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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 18 August, 8 September and 22 September, the Delegated Powers and Law Reform Committee considered the delegated powers in the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill](#) (“the Bill”).
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.
3. The Scottish Government has provided the Parliament with a [memorandum on the delegated powers provisions in the Bill](#).

Overview of the Bill

4. This Scottish Government Bill was introduced by the Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell MSP, on 18 June 2020. The lead committee is the Finance and Constitution Committee. The Environment, Climate Change and Land Reform Committee is a secondary committee.
5. The Bill is divided into three parts and is comprised of 47 sections and two schedules. The stated purpose of the Bill as set out at [paragraph 5 of the Policy Memorandum](#) 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; to ensure that there continue to be guiding principles on the environment in Scotland; and to establish an environmental governance body, Environmental Standards Scotland, to continue the role and functions of the European institutions in ensuring the complete and effective implementation of environmental law.

Delegated Powers

6. The Committee considered each of the delegated powers in the Bill. The Committee determined that it did not need to draw the attention of the lead committee to the delegated powers in the following sections of the Bill:
 - Section 9(4) – Power to add, remove, amend or further define the guiding principles
 - Section 13(1) – Duty to publish guidance on the guiding principles on the environment
 - Section 17(1) – Power to modify the functions of Environmental Standards Scotland
 - Section 44 – Ancillary provision
 - Section 45 – Commencement
 - Section 46 – Repeal of Part 1
 - Schedule 1, paragraph 2(7) – Power to amend the minimum and maximum members of Environmental Standards Scotland
7. The Committee agreed at its meeting on [19 August 2020 to write to the Scottish Government](#) in relation to the delegated powers in the following sections of the Bill:
 - Section 1(1) – Power to make provision corresponding to EU law
 - Section 3(2) – Duration of the section 1(1) power
 - Section 10(4) – Power to specify matters or circumstances where the duties in sections 10(1) and (2) are not to apply
 - Section 39(5) – Power to provide that legislation is not environmental law
8. The [response from the Scottish Government dated 31 August 2020](#) (see Annex B) was then considered by the Committee at its meeting on 8 September. The Committee agreed to [write to the lead committee at that meeting to highlight a number of themes relating to the keeping pace power in section 1\(1\) of the Bill](#). This was to aid the lead committee in its evidence session on the Bill the following day where it questioned the Cabinet Secretary for the Constitution, Europe and External Affairs (see Annex).
9. The Committee's consideration and recommendations in relation to the powers outlined at paragraph 7 above are set out below.
10. The Committee received [written evidence on the Bill from the Campaign for Freedom of Information in Scotland](#).

Section 1(1) – power to make provision corresponding to EU law

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative where provision is made that falls within section 4(2); otherwise negative unless Ministers lay in draft under affirmative procedure

Provision

The Power

11. Section 1(1)(a)(i) to (iii) in Part 1 of the Bill grants power for the Scottish Ministers by regulations to make provision corresponding to EU law as it has effect after IP completion day. IP completion day is the day when the implementation period agreed under the Withdrawal Agreement between the UK and the EU ends on 31 December 2020 at 11pm.
12. Section 1(1)(a)(iv) provides that the power can be exercised to modify any provision of retained EU law relating to the enforcement or implementation of an EU regulation, EU tertiary legislation, an EU decision or an EU directive as it has effect in EU law after IP completion day.
13. Section 1(1)(b) provides that the regulations may otherwise make provision for the purpose of, or related to, the operation from time of any rights, powers liabilities, obligations or restrictions created by regulations made under section 1(1) or any remedies or proceedings provided by for such regulations. This is similar to section 2(2)(b) of the European Communities Act 1972 (the “ECA”).
14. Section 1(2) further defines the scope of the power to tailor the provision made in relation to Scotland under the regulations to take account of the fact that the UK is no longer a member state of the EU. For example, the regulations may omit anything which has no practical application in relation to Scotland or is otherwise redundant or substantially redundant, and can omit functions of EU entities which no longer have functions in that respect under EU law in relation to Scotland.
15. Section 1(3) allows the regulations to make provision for functions exercisable by EU entities or public authorities in member states to be exercisable instead by a Scottish public authority (including those functions being omitted or provided for differently). Similarly, EU related functions already exercisable by a Scottish public authority in retained EU law can be delegated or carried out by another person or conferred instead on another Scottish public authority (section 1(4)).
16. The regulations may make provision for the charging of fees or other charges in connection with the exercise of an EU related function (section 1(5)). This includes conferring power on a Scottish public authority to make, by subordinate legislation, any provision that Scottish Ministers can make under the power in section 1(1) of the Bill. This is equivalent to the fees and charges power in paragraph 1 of Schedule 4 of the European Union (Withdrawal) Act 2018 (the “2018 Act”), as amended by the European Union (Withdrawal Agreement) Act 2020 (the “2020

Act”). That regulation-making power, which also includes the ability to sub-delegate the power, applies where a public authority has a new function as a result of regulations made under certain powers in the 2018 Act (e.g., the deficiency-correcting powers in section 8 and Part 1 of Schedule 2, or the powers in connection with the Ireland/Northern Ireland Protocol in section 8C and Part 1C of Schedule 2).

17. Regulations under section 1(1) of the Bill may make any provision that could be made by an Act of the Scottish Parliament (section 1(6)).

Limitations

18. Limitations on the power in section 1(1) are set out in section 2. The regulations may not impose or increase taxation, make retrospective provision, or create a criminal offence for which an individual who has reached the age of 21 is capable of being sentenced to imprisonment for a term of more than 2 years.
19. Regulations under section 1(1) may also not establish a Scottish public authority, remove any protection relating to the continued independence of the judiciary, or confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes of the authority. Furthermore, the regulations may not modify the Scotland Act 1998 (the “Scotland Act”) a protected subject-matter under section 31(5) of the Scotland Act (relating to elections), or the Equality Acts of 2006 or 2010.

Sunset

20. Section 3 limits the duration of the regulation-making power in section 1(1) to 10 years, with an option for an additional period of up to five years, and to extend any such further period by up to five years without limitation. This is considered below in respect of the separate power in section 3(2) of the Bill.

Parliamentary procedure

21. Section 4 provides that any regulations made under section 1(1) which contain the following provisions are subject to the affirmative procedure:
- abolishing a function of an EU entity or a public authority in a member State without providing for an equivalent function to be exercisable by any person;
 - providing for any function of an EU entity or Scottish public authority to be exercised instead by an existing or different Scottish public authority or person;
 - imposing a fee or charge (except where the alteration of the fee reflects changes in the value of money);
 - creating, or widening the scope of, a criminal offence; or
 - creating or amending a power to legislate.
22. Otherwise, regulations under section 1(1) are subject to the negative procedure unless Ministers decide to lay them under the affirmative procedure.

Annual reports

23. Section 7 requires Scottish Ministers to prepare and lay annual reports before the Scottish Parliament explaining how the power in section 1(1) has been used.

Committee consideration

24. The Committee asked the Scottish Government 12 questions on the delegated power in section 1(1) of the Bill conferred on Scottish Ministers to make provision corresponding to EU law (see Annex A). In light of the Scottish Government's responses (see Annex B), the Committee agreed at its meeting on 8 September 2020 to draw a number of themes relating to the keeping pace power in section 1(1) of the Bill to the attention of the lead committee in writing (see Annex C). Those themes were:
1. the appropriateness of the power in principle;
 2. the general constraints on the exercise of the power in practice;
 3. sub-delegation;
 4. scrutiny procedures;
 5. engagement; and
 6. the sunset clause.
25. The first three themes focus on the width of the power and its effect in practice. The final three themes concentrate on how the Parliament could ensure appropriate oversight of the power. The Committee builds on those themes in this report below. The sunset clause theme is considered separately below in relation to the power in section 3(2) of the Bill.
26. The Committee also includes an additional observation related to the technical scope of the power, which is considered at paragraphs 55 to 57 below.

Width and effect of the power in practice

Appropriateness of the power in principle

27. The power to keep pace with EU law in section 1(1) is a significant delegation of the Parliament's legislative power, wide enough to enable regulations on matters which would normally be contained in primary legislation. It is available for use across the full range of policy areas currently governed by EU law, and affords the Scottish Ministers a choice as to whether or not to keep pace with individual developments in EU law following the UK's exit from the EU. The Committee therefore asked the Scottish Government whether, and if so why, the keeping pace power strikes an appropriate balance between the Parliament's power to legislate and powers exercisable by the Scottish Government.
28. In its response, the Scottish Government said that the power in section 1 strikes an appropriate balance on the basis that it is "a largely technical, pragmatic and practical power and, in recognition that the UK has withdrawn from the EU, it is discretionary, time-limited, and will be subject to Parliamentary scrutiny."
29. The response indicates that the Scottish Government's intention is that the power in section 1(1) of the Bill "will complement other powers which already exist in certain

policy areas, while removing the risk that these existing powers are not sufficient to allow Scottish Ministers to do everything which may be needed to continue to align with EU law or refine retained EU law, as appropriate.”

30. The Scottish Government recognises that the context of the power in section 2(2) of the ECA is different to that in the current Bill. While consideration was given to taking forward primary legislation on a case by case basis, the Scottish Ministers consider that the breadth of EU law justifies the “temporary” power in section 1(1) of the Bill. It would be disproportionate and inefficient to require changes to keep pace with EU law to be made through primary legislation.
31. The Scottish Government believes it is appropriate that the power at section 1(1) allows a degree of flexibility in how to implement EU law to best benefit Scotland. It considers that the discretionary nature of the power is important partly because some aspects of EU law will be inoperable or will not operate properly outside of the EU, and partly because it will need to consider broader implications, such as in relation to other international obligations.
32. The Scottish Government recognises that the power is broad and has therefore built safeguards into it, including a sunset provision (considered separately below), the requirement for written explanatory statements to accompany regulations made under the power, and the annual reporting requirement of the use made of the power.
33. In its letter to the lead committee dated 9 September 2020, the Committee highlighted the following particular points under the theme of the appropriateness of the power in principle:
 - Fundamentally, it is for the Parliament to legislate. Where it agrees to delegate that role to the Scottish Government, there should be good reasons for doing so, and the limits of the delegation should be strictly defined. As a matter of principle, delegated powers should not be taken as a substitute for policy development.
 - Unlike the power to implement EU law in section 2(2) of the ECA, the keeping pace power would allow Scottish Ministers to decide whether or not to keep pace with EU law in circumstances where it has no formal ability to influence that law given that the UK is no longer an EU member state.
 - Furthermore, the keeping pace power can be used across the full range of policy areas currently governed by EU law and affords discretion as to whether and how to implement particular aspects of chosen EU laws – for example, to omit functions of EU entities or provide for them differently.
 - The Scottish Government stated in its written response to the Committee that it “cannot predict in which specific areas the power is likely to be used in future”.
 - Various bills in relation to the UK leaving the EU considered by the Scottish Parliament under the legislative consent procedure confer more tailored and specific delegated powers, including in some instances power to implement international obligations, in devolved areas such as fisheries, agriculture, and the environment.

34. The Committee notes that the [lead committee heard evidence on the Bill](#) from the Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell MSP, on Wednesday 9 September. The Cabinet Secretary stated that:

” where primary legislation is required for particularly major pieces of work or legislation, we are open to that. However, primary legislation is not required for more minor pieces of work, nor for keeping pace with existing standards as they develop. It would be a waste of parliamentary time and it would be a means by which those who are opposed to any keeping pace could frustrate the legitimate will of the Scottish people to keep pace with high standards.

35. The Committee reiterates the points identified at paragraph 34 above, which it highlighted in its themes letter to the lead committee dated 9 September 2020.
36. The Committee recognises the Scottish Government’s position that it would be impracticable to require that changes to domestic law to keep pace with EU law were exclusively made by primary legislation. However, it considers that a distinction can be drawn between provision made under the keeping pace power which seeks to refine retained EU law after the end of the implementation period to ensure that it continues to work effectively, and more fundamental provision keeping pace with significant new policy developments in future EU law where there is no equivalent in retained EU law.
37. The Committee remains uncertain as to whether the width of the power to keep pace with EU law in section 1(1) of the Bill is appropriate. It suggests that the power might be limited by only being available to ensure that existing standards in retained EU law keep pace with evolving EU standards in technical areas.
38. The Committee considers that primary legislation is the most appropriate vehicle for domestic law to implement significant new policy proposals that have no equivalent in retained EU law. This applies particularly to EU Directives, which confer discretion as to how to achieve a particular result and which commonly have long implementation deadlines.
39. More widely, the lead committee may wish to encourage the Scottish Government to seek tailored powers in specific policy areas to allow the Parliament to conduct closer scrutiny. Examples of this approach already exist in UK Brexit bills, and in the Agriculture (Retained EU Law and Data) (Scotland) Bill to amend or replace the European Union Common Agricultural Policy elements of retained EU law in Scotland.

Constraints

40. The Scottish Government’s ability to keep pace with EU law may be subject to various statutory and non-statutory constraints, including the following highlighted by the Committee to the Scottish Government:
- Compliance with UK international obligations, including future trade deals and other international agreements;
 - Statutory and non-statutory common frameworks;

- The functioning of a UK internal market;
 - The manner of replacement of EU funding.
41. The Committee asked the Scottish Government to explain the extent to which it considered that these, or any other factors, could constrain the Scottish Ministers' ability to use the keeping pace power.
42. On compliance with international obligations, the Scottish Government indicated that the impact of any deals or legislation on the ability to use the power at section 1(1) will depend on what, specifically, is contained within those deals or legislation, and how they are to be implemented. The Scottish Government's position is that UK Ministers should take into account the Scottish Parliament's and the Scottish Government's views and responsibilities for devolved matters and standards before they agree any deals, or before they bring forward legislation which would impact on devolved areas.
43. In relation to statutory and non-statutory common frameworks, the Government states that these arrangements, whatever form they take, will not alter or constrain devolution in any way. According to the response, they will also not prevent the Scottish Parliament from making alternative arrangements in these areas should they judge that to be necessary in the future. The response indicates that the Scottish Government has reaffirmed its commitment not to create divergent policy in ways that would contradict future frameworks in light of continuing joint progress and collaboration on future frameworks. As a result, the UK Government has concluded that it does not intend to bring forward any regulations freezing the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers under the 2018 Act.
44. The Scottish Government states that the effect of possible divergence in ways which could cut across framework areas will be considered as part of the potential practical implications of aligning with EU law. However, the Government's position is that the frameworks process aims to deliver the most effective way to manage potential divergence.
45. Finally, on the manner of replacement EU funding, the Scottish Government's written response to the Committee indicates that the UK Government has yet to provide clarity on future arrangements for such funding. The response states that assurances are required that all lost EU funding will be replaced in full, and that devolution will be respected by taking full account of the Scottish Government's position on all future funding arrangements.
46. As the Committee did in its themes letter to the lead committee dated 9 September 2020, it highlights the Scottish Government's response to its questions on the statutory and non-statutory constraints to the exercise of the power to keep pace with EU law in section 1 of the Bill.

Sub-delegation of legislative power

47. The power in section 1 of the Bill allows the Scottish Ministers to sub-delegate the power to make an instrument of a legislative character or provide funding to a

Scottish public authority (whether or not established for the purpose), or to any person whom the authority authorises to carry out functions on its behalf.

48. The Committee asked the Scottish Government to explain why this power to sub-delegate is considered appropriate when there is no equivalent power to sub-delegate legislative power in section 2(2) of the ECA.
49. The Scottish Government's response states that the position at the end of the transition period is similar to that which arose in relation to correcting deficiencies in retained EU law under the 2018 Act. This is on the basis that there will be some areas of EU law which will not be operable, or which will not operate properly, given that the UK is no longer a member state of the EU.
50. The Scottish Government considers that the power to sub-delegate is necessary to allow EU law to be adapted so that it operates effectively in Scots law despite the UK no longer being a member state. The response identifies that these functions might include the ability to set rules or create standards, which are otherwise made by the EU as non-legislative acts (delegated and implementing acts).
51. The Government states that it appreciates that the power is wide and observes that there will be an opportunity for enhanced scrutiny afforded by the automatic application of the affirmative procedure to regulations that create or amend a power to legislate (section 4(2)(e) of the Bill).

52. As the Committee did in its themes letter to the lead committee dated 9 September 2020, the Committee recognises that powers to legislate contained in EU delegated and implementing acts may in some circumstances be technical in nature. However, it considers that the ability to sub-delegate legislative or funding powers to a Scottish public authority, or such an authority's nominee, is particularly significant. While a similar ability to sub-delegate formed part of the power to correct deficiencies conferred on UK and Scottish Ministers under the 2018 Act, that applies in the context of deficiencies in existing EU law, rather than future EU law which may or may not be implemented in full.
53. Given the uncertainty over the potential use of this significant power, the Committee recommends that the lead committee asks the Scottish Government to give further consideration in advance of Stage 2 to the necessity of this aspect of the power to allow sub-delegation through subordinate legislation.

Technical scope of the power

54. Section 1(2) and (3) set out the permitted adaptations to EU law made under keeping pace regulations to ensure EU law operates effectively in Scots law despite the UK no longer being a member state of the EU.
55. In particular, section 1(2)(f) provides that keeping pace regulations may confer functions and impose restrictions which are in an EU Directive and in force and which it is "appropriate to retain". This seems to be wider than the power in section 1(2)(a) to omit anything which has no practical application in relation to Scotland or is otherwise redundant or substantially redundant.

56. The Committee calls on the Scottish Government to provide further clarification on when it would not be considered “appropriate” in terms of section 1(2)(f) to retain a function or restriction in an EU Directive which is in force.

Ensuring appropriate oversight

Scrutiny procedures

57. Under the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (the “2018 Continuity Bill”), the affirmative procedure applied to regulations made under the keeping pace power in section 13 of that bill unless a 60-day super-affirmative procedure applied in certain circumstances. This applied where, among other things, the regulations abolished a function of an EU entity or public authority in a member State without providing for an equivalent function to be exercisable by any person. A sifting mechanism would have allowed parliamentary committees to require keeping pace regulations laid in draft under the affirmative procedure to instead proceed under the super-affirmative procedure.
58. In contrast, despite the keeping pace power being similar under the current Bill, only keeping pace regulations made under section 1(1) that contain similar types of provision are subject to the affirmative procedure. All other regulations under section 1 of the Bill are subject to the negative procedure unless Ministers decide to lay them under the affirmative procedure. There is no provision made for a sifting mechanism.
59. The Committee asked the Scottish Government to explain the differences in the availability of the negative, affirmative and super-affirmative procedures that apply to the power in section 1 of the Bill compared to the similar power in the 2018 Continuity Bill.
60. The Scottish Government responded that the procedures which apply in the current Bill to the keeping pace power in section 1(1) represent a better balance between scrutiny and flexibility than that which was achieved in the 2018 Continuity Bill.
61. The Scottish Government referred to the ability conferred on the Scottish Government under the current Bill to choose to apply the affirmative procedure to keeping pace regulations that would otherwise be subject to the negative procedure (known as an “either-way provision”). This approach has been adopted because it is likely that many of the changes made under such regulations will be minor or technical in nature, or may need to be made quickly. It therefore considered that attaching the affirmative procedure to all such regulations would be disproportionate. The Scottish Government also recognised, however, that there may be more significant policy changes brought forward by keeping pace regulations made under the power in section 1(1) of the Bill that would merit increased scrutiny under the affirmative procedure. The either-way provision “would give Ministers the opportunity and flexibility to make a judgment about which procedure is most appropriate for the particular provision in question in a way which would otherwise be difficult to provide for legislatively.”
62. The Scottish Government considered that providing for a form of super-affirmative procedure would be disproportionate and could make planning legislation less

manageable. It also rejected this approach on the basis that it would not allow for flexibility where that would be required to make legislative changes quickly.

63. In [evidence to the lead committee on Wednesday 9 September](#), the Cabinet Secretary stated that “the balance between negative, affirmative and super-affirmative resolution will no doubt be one that we will work out during the course of the bill, as always happens.
64. Affirmative instruments are subject to approval by resolution of the Parliament. A lead committee must report to the Parliament on the instrument no later than 40 days after the instrument has been laid in draft before the Parliament. The lead committee will decide whether to recommend to the Parliament that the draft instrument be approved.
65. There is no singular form of “super-affirmative” procedure. Instead, it is a form of enhanced scrutiny in addition to the affirmative procedure. “Super-affirmative” procedures have been used in the past in connection with delegated powers in bills for which the Parliament considered that a particularly high level of parliamentary scrutiny is appropriate.
66. The precise procedure varies, and is prescribed in the parent Act, but the element common to most “super-affirmative” procedures is a requirement for a pre-scrutiny draft of the instrument to be laid before the Parliament together with an explanatory note. This would afford the Parliament an initial opportunity to comment on the proposed instrument. The period for comments could be 40, 60 or 90 days and could be accompanied by a requirement for the Scottish Government to formally consult publicly. The Government is often required to consider any representations made and to outline in an accompanying statement whether or not any amendments have been made to the draft instrument in light of them. A final version would then be laid before the Parliament for approval under the affirmative procedure. It should be noted that the power to revise a proposed instrument remains with Ministers.
67. As the Committee did in its themes letter to the lead committee dated 9 September 2020, the Committee notes that the scrutiny procedures that apply to regulations made under the keeping pace power in section 1(1) of the Bill are different than those that applied to the equivalent power in the 2018 Continuity Bill.
68. The Committee agrees with the Scottish Government’s position that parliamentary scrutiny should be proportionate and accepts its rationale for including a choice of procedure (known as an “either-way provision”) that would apply to keeping pace regulations. The Committee considers that it would be disproportionate to apply a sifting mechanism to allow committees to change the parliamentary procedure that applies to regulations laid under the keeping pace power. Instead, the Committee considers that the Parliament should focus on early engagement in the policy process, rather than debating the parliamentary process that applies once policy proposals have been finalised in regulations. Further observations on this point are made under the engagement theme below.

69. The Committee reiterates its position stated at paragraph 39 above, in relation to the appropriateness of the power in principle, that primary legislation is the appropriate vehicle for keeping pace with significant new policy developments in future EU law with no equivalent in retained EU law.
70. However, in the event that the power is not amended to that effect, the Committee recommends that the choice of procedure is expanded to include the super-affirmative procedure. This would allow Ministers to apply a super-affirmative procedure where keeping pace regulations would implement significant new policy proposals from EU law that do not exist in retained EU law. In addition, the Bill could also be specifically amended to require that a super-affirmative procedure applies to keeping pace regulations that implement EU Directives in new policy areas where there is no equivalent in retained EU law.
71. The Committee considers that the chosen form of super-affirmative procedure should include a requirement for a pre-scrutiny draft of the instrument to be laid before the Parliament together with an explanatory note. The period for comments should be at least 60 days and should be accompanied by a requirement for the Scottish Government to formally consult publicly. The Government should be required to consider any representations made and to outline in an accompanying statement whether or not any amendments have been made to the draft instrument in light of them. A final version would then be laid before the Parliament for approval under the affirmative procedure.

Engagement

72. The Committee asked the Scottish Government whether it can and 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.
73. The Scottish Government's written response to this particular question states 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. It observes that it is open for members, Committees and others to make proposals to the Government for legislation in the normal way.
74. More generally, the Scottish Government's written response also indicates that in exercising the power under section 1 of the Bill, it will consult as appropriate, as with any policy development. Furthermore, in addition to the normal policy note and impact assessments, the additional statements required under sections 5 and 6 of the Bill will have to be published to accompany any SSI.
75. However, the Scottish Government's written response also referred to the Faculty of Advocates suggestion that it may be helpful for the Scottish Government to issue forward guidance about the manner in which it anticipates exercising the new power. The response states that this suggestion, and the others made by other stakeholders, will be further considered ahead of Stage 2.
76. Furthermore, in [evidence to the lead committee on Wednesday 9 September](#), the Cabinet Secretary stated:

” 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. The Scottish Government is not ruling out the use of primary legislation where that is the best and most appropriate legislative route, but it should not be the default or the only route.

77. 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.
78. 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.
79. The Committee agrees that there is merit in the Faculty of Advocate's suggestion that it may be helpful for the Scottish Government to issue forward guidance about the manner in which it anticipates exercising the new power.
80. The Committee suggests that further consideration is also given to the annual reporting obligation in section 7. In particular, the Committee recommends that the reporting requirement should be quarterly for the first two years then, if the Parliament decides that reporting can become less frequent, twice yearly thereafter. 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.
81. The Scottish Government's written response to the Committee stated that decisions to keep pace with EU law will be based on factors such as practical implications; economic and social benefits and costs; resource implications of both budget and Government / parliamentary time; and whether an alternative approach would demonstrably deliver the same, or more ambitious outcomes, than the relevant EU measure.
82. The Committee recommends that the explanatory statements required under section 6 to accompany regulations made under the power in section 1(1) could be expanded to include these more specific indicators of whether there are good reasons for making the provision contained in the keeping pace regulations.

Section 3(2) – duration of the section 1(1) power

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

83. Section 3(1) limits the duration of the power in section 1(1) to 10 years.
84. The delegated power is contained in section 3(2), which provides that the Scottish Ministers may by regulations extend the duration of the power in section 1(1) by up to five years and may also extend any period of extension under such regulations by a further period of up to five years. Such regulations are subject to the affirmative procedure.

Correspondence with the Scottish Government

85. In its correspondence to the Scottish Government, the Committee highlighted that the keeping pace power in section 13 of the 2018 Continuity Bill was limited in duration to three years with an option to extend twice by one year to a maximum of five years in total.
86. The Committee asked for an explanation of the circumstances that justify the significant extension of the sunset provisions that apply to the keeping pace power in section 1 of the Bill. In addition, it also asked why no maximum period of extension has been set in section 3, unlike section 13(8A) of the 2018 Continuity Bill.
87. The Scottish Government's response explains that the 2018 Continuity Bill was brought forward as an alternative to the UK Government's EU (Withdrawal) Bill. At this time the UK Government was committed to negotiating a close relationship with the EU. The transition period was to last from March 2018 to at least December 2020, with the possibility of an extension by one or two years if necessary. This explains why an initial duration of three years with a maximum period of extension was considered to be appropriate.
88. In relation to the current context, the Scottish Government's response considers that the UK's future relationship with the EU is currently unknown and will take some years to settle properly once it has been agreed. There are also at present no new free trade agreements with other countries and no common frameworks in place. The response also refers to the recent publication by the UK Government of its UK internal market proposals.ⁱ
89. The Scottish Government response considers that the keeping pace power provides one element of stability in this uncertain and evolving landscape. It recognises that EU law has a development cycle that can take some years. The response adds that retained EU law will be a part of the system of Scots law for

ⁱ The UK Government's trade deal with Japan was agreed after the Scottish Government provided its response to the Committee.

some years after the end of the implementation period under the EU Withdrawal Agreement and will need to be refined and updated over time.

90. The Scottish Government believes that having the power available for a shorter period of time, without an ability to extend it, would increase the risk of similar legislation having to be passed again in the near future. Having the keeping pace power would not stop specific powers being taken in subject areas through primary legislation, which would supplement, or even replace, the keeping pace power.
 91. The initial ten-year period roughly translates into two parliamentary sessions, which the Scottish Government considers is “necessary, sensible and pragmatic to ensure that these powers are available for a sufficient period of time to take account of the timescales for progress so far”. However, the Scottish Government observes that the keeping pace power can be repealed when it is no longer required by regulations subject to the affirmative procedure made under section 46 of the Bill.
92. The Committee highlighted the expiry provisions in section 3 that apply to the power to keep pace with EU law in section 1(1) of the Bill under the “sunset” theme in its letter to the lead committee dated 9 September 2020.
 93. The Committee again recognises that there are differences between the context surrounding the choice of time limit that applied to the keeping pace power in section 13 of the 2018 Continuity Bill and the current circumstances regarding the time limit that should apply to power in section 1 of the Bill.
 94. However, the Committee reiterates that the expiry provisions in section 3 apply for an initial period of 10 years, amounting approximately to two full parliamentary sessions, with an unlimited option to extend by further periods of five years if approved by affirmative regulations. In the Committee’s view, the power in its current form cannot properly be described as “temporary” in nature.
 95. The Committee recently considered the Agriculture (Retained EU Law and Data) (Scotland) Bill where there was originally no sunset clause, despite the intention that the provisions would only be temporary in nature. It recommended a sunset clause and the Bill was subsequently amended to include a sunset provision to May 2026, or roughly equivalent to one parliamentary term.
 96. The Committee recommends that consideration is given to amending section 3 of the Bill to reduce the length of the expiry provisions that apply to the keeping pace power. It considers that it should be for future Scottish Parliaments to agree through affirmative regulations at the start of each parliamentary session whether the keeping pace power should continue to be available, subject to a maximum duration of 10 years from the Bill receiving Royal Assent.

Section 10(4) – power to specify matters or circumstances where the duties in sections 10(1) and (2) are not to apply

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

97. Section 10 of the Bill requires the Scottish Ministers (subsection (1)) and UK Ministers (subsection (2)) to have regard to the guiding principles on the environment (defined in section 9) when developing policies, including proposals for legislation (for UK Ministers this applies so far as extending to Scotland).
98. These duties do not apply in relation to any policy or proposal so far as relating to national defence or civil emergency, or finance or budgets (section 10(3)).
99. The delegated power is contained in section 10(4), which allows the Scottish Ministers by regulations to make further provision about matters or circumstances where the duties on the Scottish Ministers and UK Ministers to have regard to the guiding principles on the environment do not apply.
100. Regulations made under this power are subject to the negative procedure.

Correspondence with the Scottish Government

101. In its correspondence to the Scottish Government, the Committee highlighted that paragraph 35 of the DPM states that this power is likely to be used for technical matters. However, it noted that the power, which is to restrict the scope of duties in primary legislation (i.e. the duties in section 10(1) and (2) to have regard to the guiding principles on the environment), is not restricted in such a way as to guarantee that it will always be used for technical matters.
102. Furthermore, although the regulations would not be capable of amending section 10 of the Bill as enacted, they could have the same effect by allowing further provision to be made in regulations about matters or circumstances where the duties do not apply.
103. The Committee therefore asked the Scottish Government to consider whether it would be more appropriate that the power in section 10(4) is amended to only permit amendment to section 10(3) of the Bill as enacted, and is made subject to the affirmative procedure to provide the opportunity for enhanced scrutiny.
104. The Scottish Government responded that it will give further consideration to the points the Committee raised about section 10(4).
105. The Committee highlights to the lead committee that the Scottish Government has committed to considering whether it may be more appropriate that the power

in section 10(4) is amended to only permit amendment to section 10(3) of the Bill as enacted, and is made subject to the affirmative procedure.

Section 39(5) – power to provide that legislation is not environmental law

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

106. Section 39 defines environmental law for the purposes of Chapter 2 (Environmental Governance) of Part 2 (Environment) of the Bill. It is defined as any legislative provisionⁱⁱ to the extent that it is “mainly concerned” with environmental protection, and is not concerned with disclosure of (or access to) information, national defence or civil emergency, or finance or budgets (“excluded matters”). By virtue of section 39(4), it does not include Parts 1 to 3 of the Climate Change (Scotland) Act 2009 (the “2009 Act”).
107. The delegated power is contained in section 39(5), which allows the Scottish Ministers by regulations to provide that a legislative provision specified in the regulations is, or is not, within the definition of “environmental law” in section 39(1). Such regulations may specify Parts 1 to 3 of the 2009 Act (or any provision of any of those Parts) as being within the definition of “environmental law” and may modify section 39(4) accordingly.
108. Regulations under section 39(5) are subject to the affirmative procedure. Before laying a draft of the regulations before the Scottish Parliament, the Scottish Ministers must consult Environmental Standards Scotland (“ESS”, established under section 15 of the Bill) and such other persons as they consider appropriate.

Correspondence with the Scottish Government

109. The Committee asked the Scottish Government why the Bill does not provide a more comprehensive definition of “environmental law” with reference to relevant provisions on the domestic statute book and EU law to ensure greater legal certainty for ESS, those subject to enforcement by ESS, and the courts.
110. The Committee also asked whether the power could and should be framed instead to permit modification of a fuller definition of “environmental law” set out on the face

ii “Legislative provision” is defined as any provision contained in, or in an instrument made under, an Act of the Scottish Parliament, and provision contained in any other enactment which, if contained in an Act of the Scottish Parliament, would be within the legislative competence of the Parliament.

of the Bill in light of future developments in environmental law (for example, following a future agreement between the UK and the EU).

111. The Scottish Government's response considers that the Bill's approach to the definition of "environmental law" is necessary and appropriate, comprehensive, provides the reader with sufficient clarity, and is flexible enough to respond to future developments in this area of the law.
112. The response states that the definition of "environmental law" has to be read in the context of the definition of "environmental protection", and also the definitions of "environmental harm" and "the environment" used in that term, in section 40. The Scottish Government believes that doing so provides clarity to the reader of the Bill as to the meaning and extent of "environmental law".
113. The Scottish Government states that environmental regulation is broad ranging and therefore that the definition of "environmental law" is framed to ensure that it is comprehensive and accommodates future developments such as arising from a future agreement between the UK and the EU. It highlights that there is some overlap between the power in section 39(5), which could be used to clarify whether legislative provisions fall within "environmental law", and therefore ESS's remit, and the power in section 17 of the Bill. Section 17 allows the Scottish Ministers by regulations to modify ESS's functions for the purpose of implementing an international obligation that arises or may arise under an agreement or arrangement between the UK and the EU following the withdrawal of the UK from the EU.
114. The Government believes that updating a definition of "environmental law" with every new relevant provision would be onerous and an inefficient use of parliamentary time, and could create a risk that new provisions added to the statute book might be inadvertently missed, which could undermine ESS's governance role.
115. The response indicates that the power in section 39(5) to clarify whether a legislative provision does or does not fall within the definition of environmental law is expected to be used infrequently. It is not anticipated that the power will be used frequently to remove legislative provision from ESS's remit.

Committee consideration

116. The Committee notes that section 43 of the UK Environment Bill contains a definition of "environmental law" in a similar manner to the definition of the same term in section 39 of the Bill. Like the power conferred on Scottish Ministers in section 39(5) of the Bill, section 43(5) of the UK Environment Bill contains a power conferred on the Secretary of State by regulations to provide that a legislative provision is, or is not, within the definition of environmental law. The power in section 43(5) of the UK Environment Bill cannot be exercised in relation to devolved legislative provisions.
117. The Committee recognises that the power is taken to clarify questions over whether certain legislative provisions are or are not environmental law. This could be the case where, for example, a legislative provision addresses multiple objectives and it may not be immediately apparent whether it is mainly aimed at one or more of the matters concerned with environmental protection (within the meaning given in

section 39), or with other policy objectives (e.g., relating to economic or social policy).

118. It is not clear that the very wide-ranging definitions of “environmental protection”, “environmental harm” and “the environment” would “provide the reader with a clear description of what constitutes ‘environmental law’” to allow the user of the legislation to “determine whether a specific legislative provision falls within the term as defined by the Bill”. For example, “environmental law” is mainly concerned with “environmental protection”, which includes “preventing, mitigating, minimising or remedying environmental harm caused by human activities”. The definition of environmental harm in turn includes “offence to the senses of human beings” and “damage to property”, which appear to be particularly broad. It is not clear that ESS, those subject to enforcement by ESS, or the courts, would be able to establish with certainty whether any particular law in these wide areas would fall within the scope of “environmental law” for the purposes of the Bill.

119. **The Committee is content with this power in principle on the basis that it is clarificatory in nature. The Committee considers that the affirmative procedure is appropriate to afford the Parliament the opportunity to conduct enhanced scrutiny of regulations that could determine the remit of a statutory body (i.e. ESS).**
120. **However, the Committee draws to the attention of the lead committee that the definitions of “environmental law”, “effectiveness of environmental law”, “environmental protection”, “environmental harm” and “the environment” in sections 39 and 40 of the Bill are very wide. With a view to ensuring greater certainty for ESS, those subject to enforcement by ESS, and the courts, the Committee calls on the Scottish Government to provide further details, such as an indicative list, of the legislation that would fall within the definition of “environmental law”.**

