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Finance and Constitution Committee
Comataidh Ionmhais is Bun-reachd

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

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Introduction

1. The UK Withdrawal from the European Union (Continuity) (Scotland) Bill ("the Bill") was introduced by the Scottish Government on 18 June 2020. The Bill was referred to the Finance and Constitution Committee ("the Committee") as the lead committee and the Environment, Climate Change and Land Reform (ECCLR) Committee was designated a secondary committee.

2. The purpose of the Bill as set out in 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.

3. The Committee focused its scrutiny on the keeping pace power in Part 1 of the Bill and the ECCLR Committee focused on the proposals in Part 2 in relation to the environmental principles and Environmental Standards Scotland. The ECCLR Committee report is published here on the website.

4. The Delegated Powers and Law Reform Committee (DPLRC) also considered the Bill at Stage 1 and its report is published here on the website.

5. The Committee would like to thank all those who provided written and oral evidence and our Adviser, Professor Tom Mullen. All of the evidence received and the Adviser briefing is available on the Committee's web pages.

Part 1: Alignment with EU Law

6. The policy memorandum states that the purpose of Part 1 of 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." [1] Section 1(1)(a) of the Bill, therefore, confers on the Scottish Ministers power to make regulations for the following purposes—

   - Corresponding to an EU regulation, EU tertiary legislation or an EU decision;
   - Implementing an EU directive;
   - Enforcing any such EU legislation.

7. The Bill's explanatory notes explain that EU Regulations contain detailed legal rules and have "direct effect" in Member States. [2] This means, in principle, they do not need to be specifically implemented domestically and can be applied based on the text of the Regulation itself. EU Regulations are automatically applied in the UK without the need for specific implementing legislation by virtue of section 2(1) of the European Communities Act (ECA).

8. EU Directives set out a legal framework which member states have to follow but which leave discretion to member states about how to make them part of their law. Directives do not generally have direct effect and require to be implemented through domestic law, frequently using the powers provided for this purpose in section 2(2) of the ECA.

9. The policy memorandum states that the keeping pace power is, therefore, necessary to replace the power to regulate using sections 2(1) and 2(2) of the ECA. Section 1(1)(a) of the Bill gives Ministers the power, by regulations, to make provision that would correspond to provision in EU law as it has effect in EU law after the end of the implementation period.

10. The policy memorandum also states that while it may be possible to maintain alignment with EU law using other existing legislation in specific policy areas, in "many cases, however, separate legislative powers will not be available or sufficient." [3] On this basis the Scottish Government "considers it necessary to give Scottish Ministers the power to ensure that Scotland's laws may keep pace with changes to EU law, where appropriate and practicable."

Comparison with the current arrangements for implementing EU law

11. Although international relations, including relations with the EU are not within devolved competence, EU obligations may be implemented by the Scottish Parliament or Scottish Government so long as the subject matter of the obligation falls within devolved competence. However, as devolved competence is not exclusive, EU obligations may also be implemented by the UK Parliament or UK Government. There are four principal ways in which EU obligations which require legislation to implement may be implemented in devolved areas:

- A specific Act of the UK Parliament;
- subordinate legislation made by UK Ministers under section 2(2) of the European Communities Act 1972 (read with section 57(1) of the Scotland Act 1998);
- A specific Act of the Scottish Parliament;
- subordinate legislation made by the Scottish Ministers under section 2(2) of the European Communities Act 1972.

12. There are no legal rules governing the choice between UK-wide implementation and separate Scottish implementation. In practice, some EU obligations which affect devolved areas are implemented by Scottish legislation; others are implemented by UK legislation.

13. The Scottish Government state that the keeping pace power will "largely mirror the regulatory power which will be lost at the end of the transition period" while recognising that the "context of the power under section 2(2) of the ECA is different" to that in the Bill. In their view it is "a largely technical, pragmatic and practical power." [4] Although consideration was given to "taking forward primary legislation on a case by case basis", it is the breadth of the issue which Scottish Ministers consider justifies the temporary need for the power in section 1(1) of the Bill. [4] The Bill includes a sunset clause 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.

14. However, the evidence which the Committee received highlighted two significant areas in which the keeping pace power is different from the regulatory powers in the ECA:

- There is no longer a legal obligation to implement EU law;
- The Scottish Government will have no formal role in the policy development process.

Discretionary Power

15. A number of our witnesses highlighted that a key difference between section 2(2) of the ECA and the keeping pace power is that the former relates to an obligation to implement EU law whereas the latter is a discretionary power (subject to the future relationship with the EU which is discussed in more detail below). The Law Society of Scotland told us that the keeping pace power "is implementing EU law as a matter of choice rather than as a matter of obligation" and this provides "whichever Government that chooses to pursue that path the opportunity to depart from the law that the EU is making at any time." [5]

16. The Law Society of Scotland also point out that we "will not know, unless there is some additional position, what legislation the Scottish ministers have decided not to align with. It is not up to Parliament to decide that; it is a ministerial decision. It is uncharted territory, and the bill does not make it clear." [6]

17. The DPLRC point out that section 2(2) of the ECA does not permit much, if any, choice regarding policy development and implementation of EU law. The DPLRC also point out that the keeping pace power affords the Scottish Ministers discretion as to whether, and how, to implement new EU laws/policies – for example, to omit functions of EU entities or provide for them differently.

18. However, some of our witnesses argued that there should be an obligation to implement EU law in some areas in the Bill. Scottish Environment (SE) Link suggest that the Bill should be amended to "specifically require Scottish Ministers to use keeping pace powers to deliver high environmental outcomes." Likewise, the National Trust for Scotland (NTS) suggest that a "duty written into the bill with a requirement to keep pace with EU environmental standards would prevent any regression of environmental standards taking place." [7]

19. At the same time SE Link recognise that there may be circumstances in which keeping pace may not be possible. They, therefore, propose that the use of the power could be linked to specific purposes. For example, making it "a duty to use the power where it is necessary to achieve" environmental objectives as well as other "public interest concerns" such as social and employment protections.

20. In contrast, some of our witnesses pointed out that not having the obligation to implement all EU law could be advantageous. The National Farmers Union Scotland (NFUS) told us of the frustrations for Scottish agriculture regarding Scotland's ability to tailor EU regulations to meet local circumstances. They suggest that "rather than harmonising our regulations absolutely, we need to think about reflecting and adhering to the basic principles of those regulations in a way that would enable us to adapt them to Scottish circumstances." [8] In their view the Bill "is required because Scotland needs to retain its flexibility in all aspects of environmental regulation as they come back to the UK" but whether it "needs to go as far as keeping pace with the EU is a moot point." [9]

21. The Scottish Government has pointed out that it is "important for the power under section 1(1) to be discretionary, partly to address the fact that some aspects of EU law will be inoperable or will not operate properly outside of the EU, and partly because we will need to consider broader implications, such as in relation to any other international obligations by which we are bound." [4]

22. The Cabinet Secretary for the Constitution, Europe and External Affairs ("the Cabinet Secretary") told us that that the "difficulty with mandating keeping pace is that it is indiscriminate. In those circumstances, the Government might find itself overwhelmed." [10] He explained that regrettably "we cannot keep pace with the highest of standards in everything, even in the environmental sphere, let alone in the range of other areas in which we would be interested." [11] However, although he does not believe that "we should be mandated to keep pace, we should be sensitive to those who have views about what we keep pace with." [12]

23. Given that keeping pace is a discretionary power (albeit subject to a number of constraints as discussed below) the Committee asked whether there is a need for clearly defined criteria to apply to its use and whether this should be on the face of the Bill. The ECCLR Committee state that there needs to be more clarity about the instances when the Scottish Government would use the keeping pace power.

24. The Faculty of Advocates told us that the range of EU law which might be the object of such regulations "is such that the definition of criteria within the Bill would be an impossible task." [13] However, they suggest that the Scottish Government could "issue forward guidance about the manner in which they anticipate exercising the new power and any specific policy areas in which they consider it may be used." [14] The DPLRC considers that there is merit in this suggestion.

25. Professor Keating suggests that there is a need for "some sort of broad statement regarding the purpose of dynamic alignment and whether it is just to stay aligned with everything, is it so that we can we pick and choose, or is there some broad strategy that would make it important to stay in dynamic alignment." [15] In his view the policy memorandum provides some examples picked at random when there is a "need to know on what basis things are going to be selected." [16] Scottish Land and Estates state that they would have expected there to be some criteria in the Bill that can be applied when considering which EU law may be appropriate for domestic application. [17]

26. Some of our witnesses suggested that while it may be challenging to set out criteria which applies to the use of the power, there is a potential for confusion and uncertainty without further clarity regarding the use of the keeping pace power. Professor Keating told us that he is "very worried about the proliferation of sources of regulation, from trade deals through to internal markets and dynamic alignment. That could make for a great deal of confusion for business and other stakeholders." [18]

27. Given the current level of uncertainty the Committee explored with witnesses whether it was appropriate to proceed with the Bill now or postpone it until the issues discussed above have been resolved or are much clearer. Both Professor McHarg and Professor Keating agreed that if "you believe that you need the power, it is sensible to be prepared." Professor McHarg told us that if "you think that the power is necessary, it is a good idea to have it in place for when the implementation period ends and the European Communities Act 1972 ceases to be enforced." [19]

28. The Scottish Government also explained in correspondence with the DPLRC that in "assessing whether or not to align with any given EU measure, Ministers will consider things such as—

    - Practical implications;
    - Economic and social benefits and costs;
    - Resource implications (budget and Government / Parliamentary time);
    - Whether an alternative approach would demonstrably deliver the same, or more ambitious outcomes than the relevant EU measure." [4]

"Rule Makers" to "Rule Takers"

29. The DPLRC point out that 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." The DPLRC asked the Scottish Government how the keeping pace power is justified in principle given that Scotland has limited ability to influence EU law.

30. They responded that in "terms of the justification for the power despite the UK not being a member state, it is important to stress that the power does not require Scottish Ministers to implement each and every EU Directive or EU Regulation." Rather, it is "about bringing forward a temporary power to enable Scottish Ministers to legislate efficiently when EU developments or refinements could be implemented to benefit Scotland."

31. The Committee asked our witnesses what the implications are of no longer having a formal role in influencing the policy-making process at EU level. Professor McHarg's view is that the "reduced influence and scrutiny at the EU level has to be compensated for by increased scrutiny at the domestic level." [20] Professor Keating's view is that it is highly problematic, highlighting the example of Norway which is in the same position and "has to take policy, but it has no way of making policy." [20]

32. The Faculty of Advocates responded that "the absence of a formal role moves the UK and devolved governments from 'rule makers' to 'rule takers'." However, the extent of this shift depends on whether the future UK-EU relationship might include "provision for the UK (and by extension, the devolved governments) to participate in EU law-making in areas where the UK wishes to pursue close alignment with the EU." [14] The Faculty of Advocates also point out that the Scottish Government "will not be able to 'keep pace' in areas of EU law which depend on reciprocal arrangements between Member States"; unless similar arrangements are agreed as part of the future relationship. [14]

33. The Law Society of Scotland's view is that there is "a qualitative democratic difference" between the effect of the keeping pace power and the ECA. They point out that the latter operates within a framework for democratic engagement whereas the Bill purports to implement EU law which will not be subject to democratic input from the UK or Scotland.

34. SE Link's view is that the Scottish Government "should be subject to parliamentary scrutiny in cases where they choose not to keep pace" and that in such cases Ministers should be required to make a statement to Parliament. [21] Professor McHarg suggested that the provision for the Scottish Government to report on the use of the power could be extended to cover where it is not being used. But there would be no point in doing so retrospectively. The DPLRC's view is that the Parliament may wish to concentrate its scrutiny not just on the areas where decisions are to be taken to keep pace, but also where decisions are taken not to keep pace with EU law in devolved areas.

35. The Cabinet Secretary told us 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." [22] The Cabinet Secretary also told us that he is committed to discussing with Parliament "how, at the earliest stage of

policy development, we can build in an appropriate level of consultation" and that the "Government will not decide" on whether to keep pace alone. [23] But the "broad nature of EU law and the different scenarios that we might face make agreeing such a framework on the face of the bill not only unhelpful but very difficult." [24]

36. The Committee supports the keeping pace power in principle and agrees that it would not be appropriate or workable for it to be absolute and inflexible. But the Committee does not accept that the use of this power should be entirely at the discretion of the Scottish Government and believes that there needs to be much greater clarity on how the Scottish Government proposes to use the power. [i]

37. The Committee notes that one of the aims of the Bill as set out in the policy memorandum is to ensure "consistency and predictability" for people and business both in Scotland and the EU. But at the same time the Scottish Government recognises that it will not be possible to keep pace with all future EU law in devolved areas.

38. The Committee, therefore, recommends that the Bill should be amended to require the Scottish Government to provide guidance setting out the criteria which will apply to the use of the power. The guidance should also clearly set out how the keeping pace power interacts with other sources of regulation which will impact on peoples and business in Scotland. This should include the impact of trade deals, common frameworks and the operation of the UK internal market.

39. Specifically, in keeping with the aim of "consistency and predictability" there needs to be transparency in relation to the extent to which Scotland can keep pace with EU law in devolved areas and how to resolve any tension arising as a result of UK international agreements and mutually agreed common frameworks.

40. 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.

41. 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.

42. 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

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[i] This paragraph was agreed to by division - For 8 (Bruce Crawford, George Adam, Tom Arthur, Jackie Baillie, Angela Constance, Patrick Harvie, John Mason, Alex Rowley) Against 3 (Murdo Fraser, Alexander Burnett, Dean Lockhart) Abstentions 0

Parliament, on at least an annual basis, on how it has used the keeping pace power.

43. 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.

44. 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 use of Secondary Powers

45. The keeping pace regulations are subject to either affirmative or negative procedure. Section 4(2) of the Bill provides for the affirmative procedure where an instrument—

- abolishes a function of an EU entity or a public authority in a Member State without providing for an equivalent function to be exercisable by someone else;
- transfers functions from EU entities or public authorities in Member States to Scottish public authorities, or transfers functions between Scottish public authorities;
- charges fees (except uprating for inflation);
- creates, or widens the scope of, a criminal offence; or
- creates or amends a power to legislate.

46. All other regulations which might be made under the keeping pace power are subject to the negative procedure, unless Scottish Ministers decide to apply the affirmative procedure. SE Link recommend that Section 4(2) should be amended to "include deviation from current EU environmental standards."

47. A key question for the Committee is whether the extent of this power is appropriate. The DPLRC state that the keeping pace power "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."

48. Our Adviser points out that Section 1 of the Bill "creates a substantial Henry VIII power". [25] In his view, such measures "require strong justification and should be accompanied by appropriate substantive limits and procedural safeguards." [26]

49. There were a range of views among our witnesses as to whether the use of secondary powers to keep pace is appropriate. The view of the Faculty of Advocates is that the arguments for the use of secondary powers to "keep pace" as set out in the policy memorandum "have force." They point out that while there are good practical reasons for using secondary legislation in many circumstances to 'keep pace', "equally there may be significant policy choices" where primary legislation would be appropriate. They suggest that the Committee "may wish to explore with Ministers circumstances in which they would envisage primary legislation being appropriate."

50. SE Link "are content with the proposals to maintain alignment through secondary rather than primary legislation." But at the same time they "would like to see as much consultation and engagement as possible either before the parliamentary process begins or during the parliamentary process." [27] The NTS "are comfortable" with the use of secondary rather than primary legislation in order for the proposed keeping pace powers to be used most effectively.

51. Other witnesses were less comfortable. SCVO have considerable concerns about the "use of statutory instruments (so called Henry VIII powers) in the process of disentangling from the EU." They "anticipate that there is likely to be an unprecedented use of these powers by UK and Scottish Ministers, creating a risk that rights are accidentally or deliberately removed or weakened." [28] Professor McHarg's view is that "secondary legislation is always sub-optimal" [29] and "the provisions in the bill are not justified in respect of their current breadth." [30]

52. The Committee also gave some consideration to whether a super affirmative procedure or primary legislation to keep pace may be appropriate in some circumstances. The Law Society of Scotland point out that there is no provision within the Bill for when primary legislation may be used to keep pace. Their view is that primary legislation "should be an option" and "that the circumstances and criteria that would apply to their doing so should be set out." [6] They also propose that "the power to make regulations under section 1 should be subject to super affirmative procedure in the cases where the changes in EU law involve substantial policy considerations." [31]

53. The Faculty of Advocates told us in relation to the provisions in Section 4(2) of the Bill that one "might think that some of those require something more than simply the affirmative procedure, and there would be room for argument about whether they should require the superaffirmative procedure." [32]

54. The NFUS provided a number of examples where EU directives have been implemented through primary legislation in the Scottish Parliament including the water framework directive which was transposed into Scots law through the Water Environment and Water Services (Scotland) Act 2003. In their view, that "enabled the Scottish Government, the Scottish Parliament and stakeholders to have a significant input into how the process of Scotland meeting its obligations under the directive would work in practice on the ground." [33]

55. The Committee also explored with witnesses whether it would be possible to distinguish between technical changes to EU law which could be implemented using secondary legislation and more substantial policy changes which would require primary legislation. The Faculty of Advocates told us that "defining that in the bill is, from a legal point of view, difficult." [6] For example, should the choice about the form of legislation be tied to existing policy, so that if a proposal is made to change an existing policy area, that requires a particular type of legislation? The view of the Faculty of Advocates is that this "seems rather a blunt tool" which "might give rise to unforeseen consequences." [34]

56. Professor McHarg told us that "is a difficult thing to do, because distinctions between minor and technical changes and major and policy changes are, to some degree, in the eye of the beholder" [35] For example, the powers conferred by the European Union (Withdrawal) Act 2018 have resulted in instances where amendments which were supposed to be minor and technical have involved much more significant policy changes. Professor Keating explained that issues "that might look technical can be very salient."

57. Some witnesses suggested that one area where primary legislation may be more appropriate is to implement EU directives which introduce substantially new policies. Professor McHarg told us that "if we are talking about implementing a new directive, we must question whether a ministerial power is the appropriate way to go." [36] She suggested that consideration could be given to distinguishing "between directives on the one hand and regulations and decisions on the other hand, because directives tend to be used for more significant policy changes" with the caveat that regulations can sometimes be used for significant policy changes.

58. The Committee also considered whether there is a need for a sifting mechanism to decide which level of parliamentary scrutiny is appropriate. Both Professor Keating and Professor McHarg argued for the need for a sifting mechanism to determine not only which level of secondary legislation is appropriate but also whether primary legislation would be required. SE Link also suggest that "one way of dealing with whether the different instruments should be subject to different procedures might be for the Government to involve a sifting committee." [37]

59. The DPLRC's view is that since 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. However, it may be necessary and acceptable for minor and technical amendments to be made quickly by subordinate legislation to refine retained EU law.

60. The DPLRC 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. However, if the Bill is not amended to require primary legislation in these circumstances the DPLRC recommends that it is amended to require that a super-affirmative procedure would apply.

61. The DPLRC's view is that the choice of procedure (currently between negative and affirmative) is expanded to include super-affirmative, to cater for 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.

62. The 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 and a formal consultation period of at least 60 days. The Government should then 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.

63. The Cabinet Secretary told us that he does "not accept that the bill will give ministers sweeping powers to introduce new laws by means of secondary legislation." [38] He explained that 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." [24] He also explained that "there is a ground for primary legislation in case of major innovation" [39] but that in his view it is not "required for more minor pieces of work, nor for keeping pace with existing standards as they develop."

64. The Cabinet Secretary was asked whether he agreed that "there is at least a case for a sifting mechanism to ensure that the proper level of scrutiny is brought to bear on such measures." [40] He responded that he is "not necessarily in favour of a new sifting committee" but there will be an opportunity for every committee to do that work." [41]

65. The DPLRC "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 they recommend that the Parliament should focus on early engagement in the policy process.

66. The Committee welcomes the commitment from the Cabinet Secretary to agree an appropriate and proportionate decision-making framework for future alignment with EU law. The Committee agrees that the Parliament should focus on early engagement in the policy process. This should be set out in the decision-making framework proposed by the Cabinet Secretary as discussed above.

67. The Committee recognises that it may be necessary and acceptable for minor and technical amendments to be made quickly by subordinate legislation to refine retained EU law. However, the Committee recommends that further consideration is needed in relation to the implementation of significant new policy proposals that have no equivalent in retained EU law including EU Directives.

68. The Committee recommends that the Scottish Government gives serious consideration to the DPLRC's view 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 and that this applies particularly to EU Directives;
- 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.

Sub-delegation of legislative Power

69. 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.

70. The DPLRC 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. It notes that while a similar ability to sub-delegate forms part of the power to correct deficiencies conferred on UK and Scottish Ministers under the European Union (Withdrawal) Act 2018, 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.

71. The DPLRC considers that the power to sub-delegate "is particularly significant" and is not the same as the power in the 2018 Act which is limited to correcting deficiencies. In contrast, the sub-delegation of the keeping pace power includes future EU law.

72. The DPLRC recommends that, "given the uncertainty over the potential use of this significant power", the Scottish Government gives "further consideration in advance of Stage 2 to the necessity of this aspect of the power to allow sub-delegation through subordinate legislation."

Constraints

73. A key question for the Committee is the extent to which the keeping pace power may be subject to statutory and non-statutory constraints. As Professor McHarg explained, "the issue is not whether Scotland is able to maintain alignment with EU law when England might not want to—that is fair enough and there is no problem with that—it is about how much scope there will be for that divergence in practice." [42]

74. Professor Keating's view is that Scottish Ministers will be "enormously constrained" in the use of the keeping pace power. The Faculty of Advocates told us that while there might not be formal UK provisions that preclude the exercise of the keeping

pace powers, the effect of UK legislation might be, in some sectors, to limit the practical value of the powers that are sought in the Bill.

75. However, one of the challenges for the Committee and the Parliament in scrutinising the keeping pace power is that the extent of statutory and non-statutory limitations on the operation of the powers are currently difficult to ascertain. So while in principle the keeping pace power is very wide, in practice it may be much more limited. This is due to numerous uncertainties some of which are acknowledged in the policy memorandum which states that the "full range of issues where the power will be used cannot be predicted at present." In particular, there is currently a lack of clarity in the following inter-related areas —

- International agreements;
- UK Internal Market Bill;
- common frameworks.

International Agreements

76. The Financial Memorandum states that the Scottish Government "considers it prudent to take powers to enable Scots law to remain aligned with EU law in devolved areas, where appropriate or where required under international agreements." [43] However, some of our witnesses noted that it is unclear why the keeping pace power is required to meet the requirements of international agreements including the future relationship with the EU.

77. This is because the UK primary legislation required to implement international agreements would normally provide Scottish Ministers with the secondary powers to meet the requirements of the agreement in devolved areas. For example, section 2(2) of the ECA. More recent examples include the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020, and the Trade Bill (powers to implement international trade agreements). In these examples, the legislation confers powers on UK Ministers as well as Scottish Ministers to implement the requirements of the international agreements.

78. Furthermore, as the Committee has previously noted the UK Government has existing order-making powers available to it under sections 35 and 58 of the Scotland Act 1998. [44] These could, in theory at least, be exercised to prohibit a Scottish Bill or an action of the Scottish Government which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations (among other things) from becoming law. Professor McHarg explained that it "is clear that, if trade agreements require divergence from EU standards, they can be made binding on the Scottish Parliament, even if they affect devolved areas." [45]

79. The Committee invites the Scottish Government to clarify why the keeping pace power is required to meet international agreements. This is because the Committee understands that the UK primary legislation required to implement international agreements would normally provide Scottish Ministers with the secondary powers to meet the requirements of the agreement in devolved areas.

80. The Committee also notes that the use of the keeping pace power is likely to be influenced to some extent on the requirements of international agreements including trade deals. In our report on the Trade Bill LCM in October 2018 we noted that given future trade agreements may well limit the legislative competence of the devolved institutions it is therefore essential that they are involved at all stages of the trade negotiation process. More recently in our report on the Trade Bill LCM in October 2020 we restated this. [ii]

UK Internal Market Bill

81. A further potential constraint on the keeping pace power is the impact of the UK Government internal market legislation which is currently being considered at Westminster. The Committee will report separately on the Bill and the Legislative Consent Memorandum (LCM).

82. The Committee's consideration of the UK Internal Market Bill in this report relates to the potential impact of the mutual recognition and non-discrimination principles on the keeping pace power. In its assessment of the proposals in the white paper the Scottish Government provides a case study for their potential impact on the food and drink sector. This states that the Continuity Bill will allow the Scottish Government to keep pace with the high environmental, social and regulatory standards provided by EU law which apply to this sector but the internal market proposals potentially undermine these policy choices. [46]

83. Professor McHarg explained that the internal market proposals "will not technically prevent the use of the keeping pace power" but they "will render it probably less useful in practice, because the effect of Scottish divergence will be overtaken by whatever happens in other parts of the UK." [47] The Public Administration and Constitutional Affairs Committee (PACAC) states that the proposals in the internal market white paper to set in law the principles of mutual recognition and non-discrimination "will effectively create new reservations in areas of devolved competence." [48]

84. The NFUS "want to ensure that we respect the devolution settlement and that, where flexibility and differentiation are appropriate, they are allowed to continue." [49] They "want a regulatory framework that operates to basic standards across the UK so that there is no competitive advantage or disadvantage in the UK's single market." However, in their view, the mutual recognition and non-discrimination proposals in the UK Internal Market Bill "would, in effect, drive a coach and horses through the concept of commonly agreed frameworks." This is because, for example, "something that could be produced to a significantly different environmental standard in one part of the UK would have to be accepted as a legitimate product to be sold or used in another part of the UK." [49]

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ii Alexander Burnett MSP, Murdo Fraser MSP and Dean Lockhart MSP dissented from this paragraph.

85. The NFUS point out that if the UK starts to veer away from EU law but Scotland, through the Continuity Bill, retains alignment, that "will start to put extreme stresses on the operation of the internal UK market." This is why the NFUS "have been very critical of the UK Government's proposals, why we are still concerned about aspects of the continuity bill and why we still believe that the commonly agreed frameworks are the right approach." [50]

86. The explanatory notes to the UK Internal Market Bill state that Parts 1 to 3 "operate so that any requirements created after its entry in force that would impede the operation of the UK internal market will have no effect. It will therefore no longer be possible to enforce requirements that would interfere with the operation of the principles outlined in the Bill." The explanatory notes then go on to state that in this way, "the Bill's provisions create a new limit on the effect of legislation made in exercise of devolved legislative or executive competence. For example, clause 2(1) disapplies any legislative requirements that do not comply with the mutual recognition principle." [51]

87. The Committee notes that the mutual recognition and non-discrimination principles in the UK Internal Market Bill have the potential to significantly undermine the use of the keeping pace power in this Bill. Indeed, as the Committee states in our report on the Internal Market Bill LCM, we believe that the Internal Market Bill, and the market access principles in particular, undermine the whole basis of devolution.[iii]

Common Frameworks

88. The policy memorandum states that "the UK Government and the devolved governments have agreed to work together in some devolved areas currently subject to EU law, by agreeing frameworks to govern matters currently regulated at the EU level." [52] A key question for the Committee in considering the Continuity Bill is how common frameworks may also constrain the use of the keeping pace power. In part, this will depend on how they interact both with international agreements including trade deals and the proposed UK internal market legislation.

89. The Scottish Government's view is that the UK Government's internal market proposals are "completely unnecessary" as common frameworks provide "arrangements to manage the intersection of EU law and devolved competence" in areas of policy and regulation relevant to UK internal trade. [53] Common frameworks are intended to "manage the practical regulatory and market implications of the UK leaving the EU while allowing legitimate policy choices to continue to be made in line with the devolution settlement." [54]

90. SE Link's view is that if the keeping pace power is enacted then that "will simply be a difference of policy approach that the common frameworks will need to recognise." [55] COSLA's view is that there is insufficient consideration of the

iii Alexander Burnett MSP, Murdo Fraser MSP and Dean Lockhart MSP dissented from this paragraph.

evolving UK-wide common frameworks either in the Bill or in the supporting documents.

91. Both the NTS and SE Link propose that mutually agreed minimum environmental standards are set out in common frameworks. The NTS state that it is crucial for the UK Government and the devolved governments "to work together to come to an agreement around minimum environmental standards within which the UK internal market can function." [7] SE Link state that "commonly agreed minimum standards are essential." [21] In their view this "would ensure there is no drive for competitive deregulation in any part of the UK that would damage our environment" and "a transparent and cooperative process for agreeing common frameworks is urgently needed." [21]

92. The Welsh Government have stated that two common frameworks – on Nutrition and Hazardous Substances – have been agreed by the JMC (EU negotiations) and can "now progress to legislative scrutiny by the four legislatures." [56] They also stated that "there was general agreement that work was progressing well given the circumstances and there was a shared understanding that, where it was not possible to complete work on Frameworks before the end of the transition period, all Governments would consider themselves bound by outline Frameworks, whilst legislative scrutiny and final agreement took place in 2021."

93. The Scottish Government explained to the DPLRC that the purpose of common frameworks is "to enable co-operation between the governments after EU exit" and they "will not alter or constrain devolution in any way and will not prevent the Scottish Parliament from making alternative arrangements in these areas should they judge that to be necessary in the future." [57]

94. However, the view of the Law Society of Scotland is that both statutory and non-statutory common frameworks will constrain the ability of the Scottish Government to keep pace in the areas which they cover. The DPLRC question why common frameworks will not "constrain devolution in any way" given the Scottish Government's commitment "not to create divergent policy in ways that would cut across future frameworks."

95. The Committee recognises that while common frameworks may not alter devolution they may nevertheless constrain, albeit voluntarily and subject to continued agreement, the Scottish Government's options for policy divergence in certain policy areas. If so, it is essential that this is done transparently and with an opportunity for parliamentary and stakeholder engagement.

96. In keeping with the Scottish Government's aim of "consistency and predictability" the Committee recommends that when draft common frameworks are published for consultation, they set out how they will interact with the keeping pace power and, in particular, whether they will constrain in any way the use of this power as discussed above.

97. The Committee recognises the frustration felt by some of our witnesses regarding a lack of consultation with the Parliament, stakeholders and wider public. The Committee reported in January 2018 that the "process for agreeing common

frameworks and the actual content must be arrived at through agreement and not imposed" and that "this process is not solely a matter for governments but must be transparent and inclusive." [58] Nearly three years later there has been little if any public consultation.

98. The Committee remains very supportive of the Scottish Government's view that common frameworks should not be imposed by the UK Government and is supportive of a system of common frameworks for trade in the Internal Market, with the common frameworks to be agreed between the devolved Governments and the UK Government. However, it is equally important that common frameworks are not effectively imposed on the Parliament and stakeholders without meaningful consultation and an opportunity to propose amendments.

99. The Committee also recommends there should be a requirement for the Scottish Government to report on the operation of each common framework on an annual basis. This should include an update on the interaction of each common framework with the keeping pace power; for example, if the keeping power pace has not been used as a consequence of a common framework.

Resource Implications

100. The Bill's Financial Memorandum (FM) states that given the full range of issues where the keeping pace power will be used cannot be predicted at present, "it is not possible to provide meaningful projections of costs associated with the use of the keeping pace power." [43]

101. Both the Bill team and Cabinet Secretary were asked by the Committee how many significant measures would be brought in on an annual basis under the Bill. The Cabinet Secretary responded that "up to 70 minor items could be changed in a normal year, which seems entirely reasonable. However, I do not think that we would wish to keep pace with all 70. I do not think that we have the capability, even with secondary legislation, of keeping pace in that way."

102. There are currently four principal ways in which EU obligations which require domestic legislation may be implemented in devolved areas—

- A specific Act of the UK Parliament;
- subordinate legislation made by UK Ministers under section 2(2) of the ECA (read with section 57(1) of the Scotland Act 1998;
- A specific Act of the Scottish Parliament;
- subordinate legislation made by the Scottish Ministers under section 2(2) of the ECA.

103. Table 1 below sets out the number of SSIs which were made in whole or in part using powers derived from Section 2(2) of the ECA on an annual basis between 2016 and the current year.

Table 1

Year	SSIs
2016	19
2017	28
2018	11
2019	39
2020	11

Source : SPICe, based on information from the Westlaw database.

104. Table 2 shows the number of EU legislative instruments the SSIs listed above appear to have transposed. This is based on the explanatory notes of each SSI but may not be exhaustive. The reason the numbers in Table 2 below do not necessarily match up with the number of SSIs per year are due to situations where the implementation of an EU Directive or Regulation has required more than one SSI.

Table 2

	Directive	Regulation	Decision	Tertiary	EU Exit	COVID
2016	9	5	0	4		
2017	15	8	0			
2018	4	5	1	13		
2019	3	7	0	17	21	
2020	1	2	0	6		3

Source: SPICe

105. Whilst the implementation of Directives and Regulations are more likely to relate to policy proposals, transposition of tertiary legislation is more likely to have been making technical changes to EU legislation. In 2019, a number of SSIs made in part using the power in Section 2(2) ECA were to address EU Exit matters. In 2020, 3 SSIs were made (again in part using the Section 2(2) power) in 2020 using these powers to address COVID matters.

106. The Committee also notes that the Scottish Government is not currently required to legislate for EU regulations which have direct effect domestically.

Use of Section 57(1) of the Scotland Act 1998

107. There are no legal rules governing the choice between UK-wide implementation and separate Scottish implementation. In practice, some EU obligations which affect devolved areas are implemented by Scottish legislation; others are implemented by UK legislation.

108. The Memorandum of Understanding ("MoU") on Devolution [59] states that it is the responsibility of the lead Whitehall Department to formally notify the devolved administrations at official level of any new EU obligation which concerns devolved matters and which it will be the responsibility of the devolved administrations to implement. It also states for matters falling within the responsibility of the devolved administrations, it is for them to consider, in bilateral consultation with the lead Whitehall Department, and other Departments and devolved administrations if appropriate, how the obligation should be implemented, including whether the

devolved administrations should implement separately, or opt for GB or UK legislation.

109. The Bill's Financial Memorandum points out that "these arrangements will change for both the Scottish and UK Government once the UK is no longer a party to the transitional arrangements, and will depend, for example, on any further agreement between the UK and EU, and the arrangements the UK Government makes for monitoring forthcoming EU legislation." [43]

110. The Scottish Government provides the Parliament with a 6 monthly update on the use of Section 57(1) of the Scotland Act. Between February 2016 and December 2019, 51 EU legislative instruments were transposed by the UK Government under Section 57(1).

111. The Committee seeks further clarity from the Scottish Government on the anticipated volume of SSIs and primary legislation arising from the keeping pace power. Specifically, whether there is an expectation of a significant increase arising from the need to legislate for EU regulations which previously would have had direct effect and also where previously the Section 57(1) power would have been used.

Monitoring

112. The Committee discussed with witnesses the practicalities and resource implications of the Scottish Government monitoring changes to EU law given that the UK is no longer a Member State. Professor McHarg told us that this will be more difficult than it is currently. This is because neither the Scottish Government or the UK Government will be involved in the early stages of the policy-making process, "so it will be more difficult to have notice of what is coming." [60]

113. She also told us that there will be resource implications given that the Scottish Government previously relied a lot on the UK Government in its role as a Member State. Professor Keating's view is that it "will be important for the Scottish Government to anticipate what is coming up in Brussels rather than waiting for a directive or regulation to come out." [61] He suggests that the Scottish Government "needs to be there at the beginning" and to consult with stakeholders.

114. Professor Keating told us that "the Scottish Government—as it admits in the explanatory notes to the bill—will have a big task in keeping up with what goes on in Brussels." The Faculty of Advocates state that it "seems clear that the task of monitoring and assessing each new EU instrument or decision will be considerable." [14]

115. Professor Keating told us that the Parliament "will face a similar, parallel challenge, which I am not sure that it is equipped to handle. A great deal of resource and effort will be required to keep up with what comes out of Brussels." [62] In his view it is about "looking at what is in the pipeline and what is worth following through, rather than trying to monitor everything that comes out of the pipeline." [63] The LSS told us

that paradoxically, "at a time when the UK has left the European Union, the Parliament may want to consider how it monitors legislative change in Europe and what resources it wants to devote to that."

116. The Committee notes that the resource implications for both the Scottish Government and the Scottish Parliament in "keeping pace" are potentially significant. The Committee therefore seeks further clarity from the Scottish Government on the following points —

- What discussions have the Scottish Government had with the UK Government about whether the UK Government will continue to monitor the EU policy-making process and whether it will continue to share this information with the Scottish Government;
- What are the resource implications for the Scottish Government of the UK Government potentially no longer notifying the devolved administrations at official level of any new EU obligation which it will be the responsibility of the devolved administrations to implement;
- What discussions have the Scottish Government had with the UK Government about the UK Parliament continuing to legislate for the devolved governments in areas where there may be agreement across the UK to keep pace through, for example, common frameworks;
- What are the resource implications for the Scottish Government of the UK Government no longer implementing EU obligations in devolved areas.

117. The Committee also notes that the keeping pace power has potentially significant resource implications for the Parliament. But this will depend on what scrutiny role the Parliament agrees to adopt following the end of the implementation period. As noted above 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.

118. The Committee believes that there is a need to ensure that there is an appropriate and proportionate level of parliamentary, stakeholder and public engagement in the domestic policy-making process in areas which were previously subject to EU law. This is primarily because there will be no future formal democratic engagement in the EU policy making process by the UK and devolved governments. But it is also because there is a risk that the EU policy-making process is replaced by an executive-driven process which allows for significant levels of ministerial discretion including an inter-governmental process with limited opportunity for parliamentary and stakeholder engagement.

119. The Committee recognises, therefore, that as we near the end of the implementation period there is a need for the Parliament to consider how its scrutiny role needs to evolve to meet the challenges of the impact of Brexit on devolution. In particular, the role of the Parliament in relation to the following —

- The UK internal market;
- Common frameworks;

- The keeping pace power;
- International agreements including the future relationship with the EU and other trade deals.

120. The Committee will consider these issues as part of its legacy inquiry. But there is also the need for a wider debate across the Parliament. The Committee will therefore write to the other parliamentary committees seeking their views on how the scrutiny function needs to evolve to meet the challenges posed by Brexit. The Committee will also bid for a debate in the Chamber before the end of the implementation period.

Sunset Provisions

121. As noted above , the Bill currently includes a sunset clause 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. This differs from the previous UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill which provided for the expiry of the legislation 3 years after exit day with the possibility of extending that for a further total period of two years in one-year increments (i.e a maximum of five years in total).

122. The Scottish Government explained the difference in correspondence with the DPLRC. They stated that it "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 [in agreeing the future UK-EU relationship], and to recognise EU law has a development cycle that can take some years."

Human Rights

123. The Human Rights Consortium Scotland (HRCS) recommend that Section 6 of the Bill should be amended to include a statement to the effect that Scottish Ministers have had due regard to their obligations under the Human Rights Act 1998 and under international obligations. The Committee asked Scottish Government officials whether there was anything to prevent the Bill being amended in this way. They responded that "the Scotland Act 1998 and the Human Rights Act 1998 require more than due regard being paid to obligations, so we think that the suggested amendment is unnecessary." [64]

124. The HRCS was asked by the Committee why in their view the amendment is necessary. They responded that it is "necessary and valuable because we are in a context in which the Human Rights Act 1998 is increasingly being challenged at UK level, so we need to do everything to ensure that it is secure in Scots law." [65] The Cabinet Secretary was asked whether he agreed with this view. He responded that, yes, we "need to address that issue as we move to stage 2 of the bill" and

committed to ask his officials to "have discussions with the relevant organisations, to see whether we can agree a way forward." [66]

125. The Committee welcomes the commitment from the Cabinet Secretary to address the issue raised by the HRCS that the Bill should be amended to include a statement to the effect that Scottish Ministers have had due regard to their obligations under the Human Rights Act 1998 and under international obligations.

Conclusion

126. **The Committee supports the general principles of the Bill.** [iv]

[iv] ***Alexander Burnett MSP, Murdo Fraser MSP and Dean Lockhart MSP dissented from this conclusion.***

Annexe

127. Murdo Fraser moved the following amendment—

To delete paragraph 36 and replace with; “Evidence to the Committee has raised serious concerns that the Bill as presented will put us in the position of being a ‘rule taker’ but not a ‘rule maker’. The Committee accepts that there may be a place for a Bill which authorises Scottish Ministers to make minor or technical changes to retained EU law, but the powers in this Bill go far beyond that. The Committee believes that it is not appropriate for Scottish Ministers to have the power to introduce new laws enacting significant policy changes by means of secondary legislation.”

128. The amendment was disagreed by division—

- For 3 (Murdo Fraser, Alexander Burnett, Dean Lockhart)
- Against 8 (Bruce Crawford, George Adam, Tom Arthur, Jackie Baillie, Angela Constance, Patrick Harvie, John Mason, Alex Rowley)
- Abstentions 0

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[13] Submission from Faculty of Advocates. (, undefined). Retrieved from https://www.parliament.scot/S5_Finance/Inquiries/Faculty_of_Advocates.pdf

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