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SPICe Briefing

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# Alignment with EU law and the Continuity Act

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This briefing has been prepared for MSPs and Scottish Parliament committees to support their scrutiny of the Scottish Government's commitment to ensure continued alignment with EU law "where appropriate" and to support scrutiny of the draft policy statement and draft annual report which are statutory requirements of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.



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# Summary

Following the UK's departure from the EU there is no longer a requirement to continue to comply with EU law. However, Scottish Ministers have indicated that, "where appropriate", they would like to see Scots law continue to align with EU law.

As a result of EU Exit, and the Scottish Government's commitment to continued alignment with EU law, the nature of the Scottish Parliament's engagement with EU policy and legislation will change during Session 6.

When the UK was a member of the EU, Scottish Ministers were required to ensure alignment with EU law in devolved areas. However, with the decision about alignment now a policy choice rather than a requirement there are a number of barriers at both EU and UK level which may make continued alignment more challenging. These include, at an EU level, the inability of Scotland to be able to directly influence the development of EU law post EU exit, the suitability of pursuing alignment in some areas of EU law and the challenge for the Scottish Government of monitoring the vast quantity and range of EU legislation as it evolves. From a UK perspective, Scottish Ministers decisions about whether to ensure continued alignment with EU law may in part be influenced or constrained by other UK-related constitutional arrangements in place - such as common frameworks, or the effects of the UK Internal Market Act 2020.

The UK Government repealed the powers in the European Communities Act 1972 which gave effect to directly applicable EU law and enabled EU legislation (such as directives) to be implemented in Scots law by secondary legislation. At the end of the transition period which followed EU Exit, the requirement to ensure alignment with EU law as a result of EU membership fell away. Whilst the powers in the 1972 Act were repealed, there remain other legislative approaches which Scottish Ministers could use to ensure continued alignment with European law as it develops over time. These approaches include primary legislation, secondary legislation using powers conferred on Scottish Ministers and consenting to the UK Parliament legislating in devolved areas where alignment is needed.

Part 1 (section 1(1)) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the Continuity Act) confers a power on Scottish Ministers to allow them to make regulations (secondary legislation) with the effect of continuing to keep Scots law aligned with EU law in some areas of devolved policy (the "keeping pace" power).

Throughout Parliament's consideration of the Continuity Act, the Scottish Government committed to work with the Parliament to agree an appropriate and proportionate decision making framework for future alignment with EU law. The Constitution, Europe, External Affairs and Culture Committee has asked Scottish Parliament and Scottish Government officials to work together to take this work forward as part of wider consideration of the appropriate and proportionate level of parliamentary scrutiny of alignment with EU law.

In order to enable the Parliament to effectively hold the Scottish Government to account when using the keeping pace power, the Continuity Act requires Scottish Ministers to lay reports (first in draft form for consultation and then a final version) before Parliament on the intended and actual use of the keeping pace power. There are two forms of reporting to Parliament, a Policy Statement setting out policy on, and how decisions will be made about, the use of the keeping pace power and an Annual Report explaining how the power

has been used during the reporting period, and how Scottish Ministers intend to use it in the future.

The reporting requirements set out in the Continuity Act relate only to use of the keeping pace power to ensure continued alignment with EU law. However, the Scottish Government also has other legislative vehicles available to it to secure continued alignment with EU law. A further challenge for the Scottish Parliament will be to ensure that it is kept informed of other ways by which the Scottish Government secures alignment along with details of EU law which Scottish Ministers have chosen not to align with so as to ensure Parliament has the complete picture when it comes to Scots law aligning with EU law post EU exit.

# Alignment with EU law

Following the UK's departure from the EU there is no longer a requirement to continue to comply with EU law. However, Scottish Ministers have indicated that, where appropriate, they would like to see Scots Law continue to align with EU law.

The Programme for Government for 2021-22 stated:

“ With a view to re-joining the EU as soon as we are able to, we will preserve Scotland's good relations with the EU and implement our commitment to align with EU standards and laws, and we will affirm the need for international cooperation to solve global issues.”

Scottish Government, 2021<sup>1</sup>

During the passage of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, Scottish Government Ministers outlined the commitment to keep pace with EU law in devolved areas:

“ The purpose of introducing the UK Withdrawal from the European Union (Continuity) (Scotland) Bill (“the Bill”) is to enable the Scottish Ministers to make provision in secondary legislation to allow Scots law to be able to 'keep pace' with EU law in devolved areas, where appropriate.”

Scottish Parliament, 2020<sup>2</sup>

As a result of EU Exit, and the Scottish Government's commitment to continued alignment with EU law, the nature of the Scottish Parliament's engagement with EU policy and legislation will change during Session 6 as was highlighted by the Legacy Expert Panel report to the Finance and Constitution Committee at the conclusion of Session 5:

“ Previously the Parliament's scrutiny function was largely engaged when legislation to implement obligations arising from EU membership was introduced. The scrutiny function now becomes much more complex given the proliferation of sources of regulation, the level of ministerial discretion and the extent of inter-governmental agreements. An added complication is the role of Parliament and the accountability of Ministers when a decision is taken not to introduce legislation to align where previously there was an obligation to implement changes to EU law. It will be necessary to be aware of developments in EU law in all devolved areas in order to scrutinise the Scottish Government's decisions on which areas it chooses to keep pace with, and where it chooses not to do so. However, the UK's lack of an entitlement to receive information from the EU (because it is no longer a Member State) means additional steps will have to be taken to try to keep up to date with developments at EU level.”

Scottish Parliament, 2021<sup>3</sup>

# Potential challenges to continued EU alignment

As [discussed earlier in the briefing](#), when the UK was a member of the EU, Scottish Ministers were required to ensure alignment with EU law in devolved areas. However, with the decision about alignment now a policy choice rather than a requirement there are a number of barriers which may make continued alignment more challenging.

From an EU law perspective, potential challenges are the inability of Scotland to be able to influence the development of EU law post EU exit, the suitability of pursuing alignment in some areas of EU law and the challenge for the Scottish Government of monitoring the vast quantity and range of EU legislation as it evolves.

When the UK was a member state, Scotland's specific interests could have been represented either by the UK Government in the Council of the European Union or by Scotland's MEPs in the European Parliament. As the UK is no longer a member state of the EU it does not send representatives to these key EU decision-making institutions. The effect of this is that the UK is no longer able to directly influence the development of EU law. During stage one parliamentary consideration of the Continuity Act, the Faculty of Advocates described this situation as moving the UK and devolved governments from "rule makers' to 'rule takers'."

A further challenge in considering future EU alignment is that as members of the EU, compliance with EU law fitted within the overall framework of agreements between Member States along with the enforcement roles of the European Commission and the European Court of Justice. Whilst the Scottish Government may seek to continue to align with EU law, it will sit outside the EU's enforcement mechanisms and in some cases it would be inappropriate to seek continued alignment such as in areas of EU law which depend on reciprocal arrangements between Member States, as responsibility for developing international agreements with the EU and its Member States is a reserved matter.

In 2020, the EU adopted 307 new legislative acts and amended a further 140 legislative acts<sup>4</sup>. In addition, it adopted 34 non-legislative acts and amended 98 non-legislative acts. 583 implementing acts were adopted and a further 420 implementing acts amended. Whilst not all of these pieces of legislation will be relevant or relate to devolved competence, these figures demonstrate the volume of EU legislation which Scottish Ministers will need to consider when making decisions about continued EU alignment.

From a UK perspective, Scottish Ministers decisions about whether to ensure continued alignment with EU law may in part be influenced or constrained by other UK-related constitutional arrangements in place.

For example, in some areas where Scottish Ministers have signed up to a [UK or GB-wide common framework](#), they would be unlikely to exercise the keeping pace power in a way that was inconsistent with the common framework or frameworks.

The impact of the [UK Internal Market Act 2020](#) may also influence decisions by the Scottish Ministers on whether to keep pace with aspects of EU law. Goods and services produced in Scotland will be subject to Scottish regulatory standards in Scottish legislation.

However the Internal Market Act 2020 establishes the ‘mutual recognition’ principle which means that goods coming into Scotland from elsewhere in the UK will not have to meet any Scottish regulatory requirements if they meet the regulatory standards in the place they originated, even if these are different. As a result, if Scottish Ministers chose to align with regulatory standards required by EU law whilst standards in other nations of the UK diverge from EU law, it is possible that this might place Scottish business at a competitive disadvantage.

During the Finance and Constitution Committee's consideration of the Bill at stage one, the Committee heard evidence about the potential constraints on Scottish Ministers ability to use the keeping pace power. In response to a question about the possible volume of legislation likely to come before Parliament as a result of the keeping pace power, Professor Aileen McHarg told the Committee:

“ The Scottish Parliament information centre briefing said that the Scottish Government does not intend to try to keep up with every area of devolved competence that intersects with EU law, so that takes out some. There will be all sorts of other constraints on the ability to use the keeping pace power to the extent that those kinds of areas are replaced, for example, by UK common frameworks and other UK legislation, or potentially by new trade deals and so on. That would again reduce the area of discretion in which the power could be used; so it is difficult to know what the volume will be.”

Scottish Parliament, 2020<sup>5</sup>

A challenge for the Scottish Parliament in considering decisions about continued EU law alignment will be to consider the Scottish Government's tracker of EU legislation and its decisions on where to align and where not.

# The decision making framework

Throughout Parliament's consideration of the Continuity Act, the Scottish Government committed to work with the Parliament to agree an appropriate and proportionate decision making framework for future alignment with EU law. This commitment was highlighted in the Legacy Expert Panel Report to the Finance and Constitution Committee:

“ The Scottish Government also committed to working with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. The Committee agreed that the Parliament should focus on early engagement in the policy process.”

Scottish Parliament, 2021<sup>3</sup>

The Parliament's new Constitution, Europe, External Affairs and Culture Committee has written to the Cabinet Secretary for Constitution, External Affairs and Culture to request that Scottish Parliament and Scottish Government officials work together to agree a framework for future EU scrutiny following Brexit.

“ The Constitution Committee legacy expert panel recommended that Parliament in consultation with the Scottish Government needs to clearly define its scrutiny role in response to Brexit. This should include consideration of an overall approach to the scrutiny of the policy development process in areas previously within EU competence which is proportionate and deliverable; the extent to which the Scottish Government can provide the Parliament and its committees with regular updates on developments in EU law within their respective remits; the appropriate and proportionate level of scrutiny of the operation of the future relationship with the EU, the keeping pace power, common frameworks and the [market access principles](#) and how these interact; meaningful scrutiny of inter-governmental working. The Committee has asked our clerks to work with Scottish Government officials in taking forward this recommendation. Robust guidance should be agreed between the Scottish Government and Scottish Parliament on how transparent and meaningful scrutiny can be delivered in newly emerging areas such as the keeping pace power. The Committee has asked our clerks to work with Scottish Government officials in taking forward this recommendation.”

Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, 2021<sup>6</sup>

Whilst the Scottish Government are yet to respond to the Committee, Scottish Parliament and Scottish Government officials are currently discussing how to take this work forward as part of a wider consideration of the appropriate and proportionate level of parliamentary scrutiny of alignment with EU law.



# Vehicles to secure alignment with EU law

The UK Government repealed the powers in the European Communities Act 1972 which gave effect to directly applicable EU law such as regulations (Section 2(1)) and enabled EU legislation (such as directives) to be implemented in Scots Law by secondary legislation (Section 2(2)). At the end of the transition period which followed EU Exit, the requirement to ensure alignment with EU law as a result of EU membership fell away

Whilst these powers were repealed, there remained other legislative approaches, in addition to the keeping pace power which Scottish Ministers could use to ensure continued alignment with European law as it develops over time.

- Scottish Ministers can bring forward primary legislation to introduce changes in any area of devolved policy.
- Any Act of the UK or Scottish Parliament which confers powers on Scottish Ministers to make secondary legislation affecting areas of policy formerly within the ambit of the EU provides an opportunity to take account of developments in EU law. In the run up to, and following EU exit a number of Brexit related Acts passed by the UK and Scottish Parliaments have conferred powers on Scottish Ministers in devolved areas previously within the competence of the EU. These powers may also enable Scottish Ministers to ensure continued alignment with EU law in some areas.
- Scottish Ministers may also choose to consent to the UK Parliament legislating in devolved areas where alignment is needed for example to implement the Trade and Co-operation Agreement or fulfil obligations under the Withdrawal Agreement.

These legislative approaches remain options for ensuring continued alignment alongside the power contained in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. During the passage of the Continuity Act, the Cabinet Secretary for the Constitution, Europe and External Affairs told the Finance and Constitution Committee that for the purposes of ensuring continued alignment with EU law "where primary legislation is required for particularly major pieces of work or legislation, we are open to that." <sup>7</sup>

Within these additional options, there is currently no requirement for Scottish Ministers to inform the Scottish Parliament that a particular piece of legislation will have the effect of ensuring continued alignment. As a result, when considering the Scottish Government's commitment to continued alignment, it is necessary to consider the range of possible different legislative approaches which may be used to ensure continued EU alignment.

A further consideration for the Scottish Parliament is how it can also scrutinise which EU legislation Scottish Ministers have chosen not to align with.

# The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021

Part 1 (section 1(1)) of the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#) (the Continuity Act) confers a power on Scottish Ministers to allow them to make regulations (secondary legislation) with the effect of continuing to keep Scots law aligned with EU law in some areas of devolved policy (the “keeping pace” power).

Section 2 sets out that the purpose of use of the Section 1(1) power is to contribute towards maintaining and advancing standards in relation to the following matters—

- (a) environmental protection,
- (b) animal health and welfare,
- (c) plant health,
- (d) equality, non-discrimination and human rights,
- (e) social protection.

When using the keeping pace power, the Scottish Ministers must have ‘due regard’ to this purpose.

As a result of the Continuity Act, Scottish Ministers can make regulations so that Scots law keeps pace with EU law, but they are not required to do so

# Ministerial commitments during the Parliamentary passage of the Bill

During the Continuity Bill's passage through the Scottish Parliament, a number of commitments were made by Scottish Ministers in response to committees and MSPs demands for a greater role for the Scottish Parliament in decisions about continued alignment with EU law. Amongst these commitments was the Government's approach to work with the Parliament to agree an appropriate and proportionate decision-making framework for scrutiny of decisions about future alignment with EU law. This commitment was given when the Cabinet Secretary for the Constitution, Europe and External Affairs gave evidence to the Finance and Constitution Committee during stage one consideration of the Continuity Bill:

“ I want to make clear that the Scottish Government intends to work with the Parliament to agree an appropriate and proportionate decision making framework for future alignment with EU law. We all agree that decision making on the issues on which we might wish to align with EU law will vary, depending on the specific measures that are being considered... ..I am more than happy to commit to liaising with the Parliament to allow the Scottish Government to consider how, at the earliest stage of policy development, we can build in an appropriate level of consultation with the Parliament and stakeholders.”

Scottish Parliament Official Report, 2020<sup>7</sup>

Both the Finance and Constitution Committee, the Environment, Climate Change and Land Reform Committee and the Delegated Powers and Law Reform Committee used their stage one reports to propose greater scrutiny of the use of Scottish Government decisions about whether to align with EU law

The Finance and Constitution Committee's stage one report proposed that the use of the 'keeping pace' power should not be entirely at the discretion of Scottish Ministers and that there needed to be much greater clarity on how Ministers proposed to use the power. The Committee also recommended that the Bill should be amended to require the Scottish Government to provide guidance setting out the criteria which would apply to the use of the 'keeping pace' power. The Committee recommended that guidance should also clearly set out how the keeping pace power would interact with other sources of regulation which will impact on people and businesses in Scotland. This should, the Committee concluded, include the impact of trade deals, common frameworks and the operation of the UK internal market. The Committee also recommended that the Bill should provide a clear scrutiny role for the Scottish Parliament in relation to the use, or otherwise, of the keeping pace power.

## **Finance and Constitution Committee Stage One Report conclusions <sup>8</sup>**

The Committee welcomes the commitment from the Cabinet Secretary to work with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. It is, therefore, essential that the Parliament gives serious consideration to the level of scrutiny of the keeping pace power which would be both appropriate and proportionate.

Specifically, what role should the Parliament, stakeholders and wider public have in relation to:

- the decision on whether or not to keep pace;
- early engagement in the policy development process especially where there are opportunities for ministerial discretion in how to keep pace.

The Parliament also needs to consider what level of information the Scottish Government should be required to provide to support the scrutiny process. Section 7(1) of the Bill requires the Scottish Government to provide a report to Parliament, on at least an annual basis, on how it has used the keeping pace power.

The Committee notes that if the Parliament wishes to have a more proactive role in influencing the use of the keeping pace power then this requirement is likely to be insufficient. One alternative option could be to amend the Bill to require Ministers to provide an annual report setting out its —

- assessment of EU legislative priorities for the coming year;
- own priorities for the use of the keeping pace power including areas where it does not propose to keep pace.

The Committee recognises that until now the Parliament has had a very limited role in the relation to the EU policy development process. The critical question for the Parliament and its committees is the extent to which that now needs to change in the context of the proposed decision-making framework discussed above.

The Environment, Climate Change and Land Reform Committee also considered the opportunities for parliamentary scrutiny of the Scottish Government's commitment to continued alignment with EU law.

## Environment, Climate Change and Land Reform Committee Stage One Report Conclusions

The Committee notes the concerns raised about the need for transparency around when the Scottish Government would, and would not, decide to exercise its s1 powers and align its policies to EU law. In this regard, the Committee welcomes the further information the Cabinet Secretary for the Constitution, Europe and External Affairs provided about the “matrix of issues” which would inform Scottish Ministers’ decisions on whether or not to align.

The Committee believes, however, that there needs to be more clarity about the instances when the Scottish Government would use this regulation making power and draws this concern to the attention of Parliament and the Finance and Constitution Committee. Furthermore, the Committee notes that the “matrix of issues” does not include the climate or ecological emergency, climate targets, commitment to maintain environmental standards or sustainable development. The Committee recommends these considerations form part of any decision-making tools or assessments the Scottish Government would use when deciding whether to keep pace.

The Committee also notes the commitment given by the Cabinet Secretary for the Constitution, Europe and External Affairs that “the Parliament will have a clear role at the beginning, middle and end. ... The Parliament will be central to the process”. The Committee believes that a transparent and accountable process for parliamentary engagement needs to be in place. The Committee remains unclear as to the role of the Parliament at the beginning of the process, given it appears the decision on what, and what not, to keep pace with is a matter for Ministers. The Committee recommends the Finance and Constitution Committee seeks clarification on this in its Stage 1 report.

The Committee considers that the Bill could be strengthened by the inclusion of a requirement for the Scottish Government to report on a regular basis to Parliament (annually or every two years) on developments in EU environmental law, with a statement as to how this has been matched in Scotland, how it will be matched or, if it is not to be, an explanation as to why not. The Committee considers that would inform ongoing parliamentary scrutiny and accountability beyond the requirement at s7 for the Scottish Government to report to the Parliament explaining how the s1 power has been used. The inclusion of a requirement for the Scottish Government to set out its methodology and regularly report in such a manner would strengthen the Bill and support SEPA, NatureScot and ultimately ESS.

The Committee notes the UK Environment Bill, as introduced, requires the UK Government to lay a report before the UK Parliament every 2 years on “developments in international environmental protection legislation which appear to the Secretary of State to be significant”. The Committee recommends the Bill be amended to require the Scottish Government to provide a similar report to the Scottish Parliament. This information would inform parliamentary scrutiny of Scottish Ministers’ commitment to keep pace with EU environmental law, be properly appraised of changes in other international law and ensure that “Parliament will be central to the process”. The Committee urges the Scottish Government to consider amendments to the Bill to give effect to this recommendation

The Delegated Powers and Law Reform Committee stage one report also considered the parliamentary opportunities for scrutiny of the decisions about whether to use the section 1(1) power:

### **Delegated Powers and Law Reform Committee Stage One Report conclusions**

The Committee considers that the Parliament may wish to concentrate its scrutiny not just on the areas where decisions are to be taken to keep pace with EU law in devolved areas, but also where decisions are taken not to keep pace. This is in the context of the significant width of the power, which would enable proposals to be brought forward that would otherwise be expected to be contained in primary legislation.

The Committee welcomes the Cabinet Secretary's commitment to work with the Parliament to allow it to be engaged at the earliest stage of the policy development process. In the Committee's view, this is appropriate where Scottish Ministers can decide whether or not to keep pace with EU law when the UK is no longer a member of the EU and the ability to influence the development of EU law is likely to be reduced.

The Committee also considers that the report should not just look back but also forward to anticipate EU legislation, particularly to identify any key pieces of future legislation that the Scottish Government anticipates it may wish to keep pace with. The report could also set out whether the Government intends to keep pace with identified EU laws or not, and the parliamentary procedure it expects would apply to regulations under section 1(1) where a decision is made to keep pace by subordinate rather than primary legislation.<sup>9</sup>

The Delegated Powers and Law Reform Committee noted that it had asked the Scottish Government whether it should be required to report to the Scottish Parliament on areas where Scots law does not align with EU law and where a decision has been taken not to maintain alignment. The Committee reported that in its written response to this particular question, the Scottish Government stated that it does not currently provide Parliament with details of legislation it has decided not to progress, or ways in which powers have not been utilised.

On 27 October 2020, the [Scottish Government responded](#) to the Finance and Constitution Committee's stage 1 report and included responses to the recommendations of the Delegated Powers and Law Reform Committee. In the response, the Government made the following commitments:

- That it will publish the guidance which will be used to inform decisions on the use of the keeping pace power.
- This will include guidance on how Scottish Ministers intend to approach consultation when considering regulations under section 1(1).
- The Scottish Government will engage with the Scottish Parliament about what mechanisms might be best put in place to ensure an appropriate role for the Parliament and others in developing a decision making framework for the use of the keeping pace power.

- The Scottish Government will provide a regular report addressing the EU's upcoming legislative priorities, and how they may impact on devolved interests.

The Scottish Government committed to publishing guidance setting out how decisions on use of the keeping pace power will be made:

“ The Scottish Government is happy to commit to publishing the guidance which will be used to inform decisions on the use of this power. We anticipate that this guidance will set out the factors which should be considered prior to Ministers deciding whether to make regulations under section 1(1) of the Bill.”

Scottish Parliament, 2020<sup>10</sup>

Specifically on a decision making framework and the role of the Scottish Parliament in scrutinising the use of the keeping pace power, the Finance and Constitution Committee had welcomed the commitment from the Cabinet Secretary to work with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. In response to this the Scottish Government made the following commitment:

“ The Scottish Government welcomes the views of the Committee and looks forward to engaging with the Parliament to discuss what mechanisms might be best put in place to ensure an appropriate role for the Parliament and others in this regard.”

Scottish Parliament, 2020<sup>10</sup>

The Scottish Government also committed to providing a regular report addressing the EU's upcoming legislative priorities, and how they may impact on devolved interests. The response to the Finance and Constitution Committee stated:

“ The Scottish Government anticipates that this could be agreed as part of the Parliament's involvement in the decision-making framework on alignment, and that an amendment to the Bill is unnecessary. We would also note that the most appropriate moment in time to provide any such report may depend on publications at an EU level, for example of the European Commission's work programme, and that these do not necessarily reflect fixed commitments at an EU level, but often evolve over time after publication.”

Scottish Parliament, 2020<sup>10</sup>

During stage two of the Bill's parliamentary progress, the Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell made commitments about parliamentary scrutiny of the use of the keeping pace power. He told the Finance and Constitution Committee:

“ Although we in the Scottish Government do not have a monopoly on ideas in relation to how the power in section 1 may be used, I suggest that we need to look at three points in defining how we use the power and how the bill sets that out. We need to have a policy statement on the use of the power; we need to have a forward look to make sure that we are always scanning the horizon; and we need to agree a framework for the involvement of Parliament.”

Scottish Parliament Finance and Constitution Committee., 2020<sup>11</sup>

On the need for a decision making framework setting out how the keeping pace power will be used, the Cabinet Secretary said:

“ As I set out this morning, we are committed to working with the Parliament to agree an appropriate and proportionate decision-making framework. That is a work in progress, and I think that we are all indicating that we want to get to stage 3 having done that. It remains the Government’s view that using such a framework to provide for an appropriate level of consultation at the earliest stage of policy development is preferable to devising and prescribing procedural requirements to take effect at the end of the process. We are committed to publishing information on the factors that will be considered when deciding whether alignment is appropriate.”

Scottish Parliament Finance and Constitution Committee., 2020<sup>11</sup>

These commitments led to amendments which provided for additional information to be provided in the Policy Statement and Annual Report on the use of the keeping pace power. However, the proposal for a decision making framework does not form part of the legislation.



# Parliamentary scrutiny of the use of the keeping pace power

In order to enable the Parliament to effectively hold the Scottish Government to account when using the keeping pace power, the Continuity Act requires Scottish Ministers to lay reports (first in draft form for consultation and then a final version) before Parliament on the intended and actual use of the keeping pace power. There are two forms of reporting to Parliament, a Policy Statement setting out policy on, and how decisions will be made about, the use of the keeping pace power and an Annual Report explaining how the power has been used during the reporting period, and how Scottish Ministers intend to use it in future.

The reporting requirements set out in the Continuity Act relate only to use of the keeping pace power to ensure continued alignment with EU law. However, as [discussed earlier in the briefing](#), the Scottish Government also has other legislative vehicles available to it to secure continued alignment with EU law. A further challenge for the Scottish Parliament will be to ensure that it is kept informed of other ways by which the Scottish Government secures alignment along with details of EU law which Scottish Ministers have chosen not to align with so as to ensure Parliament has the complete picture when it comes to Scots law aligning with EU law post EU exit.

## Policy Statement

Section 6 of the Act requires the Scottish Government to publish a statement setting out their policy on, and how decisions will be made about, the use of the keeping pace power.

Section 7 sets out the procedure for publication of the policy statement. Scottish Ministers must lay a draft of the policy statement before Parliament, before finalising and publishing the policy statement. Once the draft has been laid, the Scottish Parliament has 28 days to make any representations about the draft statement that the Parliament wishes (not including any recess period of more than 4 days). When Scottish Ministers prepare the final policy statement for laying before Parliament for approval they must have regard to any representations on the draft and include in the final statement how they have taken account of these representations.

The Continuity Act requires the policy statement to set out:

- what factors Scottish Ministers will take into account
- the approach Scottish Ministers will take, and
- the process to be followed,

when Scottish Ministers are considering whether to use the keeping pace power.

During the passage of the Continuity Act, the Scottish Government committed to providing the following information in the policy statement:

- The decision-making process for how Ministers will decide whether to use the keeping pace power or instead use another legal mechanism such as primary legislation or secondary legislation using powers in a different Act to align with EU law.

- How the Scottish Government will approach consultation with the Parliament on when to choose to align with EU law.
- How the keeping pace power might and should interact with the operation of different common frameworks.

The Continuity Act stipulates that the Scottish Ministers must lay a draft of the first policy statement "as soon as reasonably practicable after section 1(1) comes into force". However, the Act also states that "it is not necessary for a policy statement to have been published under this section before the power under section 1(1) may be used" <sup>12</sup>.

During the stage three consideration of the Continuity Bill, the Cabinet Secretary for Constitution, External Affairs and Culture told Parliament that "the policy statement will be the key document that will guide and define how ministers approach use of the power". <sup>13</sup>

The policy statement may not be published without parliamentary approval. If the Parliament resolves that the final policy statement as laid should not be approved, Scottish Ministers must review and revise the policy statement having regard to any views expressed by the Parliament.

## Annual Report

Section 10 of the Continuity Act requires the Scottish Government to produce an annual report. The first draft annual report must be laid in the Scottish Parliament not later than two months from the end of the first reporting period on 31 August 2021. This means the first draft annual report must be laid by 31 October 2021. The annual report should explain how the power has been used during the reporting period, and how Scottish Ministers intend to use it in future over such period of time as they may determine, as well as how those past and planned uses contribute, have contributed, or are expected to contribute, to achieving the statutory objective of maintaining and enhancing standards in key policy areas set out in the Continuity Act. It also requires Scottish Ministers to set out in that report any use of the power which has been considered during the reporting period.

The Act requires that Scottish Ministers provide the following information in the annual report:

- (a) how the power under section 1(1) has been used during the reporting period,
- (b) how that use of the power contributes or has contributed towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e),
- (c) how they intend to use the power in the period (of such length as they may determine) following the reporting period,
- (d) how their intended use of the power would contribute towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e), and
- (e) any use of the power that has been considered by the Scottish Ministers during the reporting period, but not taken forward.

During the stage three consideration of the Continuity Bill, the Cabinet Secretary for

Constitution, External Affairs and Culture told Parliament that the timetable for the annual report has been set out so "that they are in a yearly rhythm, which is in step with the European Commission's annual work programme" <sup>13</sup> .

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