsibilities.

Discussions will be either multilateral or bilateral between the UK Government and the devolved administrations. It will be the aim of all parties to agree where there is a need for common frameworks and the content of them.

The outcomes from these discussions on common frameworks will be without prejudice to the UK's negotiations and future relationship with the EU.

Principles

Common frameworks will be established where they are necessary in order to:

- *enable the functioning of the UK internal market, while acknowledging policy divergence;*
- *ensure compliance with international obligations;*
- *ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;*
- *enable the management of common resources;*
- *administer and provide access to justice in cases with a cross-border element;*
- *safeguard the security of the UK.”*

¹⁵⁹ JOINT MINISTERIAL COMMITTEE (EU NEGOTIATIONS) COMMUNIQUE 16 October 2017 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

The intergovernmental agreement and the memorandum agreed by the JMC(EN) require to take into account also the White Paper on Legislating for the Withdrawal Agreement between the United Kingdom and the European Union (Cm 9674) (paragraph 67)¹⁶⁰ and also the White Paper on the Future Relationship between the United Kingdom and the European Union (Cm 9593) (paragraph 56),¹⁶¹ whilst at the same time recognising the recommendations of the Public Administration and Constitutional Affairs Committee's report, *Devolution and Exiting the EU: Reconciling Differences and Building Strong Relationships* (HC1485).¹⁶²

The agreement and the memorandum require to be amended to take account of the changes which were made to the European Union Withdrawal Bill as it progressed through parliament to become The European Union (Withdrawal) Act 2018. For example, references to clauses 7, 8 and 9 should now read as references to sections 8 and 9 and references to clause 11 should be now be references to section 12. Section 12 of the Act inserted into the Scotland Act 1998 a new section 30A entitled, Legislative Competence: Restriction, relating to retained EU Law. Section 30A provides that:

"...an Act of the Scottish Parliament cannot modify or confer power by subordinate legislation to modify retained EU law so far as the modification is of a description specified in regulations by a minister of the Crown."

The power to lay regulations is covered by subsection (30A)(3), which states that "a minister of the Crown must not lay for approval before each House of the Parliament of the United Kingdom a draft of a statutory instrument containing regulations under this section unless:

"(a) The Scottish Parliament has made a consent decision in relation to the laying of the draft or
(b) The forty-day period has ended without the parliament having made such a decision".

A consent decision is defined as:

"(a) A decision to agree a motion consenting to the laying of the draft
(b) A decision not to agree to a motion consenting to the laying of the draft or
(c) A decision to agree a motion refusing to consent to the laying of the draft".

It is notable that no regulation may be laid under the new section 30A after the end of the period of two years beginning with exit day. This has been described as a "sunset clause" but that is not truly accurate. A true sunset clause would require the repeal of the provision rather than simply a provision that no regulations were to be made.

Common frameworks applications

In March 2018, the UK Government published the first edition of the common frameworks analysis, which set out 153 areas where EU law intersected with devolved competence, including 24 areas where legislation may be needed in whole or in part, 82 areas where non-legislative frameworks may be required and 49 areas where no further action was identified.¹⁶³

The UK Government has presented two reports on common frameworks to parliament.

These confirm that the UK Government has not brought forward regulations under the EU (Withdrawal) Act 2018 to "freeze" devolved competence in these policy areas, and the commitment by the Scottish and Welsh Governments not to pursue policy divergence where it is

¹⁶⁰ DEXEU- legislating for the Withdrawal Agreement between the UK and the EU Legislating https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawal_agreement_FINAL_230718_v3a_WEB_PM.pdf

¹⁶¹ White Paper on the Future Relationship between the United Kingdom and the European Union (Cm 9593) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

¹⁶² Devolution and Exiting the EU: reconciling differences and building strong relationships <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/148502.htm>

¹⁶³ FRAMEWORKS ANALYSIS: BREAKDOWN OF AREAS OF EU LAW THAT INTERSECT WITH DEVOLVED COMPETENCE IN SCOTLAND, WALES AND NORTHERN IRELAND - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL_Frameworks_analysis_for_publication_on_9_March_2018.pdf

agreed frameworks are necessary or while discussions are ongoing. The UK and devolved administrations maintain this reciprocal arrangement.

The April 2019 edition of the common frameworks analysis provides information about the risk analysis and categorisation of policy areas in this area of work. It remains part of an ongoing dialogue that will continue to change and develop as work continues.¹⁶⁴

The analysis amends the earlier edition in a number of ways. Each category provides a clearer idea of the way in which frameworks will be implemented. It acknowledges the need for cooperation in areas where no further action to create a common framework is required, and the relevance of the amended retained EU law framework, to areas where otherwise only non-legislative framework arrangements are required.

There has been an increase in the number of policy areas within the analysis from 153 to 160 and some change in the number of policy areas in each category. There are now four policy areas that the UK Government believes are reserved but remain subject to ongoing discussion with the devolved administrations; the other areas listed in this category in the initial analysis have been resolved.

Underpinning these changes is a discussion between the UK, Scottish and Welsh governments and the Northern Ireland Civil Service of the relevant policy issues and agreement that new arrangements should be implemented according to the needs of the particular area. At this stage, primary legislation is only likely to be required in a small number of policy areas and in these areas only some elements of the framework will be implemented in primary legislation. In some instances, this will be accompanied by substantive non-legislative arrangements articulating agreed ways of working between the administrations. In the majority of areas, non-legislative arrangements, such as a concordat, are being considered and it is envisaged that the fixes to EU law, being put in place under the EU (Withdrawal) Act 2018, may provide the basis for interim or longer-term framework arrangements, depending on the outcome of negotiations with the EU.

The analysis sets out the UK Government's assessment of areas of EU law that intersect with devolved competence in each devolved administration. The analysis makes clear that as the devolution settlements are asymmetrical, a different range of powers is relevant to Scotland, Wales and Northern Ireland. The policy areas in question are broken down as follows:

- 63 policy areas where no further action is required
- 78 policy areas where non-legislative common frameworks may be required
- four policy areas which the UK Government believes that they are reserved, and
- 21 policy areas that are subject to more detailed discussion to explore whether legislative common framework arrangements may be needed, in whole or in part

Those 21 areas are:

- Agricultural support
- Agriculture- fertiliser regulations
- Agriculture – GMO marketing and cultivation
- Agriculture – organic farming
- Agriculture – zotech
- Animal health and traceability
- Animal welfare
- Chemicals
- Chemicals regulation, including pesticides
- Elements of reciprocal healthcare
- Environmental quality – ozone depleting substances and F-gases
- Environmental quality – pesticides
- Environmental quality – waste packaging and product regulations
- Fisheries management and support
- Food and feed safety and hygiene law and the controls that verify compliance with food and feed law (official controls)
- Food compositional standards
- Food labelling
- Implementation of EU emissions trading system
- Mutual recognition of professional qualifications (MRPQ)
- Plant health, seeds and propagating material
- Services Directive

¹⁶⁴ Revised Frameworks Analysis: April 2019 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

The 21 areas are important, complex and technical in nature. They comprise highly regulated areas of policy implemented by EU directives, regulations and decisions and are transposed by UK Acts and subordinate legislation, Scottish Acts and Scottish subordinate legislation, as well as a number of administrative and non-statutory arrangements.

Scottish ministers have made subordinate legislation in most of the areas, which has been approved by the Scottish Parliament.

UK ministers have also made subordinate legislation with the consent of Scottish ministers in areas which have been subject to a transfer of powers order. These have tended to be in areas of policy where there is a clear interest in a pan-UK legal structure, e.g. organic products or greenhouse gas emissions.

As would be expected, when implementing EU law there are a number of occasions where parallel regulations have been passed by each legislature in exactly the same terms.

There are also occasions where guidance or other administrative arrangements have been issued by the Scottish Government following consultation with the UK Department, e.g. the Animal Health and Welfare Framework.

The need for a new governance agreement

The Scottish Parliament Information Centre (SPICe) paper, *Common UK Frameworks after Brexit* (2 February 2018 SB 18-09), noted that: *“The 1999 devolution settlements were designed on the principle of a binary division of power between what was reserved and what was devolved. This model had advantages in terms of clear accountability, but it meant the UK did not have to develop a culture of or institutions for ‘shared rule’ between central and devolved levels. The UK membership of the EU further contributed to the weakness of intergovernmental working, since many policy issues with a cross-border component (including environmental protection, fisheries management, and market-distorting state aid) were addressed on an EU-wide basis.”*¹⁶⁵

The SPICe paper also noted that “when more decisions are taken through intergovernmental forums, as in some federal systems, accountability and parliamentary scrutiny can suffer. The creation of common frameworks signals a move away from a binary division of power towards more extensive joint working between UK and devolved governments. This therefore increases the importance of ensuring that intergovernmental bodies are transparent and accountable.”

New structures could include “new JMC-type committees in areas where common frameworks are created” and sub-committee structures. Proposals for statutory arrangements for common frameworks were debated during the passage of the European Union (Withdrawal) Act 2018, which included arrangements for determining what powers will be devolved or reserved in the event of the governments being unable to agree where the powers should lie. It would be useful for the governments to revisit those amendments as a way to inform discussions on the frameworks.

Not only is there a need for more systematic intergovernmental dialogue but also for increased inter-parliamentary contact. Parliamentary scrutiny (in all the legislatures in the UK) of the activities of the JMC and any frameworks which are created, in whatever form they take, will be essential if the actions of all the governments throughout the UK are to be fully accountable.

Recommendation 25 of the UK Parliament’s Public Administration and Constitutional Affairs Committee report referred to above may indicate a way forward.

“The absence of formal and effective intergovernmental relations mechanisms has been the missing part of the devolution settlement ever since devolution was established in 1998. The process of the UK leaving the EU has provided the opportunity for the government to rethink and redesign intergovernmental relations in order to put them on a better footing. Once the UK has left the EU, and UK common frameworks are established, the present lack of intergovernmental institutions for the underpinning of trusting relationships and consent will no longer be sustainable.

¹⁶⁵ SPICe Briefing - Common frameworks after Brexit - Akash Paun - 2nd February 2019 - <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2018/2/2/Common-UK-Frameworks-after-Brexit/SB%2018-09.pdf>

We recommend that the government take the opportunity provided by Brexit to seek to develop, in conjunction with the devolved administrations, a new system of intergovernmental machinery and ensure it is given a statutory footing. Doing this will make clear that intergovernmental relations are as important a part of the devolution settlement as the powers held by the devolved institutions. (Paragraph 132).¹⁶⁶

The interaction between frameworks and the negotiation of new international agreements including free trade agreements

One of the principles agreed at the JMC(EN) in October was that there should be a framework to ensure the UK can negotiate, enter into and implement new trade agreements and international treaties. Trade agreements can be used to affect a wide range of changes in the relationship between states and regions. In many such agreements, provisions are a means to promote or reinforce the application of the rule of law. Trade negotiations should take into consideration the need to ensure protection for human rights minimum standards or norms and respect for the rule of law, the interests of justice and access to justice.

Other aspects of the legal framework play a similarly important role in facilitating trade. This extends, for example, to continuing protection of intellectual property rights, promotion of competition and facilitating flows of data.

In the context of negotiations for a new relationship with the EU, it is important that every effort is made to continue cooperation in terms of mutual recognition and enforcement of judgments, which are so important in allowing citizens and businesses to resolve disputes. Enabling access to justice gives businesses greater confidence in their commercial relationships and is important in underpinning continued trade between the UK and remaining EU countries post-withdrawal.

Furthermore, the future relationship agreement must make provision for dispute resolution between the UK and EU. In relation to interpretation and enforcement, future free trade agreements will similarly need such provision.

A coordinated and holistic approach to trade promotion is of fundamental importance, both within and across economic sectors to maximise opportunities, for example, the suite of professional business and advisory services, including legal services, which support investment. This comprehensive approach should also highlight broader benefits of doing business in Scotland, incorporating the availability of talent and cultural factors, such as quality of life.

As set out in the Law Society's response to the consultation, *Preparing for Our Future UK Trade Policy*,¹⁶⁷ we believe that a whole of governance approach should be taken when considering trade negotiations. In the context of devolved competences, this is particularly relevant where international agreements would bind domestic legislatures to effect changes to domestic law. This is specifically recognised in paragraph D1.4 of the Concordat on International Relations, which states:

"The UK Government recognises that the devolved administrations will have an interest in international policy-making in relation to devolved matters and also in obligations touching on devolved matters that the UK may agree as a result of concluding international agreements (including UN conventions)."

and paragraph D1.5 which states:

"The parties to this Concordat recognise that the conduct of international relations is likely to have implications for the devolved responsibilities of Scottish ministers and that the exercise of these responsibilities is likely to have implications for international relations. This Concordat therefore reflects a mutual determination to ensure that there is close cooperation in these areas between the United Kingdom Government and the Scottish ministers with the objective of promoting the overseas interests of the United Kingdom and all its constituent parts."

¹⁶⁶ https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/148513.htm#_idTextAnchor083

¹⁶⁷ The Law Society of Scotland Consultation response :preparing for our future UK trade policy ;November 2017 https://www.lawscot.org.uk/media/359078/lss-response-to-dit-preparing-for-future-uk-trade-policy_november-2017.pdf

There is a lack of clarity in the Trade Bill as to how the devolved administrations might be involved in trade negotiations. The devolved legislatures and administrations have not played a formal role in negotiating international trade treaties (see the Scotland Act 1998 schedule 5, paragraph 7). However, since the EU first took over responsibility for trade negotiations, there have been constitutional developments within the UK with the creation of the devolved legislatures and administrations – including the Scottish Parliament – and subsequent further devolution of powers to them. Determining the UK’s position across a raft of sectors encompassing products and services, which may be provided from anywhere in the UK, needs a holistic approach.

There will have to be procedures in place for negotiation of international trade agreements and consideration as to how these might best be modernised to take account of changes in the UK’s political landscape, particularly those brought about by devolution and also in recognition of the increased public interest in, and engagement with, trade negotiations in recent years.

In order to create a comprehensive and inclusive trade policy, conduct negotiations and implement trade agreements, it would helpful were the UK Government to engage with the devolved administrations and legislatures. The Law Society responded to the House of Commons International Trade Committee’s UK Trade Policy Transparency and Scrutiny inquiry.¹⁶⁸ We set out a range of options for involvement of the devolved administrations as follows:

- Requiring the consent of the devolved administrations to any UK negotiated trade position.
- Normally requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent.
- Having a procedural structure for the devolved administrations’ involvement similar to that in the European Union Withdrawal Act 2018 for “common frameworks” (i.e. formal consent by the devolved administrations would not be required but a procedure would be set out to ensure involvement in the process).

and

- As a minimum, and without requiring the consent of the devolved legislatures, allowing the devolved legislatures and administrations access to documents, policies etc, and allowing them to have a scrutiny and comment role (as noted above).
- With some of the above, consideration would need to be given to whether the rules should be set down in statute, convention, or a revised memorandum of understanding. For instance, where terms such as “normally” are being used to describe what would be expected in the relationship between parties, such provision should probably best not be stated in statute, due to the lack of precision.

Where the subject of negotiations relates to devolved matters, it should be expected that the UK Government would seek the involvement of devolved administrations in negotiations. Consideration should be given to whether the UK Government should be required to seek more than just the involvement of the devolved administrations in such negotiations but also seek their consent to the position of the UK Government during such negotiations where they relate to devolved matters. This will be important where trade agreements impact on devolved matters and implementing legislation may be carried out by the devolved administrations or engage the legislative consent convention.

¹⁶⁸ Law Society of Scotland Consultation response UK Trade Policy Transparency and Scrutiny Inquiry June 2018 - <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf>

Accordingly, rather than seek to engage with devolved administrations on an ad hoc basis, to enable the smoothest possible design and operation of trade policy (and to minimise uncertainty for industry and trade partners), it would be advisable for formal structures to be established to facilitate trade-related collaboration across all the administrations, e.g. to tie in with the “common frameworks” to be agreed as a result of repatriation of EU powers. Such structures may provide, for example, for devolved participation in the design of trade mandates and in the conduct of negotiations in respect of devolved areas, thereby ensuring devolved buy-in to trade agreement implementation and minimising risks to UK-wide implementation of trade agreements.

Insofar as trade negotiations relate to devolved areas, one option would be to make UK ratification of any agreements (or relevant sections thereof) provisional on devolved administration consent (which may in turn require devolved legislative consent). This is similar to the approach taken at EU level in relation to ratification of mixed agreements.

The House of Commons Scottish Affairs Select Committee reported on the relationship between the UK and Scottish Governments on 7 June 2019.¹⁶⁹ Regarding common frameworks, recommendation 73 of that report stated:

“We believe that common frameworks must be agreed through co-decision and by consensus and that disagreements over common frameworks are less likely to arise if a culture of cooperation and trust between the two governments is developed. However, should disagreements arise, we believe recourse to a reformed dispute resolution process of the type we have recommended would help reduce the risk of common frameworks being imposed. “

Since the decision of the UK to leave the EU and the legal arrangements which will be required as a result of that decision, there has been some contention between the UK Government and the devolved administrations. In particular, the respective stances of both the UK Government and the Scottish Government have resulted in a review of the relationship between those governments.

Parliamentary inquiries in both the UK and Scottish Parliaments have made a number of recommendations with a view to improving that relationship.

¹⁶⁹ Scottish Affairs Committee: The relationship between the UK and the Scottish Governments Eighth Report of Session 2017-19 - <https://publications.parliament.uk/pa/cm201719/cmselect/cmsscotaf/1586/1586.pdf>



Chapter

7

Teaching EU Law in law schools post-Brexit

At present, the Law Society accredits ten Scottish universities to offer the LLB and continues to require EU law as an outcome of the LLB.

The question arises as to whether the Law Society continues to require EU law as a mandatory topic as a result of Brexit.

This is because EU law will no longer be part of Scots law and the Scottish courts will no longer be bound to follow it.

However, after exit day, and as the change to the Scottish legal system becomes more apparent, retained EU law will require to be taught in Scottish law schools as this will form part of Scots law. It is anticipated that a greater emphasis on comparative law will be required as EU law develops separately.

Retained EU law is new source of UK domestic law. It contains all EU law (and UK domestic law that implements it) which the UK Government wishes to keep as a starting point once the UK has left the EU.

In terms of the European Union (Withdrawal) Act 2018, retained EU law is subdivided into the categories of EU-derived domestic legislation, direct EU legislation and preserved rights and obligations that have effect due to EC as provided for in the European Union (Withdrawal) Act 2018

Whether the Scottish Parliament chooses in future to enact legislation that either converges or diverges with the European legal order remains to be seen but will of course have an effect on the teaching of law in Scottish law schools.

While the Scottish Government has now expressed an intention to keep pace with EU law after exit day, there will undoubtedly be an increased focus in the areas of both private international law and public international law.

Private international law

Reference is made to the comments on private international law at Chapter 5 above. In the absence of any bilateral agreements to be negotiated between the UK and the EU, there will be an increase in the need for a greater understanding of how Scots private international law operates once the UK has left the EU and of the various Hague Conventions which will now have to be taken into account.

This brings into focus the question as to whether private international law will become obligatory post-Brexit rather than keeping EU law as a mandatory topic.

Public international law

The UK's decision to leave the EU has also brought an unprecedented focus on public international law. For example, in international trade there will have to be a greater understanding of standard World Trade Organization rules as referred to above which would have to be relied upon. In the field of criminal justice and security, consideration would have to be given to greater study of the existing Council of Europe treaties, such as the 1957 European Convention on Extradition.

In 2018, the Law Society convened a series of roundtables as part of an evidence-gathering exercise to help review the current requirements of the LLB, Diploma in Professional Legal Practice and traineeship to ensure that the outcomes are delivering the appropriate skills for the solicitors of the future.

On 13 June 2018, a roundtable was held on EU law. This was very much against the background of the uncertainty around Brexit and how that would affect future law students.

While it was recognised that an emphasis on understanding EU law as a comparative source of law would be important as UK citizens will still marry EU citizens, buy property in the EU and form cross-border businesses, there was a general consensus that there should continue to be an international element to the route to qualification as a solicitor in Scotland and that combining international private law and trade law alongside EU law may be an extremely useful grounding for Scottish law students, as basic sources and treaty law are considered fundamental.

In her paper *Scottish legal education after Brexit* of February 2019, Dr. Sylvie Da Lomba of Strathclyde University's School of Law notes that since this roundtable "little has changed to enable further reflection on the precise nature of the post-Brexit/post-transition period LLB curriculum" and that "we simply acknowledge that a likely shift will be towards international public and private law subjects as the UK's future relations with the EU will form part of traditional treaty law and as the UK falls back on existing international law instruments and frameworks and fosters new ties with non-EU states. We suggest that a more widespread study of private and public international law and comparative law may be a desirable, if unintended, consequence of Brexit".¹⁷⁰

The Law Society ran a consultation earlier in 2019 focusing on various elements of the route to qualification. One such area was the position of EU law. The outcome of this consultation will be published in summer 2019.

¹⁷⁰ Scottish legal education after Brexit – Sylvia da Lomba, Maria Fletcher and Rebecca Zahn - *The Law Teacher* volume 53 2019 - <https://www.tandfonline.com/doi/full/10.1080/03069400.2019.1572269>



Chapter

8

Conclusions

The UK's departure from the EU will herald a profound change to Scots law as a result of the transition of EU law into domestic UK and Scots law and also to the future relationship that the UK has with the EU, which is outlined at present in terms of the Political Declaration.

The whole legal implications of Brexit cannot yet safely be predicted and, at the time of writing, a political consensus on the manner of the UK's departure has yet to crystallise.

On the basis that there is no agreement then the effect on Scots law will be more immediate. The UK is due to leave the EU by no later than 31 October 2019. In the event of "no deal", the treaties cease to apply and we then have to consider trading with other member states on WTO rules. Also, the whole body of EU law becomes part of UK law in terms of the EU Withdrawal Act 2018, together with the whole body of secondary legislation that has been promulgated. There will, however, still be an opportunity for the UK to agree separate treaties with the EU as part of its future relationship.

However, on the basis that agreement is reached, there will be no immediate change at all to Scots law as the agreement determines that EU law will apply to the UK during the transition period, which will be until December 31 2020.

In any event, the eventual loss of a supranational legislature, and one upon which the devolution settlement was predicated, will have a profound effect upon every aspect of our legal system, including how it is to be taught in our universities, how it will affect the devolved competence of the Scottish Government and

the legislative competence of the Scottish Parliament and how it will be interpreted and adjudicated upon in the Scottish courts, which will of course very much depend on the terms upon which the UK leaves the EU and its future relationship with the EU. It also depends very much upon the constitutional future of the UK as the Scottish Government has now called for a second referendum on independence to take place in the second half of 2020.

In conclusion, it is worth considering the effect that the UK's decision to leave the EU may have upon the separate institutions of the Scottish legal system.

1. The Scottish Government

With the loss of supranational governance from the EU, the work of the Scottish Government will increase as a result of the UK's decision to leave the EU. While there has already been a stated intention in terms of the letter from the Scottish Government's Cabinet Secretary for Constitutional Relations to the Scottish Parliament's Presiding Officer to keep pace with EU law in new legislation, the implications of meeting this intention could be considerable. There will be the power to introduce legislation on all aspects of retained EU law which is within devolved competence. The Cabinet Secretary's letter notes that, while Scottish ministers have "reluctantly" decided not to move for reconsideration of the Continuity Bill, the Scottish

Government will instead ensure the choices made by the Scottish Parliament are respected by:

- bringing forward new legislation to ensure Scots law continues to align with EU law
- strengthening environmental protection, including seeking opportunities to legislate
- looking at how best to safeguard EU human rights values
- agreeing new protocols with the Scottish Parliament, which are now in place, to give MSPs more scrutiny over Brexit

One concern that Scottish Government will have after exit day is that there will be no opportunity to develop policy in Europe. At present, there exists such an opportunity for Scottish influence over EU policy-making by way of the Joint Ministerial Committee and other networks. There is also a Scottish Government presence in Brussels. The position will change after exit day as EU policy becomes foreign policy reserved to Westminster, in which all the devolved administrations will have no part to play. This focuses on how the Scottish Government in future will influence the UK's international negotiations in areas of trade, the environment and human rights.¹⁷¹

Reference is made to the Law Society's response to the consultation, *Preparing for our Future UK Trade Policy*, where we stated that a whole of governance approach has to be taken regarding trade negotiations.

On 28 May 2019, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, introduced the Referendums (Scotland) Bill into the Scottish Parliament. The Bill provides a legal framework for the holding of referendums on matters that are within the competence of the Scottish Parliament.

The introduction of the Bill was accompanied by a statement from the First Minister, Nicola Sturgeon to the effect that a second referendum on Scotland's independence should take place by May 2021.

To do so would require another order in terms of section 30 of the Scotland Act 1998 and would accordingly be a matter for the UK Government.

While it remains to be seen as to whether this Bill is passed by the Scottish Parliament and whether a section 30 order is made to allow a second referendum on Scottish independence to take place, the UK's decision to leave the EU will have an effect on the Scottish Government's legislative programme in future.

2. The Scottish Parliament

The work of the Scottish Parliament will change as a result of the UK's decision to leave the EU. Its shape and competence will no doubt be far removed from that envisaged at its inception in 1999.

While having to scrutinise more legislation, both primary and secondary, as former EU competences return to the UK and are within the Scottish Parliament's legislative competence, it will also have to ensure that it legislates to conform to the common frameworks which will take the place of the existing EU frameworks which intersect with devolved competence.

As the UK negotiates new international agreements in areas such as civil jurisdiction, justice, security and trade deals, the Scottish Parliament will require to scrutinise such agreements and deals insofar as they would oblige it to change the law in Scotland.

The number of MSPs returned to the Scottish Parliament may have to increase from 129 members in order to consider the anticipated increase in legislative scrutiny. The allocation of work in terms of its existing committee structure would also have to be reconfigured.

The Scottish Parliament may in future be required to debate policies made in Whitehall and law made in Westminster in areas of international law and trade etc, where the UK wishes either to keep pace with or differentiate from the EU and the subsequent impact that this would have on devolved matters.

¹⁷¹ Scotland in Europe Future prospects Michael Keating Centre for Constitutional Change: Scottish Centre on European Relations Report The Future of Europe Disruption Continuity and Change 6th May 2019 - <https://www.scer.scot/database/ident-10675>

3. The Scottish Courts and Tribunals Service

The loss of the jurisdiction of the CJEU will no doubt be the single biggest change to the courts in Scotland as a result of Brexit. There will be no more references to the CJEU and, while the courts or tribunals may have regard to CJEU decisions, they will not be bound by any principles laid down or any decisions made after exit day.

However, as a result of the loss of CJEU jurisdiction, the scope of the domestic courts will no doubt increase as they determine points of law that were previously referred.

In terms of section 6 of the European Union (Withdrawal) Act 2018, the domestic courts will not be bound by post-exit CJEU decisions but may have regard to them.

There will be no more preliminary references to the CJEU. This is of particular interest given that Professor Rodger's research referred to at Chapter 2 above considered the impact that the CJEU had on Scots law. And, in particular, the 534 Scottish civil court judgments between 1973 and 2015 where EU law was considered and also the 12 CJEU rulings in Scottish preliminary references to the CJEU, the last of which, for the purposes of his research, being the Scotch Whisky Association minimum unit pricing case on 23 December 2015. Since then, the Wightman case referred to at Chapter 3 above has been considered by the CJEU.

The Scottish courts will be affected by cross-border disputes with EU member states regarding choice of law, choice of court and choice of jurisdiction. Particular reference is made to the loss of Brussels IA, which regulates jurisdiction, recognition and enforcement of judgments in civil and commercial matters, and Brussels IIA, which will affect jurisdiction, recognition and enforcement of judgments in matrimonial and parental responsibility matters.

In private international law, the position regarding jurisdiction should differ from that of the courts in England and Wales and in Northern Ireland. In Scotland, the fallback position where there is no agreement is set out in schedule 8 to the Civil Jurisdiction and Judgments Act 1982,¹⁷² which is applied in cases where the Brussels regime rules do not apply. The general rules on jurisdiction here are more closely aligned to the Brussels regime in that, subject to exception, persons are sued in the place where they are domiciled. This differs from the rest of the UK, where jurisdiction can be founded on residence.

Also, in the field of police and judicial cooperation in criminal matters (PJCCM), the jurisdiction of the Scottish courts will change with a return to Council of Europe instruments unless agreement is reached with the EU or bilateral agreements are entered into with individual member states.

4. The Scottish legal profession

Finally, the provision of legal services will be affected by the UK's decision to leave the EU.

At present, UK lawyers enjoy their practice rights under:

- Directive 77/249/EEC, the Lawyers' Services Directive, which allows a lawyer who is qualified in one EU member state the right to provide legal services under the home state title throughout the territory of the EU outside the home state.¹⁷³
- Directive 98/5/EC, the Lawyers' Establishment Directive, which allows a lawyer who is qualified in one EU member state (and who is an EU national) to practise on a permanent basis in another member state under their home professional title.¹⁷⁴
- Directive 2005/36/EC, the Mutual Recognition of Professional Qualifications Directive, which provides the right to acquire the professional title of another member state and to practise under the same conditions as that state's nationals, on the basis of mutual recognition of academic and vocational¹⁷⁵ qualifications. In conjunction with the Lawyers' Establishment Directive, this includes the right to acquire the host state title by integration in the local profession following three years' establishment in that state under the home state title.

¹⁷² Schedule 8 paragraph 1 of the Civil Jurisdiction and Judgments Act 1982 Rules to Jurisdiction in Scotland - <https://www.legislation.gov.uk/ukpga/1982/27/schedule/8>

¹⁷³ Lawyers' Services Directive - <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0249:EN:HTML>

¹⁷⁴ Lawyers' Establishment Directive - <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31998L0005>

¹⁷⁵ Mutual Recognition of Professional Qualifications Directive - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005L0036>

The Law Society has already said much about the impact that Brexit will have on the practice rights of Scottish solicitors working in the EU in the event of there being no agreement. In September 2018, we published guidance in our professional magazine, the Journal.¹⁷⁶

On 28 March 2019, the Scottish Government approved The Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.¹⁷⁷

This will end preferential practising rights of EU and EFTA lawyers in Scotland and provide for a range of rights for Swiss nationals, or others who are professionally recognised in Switzerland and who have Swiss legal qualifications, to practise in Scotland under certain conditions.

It is anticipated that in future there will be accessible yet robust routes to requalification for lawyers from any jurisdiction which will allow them to practise in Scotland while also reassuring their clients as to their competence.

At the outset of this paper, the need for legal stability, maintaining freedom, justice and security with respect for the rule of law, citizens' rights and the devolved arrangements was expressed. This will become even more crucial in the weeks and months that follow.

¹⁷⁶ Siobhan Kahmann, Katie Hay Practice rights and the impact of Brexit: working in the EU - http://www.journalonline.co.uk/Magazine/63-9/1026294.aspx#.XRYh_eRYaUk

¹⁷⁷ The Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 - <http://www.legislation.gov.uk/sdsi/2019/9780111041154>

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