



FACULTY OF ADVOCATES

30 August 2016

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Clerk of the European and External Relations Committee
Scottish Parliament
Holyrood
Edinburgh
EH99 1SP

Dear Madam,

Brexit implications for Scotland

We write in response to the Call for Evidence issued by the European and External Relations Committee on the matter of Scotland's relationship with the European Union after the referendum vote on 23 June 2016. We note that specific issues in which the Committee is interested are 'the implications for UK and Scots law ... of the need to repeal legislation and prepare new legislation to fill the gaps left by EU legislation'. In this response, we focus on that.

At this stage, where there is almost no clarity on when, or how, 'Brexit' is to be realised, we cannot offer more than general thoughts. It is also right to record that, although the Faculty includes several former academic lawyers in its membership, we are a body of practitioners. We are conscious that the issues raised by this Call for Evidence probably fall more within the territory of those who teach and research constitutional and/or European law in Scotland.

With these caveats, we offer the following thoughts:

1. It is obvious that withdrawal from the European Union will remove from the domestic legal systems of the United Kingdom a source of law which has been present for more than forty years. European law is woven into the fabric of law in the UK – although it proved impossible during the referendum campaign to arrive at an uncontested estimate of what proportion of 'UK' law derives from the EU.

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Whatever the extent, it appears to us to be inconceivable that it will be possible to review all that law, and determine what to keep and what to remove, in time for the last day of the UK's membership of the EU. Some kind of transitional legislation, providing that European law in force at the date of Brexit remains in force until repealed or replaced, appears inevitable. The definition of 'European law' will require to be wide and, in the case of directly effective provisions such as regulations and Treaty articles (see paragraph 4 below), repeal as such cannot take place, since they did not emanate from a parliament in the UK. To cover such provisions, a looser formula, such as 'remain in force until the passage of legislation specifically addressing the status of such measures' may be required.

2. As the Committee will be aware, there are many instances of domestic law in the UK having been made to implement obligations on the UK under a Directive. Frequently, the domestic law will refer to the Directive concerned as an aid to interpretation: doubtful cases are to be interpreted so as to give effect to the Directive. Such provisions are numerous; perhaps one example from this year will suffice. The Utilities Contracts (Scotland) Regulations 2016/49 were passed to implement, for Scotland, Directive 2014/25/EU of the European Parliament and of the Council of 26th February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors. In section 2(2), these regulations provide:

(2) Unless the context otherwise requires, any expression used both in these Regulations and in the Utilities Contracts Directive has the meaning that it bears in that Directive.

Once Brexit has taken place, the extent to which courts should make reference to such Directives and, especially, continuing case-law of the European Court of Justice, as an aid to interpretation, will be less certain, especially as one moves further in time from the passing of the implementing legislation. It is likely to depend on context: some areas of law will be more susceptible to interpretation in line with supposedly shared values than others. Following Brexit, interpretations, amendments and repeals of EU legislation by the EU institutions will not apply directly in UK law. On any view, the status of the decisions of the CJEU will become only persuasive rather than binding.

3. There are also areas where the domestic law represents the UK's implementation of European directives, but does not now specifically refer to those Directives. Perhaps the best example is the Equality Act 2010, which gives effect to EU Directives concerning discriminatory treatment on the basis of certain protected characteristics in the fields of employment and, in some instances, the provision of services. There is no reason why, following Brexit, such legislation should not remain in force unless and until the relevant parliament considers that it should be repealed or amended.

A more subtle question is the extent to which the interpretation of such legislation should remain influenced by CJEU case law and, perhaps, subsequent

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EU legislation. It is likely that, freed from the obligation to ensure compliance with the relevant directives, courts in the UK will increasingly develop their own jurisprudence on these matters. Certainly, after Brexit, the possibility of a reference from a court in the UK to the CJEU for an authoritative ruling will have disappeared. Authoritative interpretation will now be for the domestic courts; within the UK, such interpretation will be, ultimately, for the Supreme Court.

4. As the Committee will also be aware, there are provisions of European law which are directly effective. This category includes regulations, and those treaty articles and provisions of directives which are sufficiently clear, precise and unconditional to receive direct effect. By virtue of the doctrine of the supremacy of EU law, such provisions prevail over inconsistent domestic law. For all such provisions, the source of their obligatory force will be removed after Brexit. In the obvious example of the CMO regulation, the need for compliance with which has halted the attempts by the Scottish Government to introduce minimum pricing for alcohol, an obstacle to the entry into force of legislation of the Scottish Parliament will have been removed.
5. Finally, in areas where the influence of EU law is considerable but where domestic constitutional arrangements reserve legislative supremacy within the UK to Westminster, future legislation will be determined at Westminster without any direct influence from the EU. Obvious examples include equal opportunities, referred to above, competition, intellectual property and consumer protection, all currently reserved under Schedule 5 to the Scotland Act 1998.

The points made above are set out on the hypothesis that the Brexit under consideration is a 'hard' Brexit. Should there be an intermediate position, for example entry of the UK into the European Economic Area or some other form of continuing membership of the Single Market, then compliance with a proportion of European Law will still be required.

We hope that these comments are of assistance to the Committee.

Yours Sincerely,

Gordon Jackson QC