

OBLIGATIONS OF THE SCOTTISH GOVERNMENT IN RELATION TO EUROPEAN LAW

Background

Context of understanding our relationship with the EU is rooted in the separate nature of the Scottish legal system

This, together with the governing through Scottish Office (under the Ministerial office of the Secretary of State for Scotland) - in contrast to departmental structures in the UK Government - led to a form of administrative devolution.

Even pre-1999, Scotland was governed in the context of its own distinct legal system, both in subject matter areas (where for example the underlying law of contract and Scots criminal law is distinctly different from English Law) and in institutional terms.

Institutionally, not only did we have governmental independent structural arrangements, but local government worked differently and the court structures are different.

This maintained these distinctions at relatively low levels (eg sheriff courts), but at the highest levels – no access to the Appellate Committee of the House of Lords on criminal appeals and even in civil cases, appeals to that Committee have always been recognised as distinctly Scottish. That distinction is reflected even in the creation of the Supreme Court under the Constitutional Reform Act 2005.

Devolution :Legislative competence and devolved competence

Legislative competence of the Parliament

Scotland Act 1998

29- (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply— .

(a) it would form part of the law of a country or territory other than Scotland... ,

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or with Community law.

Devolved competence of Scottish Ministers

54(2)

It is outside devolved competence—

(a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament

57 - (2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.

These are broadly the same thing, but through Orders under section 63 of the Scotland Act, reserved powers can be transferred so as to be exercisable by the Scottish Ministers (called Executive Devolution). These functions are only “borrowed” (since the Order can be revoked) and does not extend to powers to make subordinate legislation (since the supervision by one or both Houses of the UK Parliament remains on the basis that no legislative competence is acquired by the Scottish Parliament).

Split between external face to EU institutions and internally within the UK

Schedule 5, paragraph 7

1) International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

(2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community law,

How does the Scottish Government influence development of UK negotiations

UK is the EU member state, but the Scottish Government can influence by

- Contributing to the UKG write-around (JMC(E) process)
- Involvement with Working Groups in the EU institutions in Brussels
- Attendance at Council – Fisheries and FSJ
- Working with the Parliament to make effective use of the Subsidiarity protocol

Implementation by administrative act, primary legislation or secondary legislation

European Communities Act 1972

2(2)any...Minister or department may make provision—

(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

57- (1) Despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under Community law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.

Issues for consideration

- The duty to comply with Community Law, as a matter of vires
- Default implementation by Whitehall – see section 57(1)
- Fines imposed on the UK – responsibility of SG, where failure is in a devolved area
- How SG can effect implementation – section 2(2), 1972 Act and drawbacks of using Primary legislation
- Differential implementation (Mark Horvath v. Secretary of State for Environment, Food and Rural Affairs, decided by ECJ on 16 July 2009)