

This document relates to the UK Withdrawal from the European Union (Continuity) (Scotland) Bill (SP Bill 77) as introduced in the Scottish Parliament on 18 June 2020

UK Withdrawal from the European Union (Continuity) (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the UK Withdrawal from the European Union (Continuity) (Scotland) Bill introduced in the Scottish Parliament on 18 June 2020.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 77–EN);
 - a Financial Memorandum (SP Bill 77–FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 77–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

Purpose of the Bill

4. The people of Scotland voted decisively to remain within the European Union (EU) in 2016. The Scottish Government remains of the view that the best option for Scotland was the one Scotland voted for: remaining in the EU. The Scottish Government had previously published compromise proposals for Scotland and the UK, including remaining in the

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Single Market and Customs Union. In spite of this, it is a source of deep regret to the Scottish Government that the UK left the EU on 31 January 2020. The Scottish Government remains committed to continuing to do everything possible to minimise the profound damage that it believes EU exit will cause.

5. It is the Scottish Government's view that the extent to which devolved law aligns itself with the law of the EU should be a decision for the Scottish Parliament to take, not the UK Government. The purpose of introducing the UK Withdrawal from the European Union (Continuity) (Scotland) Bill ("the Bill") is to enable the Scottish Ministers to make provision in secondary legislation to allow Scots law to be able to 'keep pace' with EU law in devolved areas, where appropriate; 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. These changes are designed to ensure certainty, stability and predictability for the people who live and work in Scotland and those who do business here and with Scotland in Europe by updating or aligning devolved law with new EU law where that is appropriate and practicable. They are also necessary to ensure that Scotland's environmental standards can continue to keep pace with those in the EU level.

Legal background

6. On 1 January 1973 the UK joined the European Economic Community, now the EU. The principal statute which gave domestic effect to EU law and gives the governments of the UK the ability to implement EU law was the European Communities Act 1972 (the "ECA").

7. On 23 June 2016, a referendum was held in the UK and Gibraltar on the question whether the UK should remain a member state of the EU. Across the UK and Gibraltar 52% of the votes were for leaving the EU, with 48% voting to remain. In Scotland, 62% of the votes were for remaining in the EU, with 38% voting to leave.

8. On 29 March 2017, the Prime Minister notified the European Council of the UK's intention to withdraw from the EU under the terms of Article 50 of the Treaty on European Union ("the TEU") and section 1 of the European Union (Notification of Withdrawal) Act 2017. The EU (Withdrawal) Act ("the

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EUWA”) was passed on 26 June 2018, which establishes a new framework for the application of former EU law within the UK and provides for ‘retained EU law’ as a new form of domestic law.

9. The European Union (Withdrawal Agreement) Act 2020 (“the EUWAA 2020”) gave effect to the Withdrawal Agreement agreed between the UK and EU in October 2019. The Withdrawal Agreement was accordingly ratified and the United Kingdom exited the European Union on 31 January 2020 (“exit day”) after 47 years of membership. Throughout this period, including after the notification of the United Kingdom’s intention to exit the EU, Scotland’s laws have reflected, and have been adapted to reflect, EU law. The EU has been one of the major sources of law for the UK throughout this period.

10. As part of the Withdrawal Agreement, the UK and EU agreed to an implementation period, during which the vast majority of EU law continues to apply in the UK as though it were a member state. The implementation period is due to expire on 31 December 2020 and, whilst there is scope under the Withdrawal Agreement to extend this period, this is currently ruled out under section 15A of the EUWA. As a consequence of the implementation period, despite the repeal of the ECA on exit day by the EUWA, the EUWAA 2020 has saved and modified the ECA in order to give effect to the continuation of EU law during the implementation period as per the Withdrawal Agreement.

11. The EUWAA 2020 also amends the EUWA to ensure that the snapshot of retained EU law is taken at the end of the implementation period as opposed to on exit day.¹ Retained EU law will continue to apply in Scotland until such time as new domestic laws are made to change it. The extent to which ‘post-implementation period EU law’ will apply in the UK going forward as a matter of the UK’s international obligations, will depend on whether a future Agreement is concluded by the UK and the EU and what the terms of any such Agreement are.

¹ However, the Direct Payments to Farmers (Legislative Continuity) Act 2020, which the Scottish Parliament consented to on 16 January 2020, converted the EU legislation governing the 2020 Common Agricultural Policy (CAP) direct payment schemes into domestic law at 11 pm on 31 January 2020.

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12. The UK Supreme Court confirmed in the Miller 1 case that one of the effects of UK withdrawal from the EU would be an expansion of the Scottish Parliament’s ability to make law in devolved areas currently covered by EU law:

“The removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence”.²

13. Section 29(2)(d) of the Scotland Act 1998 provides that Acts of the Scottish Parliament are not law so far as they are incompatible with EU law. Once EU law ceases to operate in the UK at the end of the implementation period, this restriction will empty of meaning. Section 12(1) of the EUWA, due to be commenced at the end of the implementation period, is also set to remove the competence restriction under section 29(2)(d). In line with the Supreme Court’s decision in the Continuity Bill Reference³, section 42 of the Bill therefore makes provision in anticipation of this adjustment to the Parliament’s ability to make laws and ensures that the Bill, and the powers in it, will only have effect once the restriction in section 29(2)(d) is spent and no longer has any legal effect.

14. Nothing in the Bill impacts on the Scottish Government’s on-going legal obligation to transpose, implement and otherwise abide by EU law for the duration of the implementation period.

The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

15. In response to the notification of the UK’s intention to leave the EU, the Scottish Government introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (“the 2018 Continuity Bill”) on 27 February 2018. The intention behind the 2018 Continuity Bill was to ensure that Scotland’s devolved laws could be prepared for the effects of UK withdrawal even if it was not possible to rely on the EUWA, a piece of

² R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5, paragraph 130.

³ <https://www.supremecourt.uk/cases/uksc-2018-0080.html>

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legislation to which the Scottish Parliament did not consent⁴ and had not yet become law when the 2018 Continuity Bill was introduced. Section 13 of the 2018 Continuity Bill, as introduced, provided a power for the Scottish Government to make provision that would correspond to or implement provision in EU law after UK withdrawal. There was further provision amended into the 2018 Continuity Bill during its passage which required the Scottish Government to have regard to the guiding principles on the environment when exercising that regulation making power.

16. The 2018 Continuity Bill completed its parliamentary passage on 21 March 2018 with 95 votes in favour and 32 against.⁵ Subsequently, the Advocate General for Scotland and Attorney General – the UK’s Law Officers – made a reference to the United Kingdom Supreme Court under section 33(1) of the Scotland Act 1998, arguing that the 2018 Continuity Bill was outwith the legislative competence of the Scottish Parliament.

17. The Supreme Court considered the reference in December 2018.⁶ In a unanimous judgment, the court held that, whilst section 17 of the 2018 Continuity Bill was ultra vires, the remainder of the Bill was within the Scottish Parliament’s legislative competence when the Bill was passed. However, the EUWA amended the Scotland Act 1998 to make itself a protected enactment⁷, thus changing legislative competence without the

⁴ As the EUWA made provision applying to Scotland for purposes within the legislative competence of the Parliament, and altered that legislative competence and the executive competence of the Scottish Ministers, it was a relevant Bill within Rule 9B.1.1 of the Scottish Parliament’s Standing Orders and required the legislative consent of the Scottish Parliament. The Scottish Government sought amendments to the EUWA to allow it to recommend to the Parliament that the necessary consent be given. Agreement on the terms of the Bill was not reached and the Scottish Parliament did not provide its legislative consent to the EUWA.

⁵ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11434>

⁶ The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64.

⁷ Section 29(2)(c) of the Scotland Act 1998 provides that provision of an Act of the Scottish Parliament is outside legislative competence if it is in breach of the restrictions in schedule 4. Schedule 4 lists enactments which are protected from modification by Acts of the Scottish Parliament. These

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consent of the Scottish Parliament, in the period between the completion of the 2018 Continuity Bill's passage through the Scottish Parliament and the court's judgment. As a result, the Supreme Court found that some further specific provisions were now outwith the Scottish Parliament's legislative competence. The Court affirmed the Scottish Parliament's power, subject to the limits on its competence, to prepare the statute book against the UK's withdrawal from the European Union.

The policy background

18. After cross-party discussions on the implications of the Supreme Court's decision, the Cabinet Secretary for Government Business and Constitutional Relations wrote to the Presiding Officer⁸ on 5 April 2019 explaining the Scottish Ministers' intention to ensure that the Scottish Parliament's wishes, as expressed in its support for the 2018 Continuity Bill, are respected by:

- bringing forward new legislation to ensure Scots law can continue to align with EU law, where appropriate
- strengthening environmental protection, including seeking opportunities to legislate
- looking at how best to safeguard important EU human rights values
- agreeing new protocols with the Scottish Parliament, which are now in place, to give MSPs more scrutiny over Brexit legislation.⁹

are known as 'protected enactments'. Making the EUWA a protected enactment meant that an Act of the Scottish Parliament could not include provision to amend or modify the EUWA.

⁸ <https://www.gov.scot/news/continuity-bill-update/>

⁹ In passing the 2018 Continuity Bill, the Scottish Parliament made clear its desire for greater involvement in decisions to agree UK-wide statutory instruments and enhanced scrutiny of SSIs made by Scottish Ministers in relation to EU exit. Protocols have since been agreed between the Scottish Government and Scottish Parliament to ensure the Scottish Parliament has this involvement. See para 19.

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19. Following the publication of the First Minister's Advisory Group on Human Rights Leadership's report¹⁰, the National Task Force for Human Rights Leadership continue to look at how best to safeguard important EU human rights values. The Scottish Government and Parliament have agreed and continue to operate a protocol for scrutiny of EU exit-related Scottish statutory instruments, and another protocol for scrutiny of proposals by the Scottish Ministers to consent to EU exit-related UK statutory instruments affecting devolved matters. This Bill is the vehicle by which the other two commitments are met.

Scotland's approach to the EU law and UK frameworks

20. The Scottish Government believes that Scotland's interests are best served by being an independent EU member state, and events since the 2016 referendum have made that case stronger. The Scottish Government believes that the EU will continue to be of fundamental importance to Scotland and that Scotland can be of importance to the EU, contributing to the EU's goals. The Scottish Government will do everything it can to be an active and constructive participant on EU matters. The Scottish Government's Programme for Government and Scotland's National Performance Framework are both closely aligned with the EU's agenda.

21. In the meantime, the Scottish Government considers that there should be a power for devolved matters in Scotland to keep pace with EU law, where appropriate. This would ensure consistency and predictability for the people who live and work in Scotland, and those who do business here and with Scotland in Europe, by updating or aligning devolved law with new EU law where that is appropriate and practicable. The Scottish Government also believes that environmental principles in domestic law, informed by the four EU environmental principles, should guide the development of policy and legislation in Scotland, and that Scotland should have effective domestic environmental governance to underpin environmental standards.

22. For as long as Scotland is part of the UK, the Scottish Government will work to ensure that devolution is respected, protected and enhanced, and that EU exit is not used as a pretext to reduce or constrain devolved

¹⁰ 10 December 2018 - <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

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powers. As the UK leaves the EU, 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. Frameworks may be implemented by legislation, by executive action, by concordats or by other means, or a combination of these means, depending on the context in which the framework is intended to operate. Some frameworks will stand alongside existing UK regulatory frameworks covering devolved responsibilities, by agreement, for example those covering producer responsibility and the regulation of chemicals that are being updated in the 2020 UK Environment Bill.

23. Work on these frameworks reflects the Scottish Government's pragmatic response to EU exit. Negotiations as to their precise shape and content are ongoing. Where a framework includes formal governance arrangements, whether on a statutory or administrative basis, Scottish Ministers will remain responsible for decisions taken in respect of devolved matters, and will be accountable to the Scottish Parliament for these decisions. The Scottish Government has been clear that it will only agree to common frameworks where these are in Scotland's interests, and where they have been established on the basis of agreement, not imposition. The Scottish Government also recognises the crucial role full parliamentary scrutiny must play in the development, implementation and oversight of any future common framework.

The power to maintain alignment with EU law

24. Section 2(1) of the ECA provides for directly applicable law (such as EU regulations) to have effect in domestic law. Other types of EU law (such as Directives) are implemented through domestic law, frequently using the power provided for that purpose in section 2(2) of the ECA. The power in section 2(2) will remain available for this purpose until the end of the implementation period.

25. A substantial number of subjects are currently regulated under section 2 of the ECA, either directly through subsection (1) or by subordinate legislation made under subsection (2). When this provision is no longer available at the end of the implementation period, in many areas this will mean that the only existing delegated power to regulate will be lost.

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26. In some cases it may be possible to align with EU law after the implementation period using other specific legislative powers (beyond section 2(2) of the ECA) which cover the subject matter of a particular EU obligation. In many cases, however, separate legislative powers will not be available or sufficient. In order to ensure the effective operation of Scots law, to provide for the most flexible approach to regulation, and to reflect Scotland's desire to remain a European nation closely aligned to the EU (so far as within devolved competence), upon the ending of the implementation period, the Scottish Government considers it necessary to give Scottish Ministers the power to make secondary legislation to ensure that Scotland's laws may keep pace with changes to EU law, where appropriate and practicable. Such an approach will minimise any disruption which will arise from the end of the implementation period and maximise coherent continuity of law over the coming period. In the event of the UK and EU agreeing a trade agreement, there may be a requirement for a form of dynamic alignment, however limited, with EU law. It is therefore prudent to legislate for this power to provide an effective and pragmatic mechanism for the Scottish Government to achieve this alignment.

27. Moreover, the Scottish Government considers that there are likely to be fields where its policy will be to voluntarily maintain regulatory alignment with EU rules. This will mean choosing to keep pace with developments in a particular field of regulation at the end of the implementation period. If there is no other power to regulate in an area, the alternative could be considerable primary legislation, so it is pragmatic to legislate for a power to keep pace with post-withdrawal developments in EU law and ensure, as appropriate, continuity of law in certain devolved areas after the implementation period ends.

Refinement aspect of the power

28. In addition to the Scottish Ministers having the power to keep pace where appropriate with developments in EU law after the implementation period, the power will also enable Scottish Ministers to 'refine' an existing EU law scheme, within the scope of their current ability to adjust EU law schemes. This will enable continuing improvements to be made in the domestic implementation of existing EU law without a substantive change in the underlying EU framework.

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Alternative approaches

29. The main alternative to introducing a keeping pace power would be the introduction of primary legislation to create subject-matter-specific powers. As can be seen from the examples below, the keeping pace power could be applied to a highly diverse range of policy areas across the Scottish Government. Policy issues can currently be remedied rapidly by regulations under section 2(2) of the ECA. To introduce primary legislation for each instance in which the keeping pace power could be used would potentially consume a significant amount of parliamentary time, sometimes with short notice, limiting space for the remainder of the legislative agenda. It could also introduce a significantly longer time-lag between the identification of an issue and its remedy than in the case of the keeping pace power being available.

30. Given the unpredictability and significance of the implications of UK withdrawal from the EU, the Scottish Government considers the introduction of this Bill to be a prudent and appropriate measure to ensure continuity of law, an appropriate range of regulatory powers, and to deliver its policy of alignment where appropriate with EU law.

Operational use of the power

31. Prior to the UK's formal exit from the EU, the Scottish Government was involved in and had visibility of the policy-making processes associated with legislative development in the EU. Relevant policy leads, staff in the Scottish Government Brussels office and legislative monitoring staff contributed to the development of, monitoring and, where necessary, implementation of EU law.

32. This cannot be entirely replicated outside the EU. However, this approach, of a collaborative process involving EU-facing staff, could be continued and developed to monitor changes to EU law and, in collaboration with policy teams, develop policy proposals for keeping pace with EU law as appropriate.

33. The Scottish Government continues to explore the optimal approach to operational use of the keeping pace power and will provide further details as this consideration proceeds.

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Scrutiny of the power's use

34. The power at section 1 of the Bill to keep pace with EU law is limited, with several potential uses of the powers prohibited by the limitations set out in section 2 of the Bill. Further, the Scottish Government considers that it is important that the Scottish Parliament has the ability to closely scrutinise the use of this power, in a proportionate manner. While some instruments will make relatively technical amendments to existing legislation, some will be required to facilitate important policy choices being proposed by the Scottish Government. As such, the Bill provides for an instrument to be subject to the affirmative procedure in the Scottish Parliament where the instrument:

- abolishes 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, or provides for any function of an EU entity or public authority to be exercisable instead by a Scottish public authority or (as the case may be) to be conferred instead on another Scottish public authority,
- imposes, or otherwise relates to, a fee or charge in respect of a function exercisable by a public authority in the United Kingdom (except in so far as the provision is made to reflect changes in the value of money);
- creates, or widens the scope of, a criminal offence; or
- creates or amends a power to legislate.

35. Where the provision in regulations made under section 1 of the Bill does not fall under the categories noted above, negative procedure will apply, subject to a discretionary decision by the Scottish Ministers to apply affirmative procedure. This represents an appropriate balance between allowing for effective and thorough scrutiny of the use of the power whilst also ensuring there is sufficient flexibility in the system to allow the Scottish Government, where appropriate, to respond quickly to developments in EU law.

36. The Bill further requires the Scottish Ministers to produce explanatory statements to accompany each instrument proposed under the keeping pace power. These statements relate to whether: the instrument will amend, repeal or revoke any aspects of equalities legislation; the Scottish Ministers have had due regard to the need to eliminate any conduct

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prohibited by or under the Equality Act 2010; the instrument will have any effect on consumer protection or on rights and duties relating to employment and health and safety legislation. In addition, the Bill requires the Scottish Ministers to explain:

- The instrument or draft itself;
- Why the Scottish Ministers consider there are good reasons for making the provision contained in the instrument or draft;
- The law prior to the end of the implementation period;
- Any effect on retained EU law deriving from the instrument or draft.

37. The Bill provides that the power should be subject to a “sunset” period. This is to provide the clarity and certainty to regulators and those impacted by regulations that the Scottish Government may, where appropriate, keep pace with changes to EU law.

38. The Bill is intended to provide the Scottish Government and Scottish Parliament with a stable legal framework to allow Scots law to remain aligned with EU law in devolved areas, where appropriate, following the end of the implementation period. The power might well eventually be supplemented, or may in time be replaced, by specific powers to keep pace in subject areas, or be overtaken by re-accession by an independent Scotland to the EU in the future. However, in line with the purpose of the rest of the Bill, and given the range of retained EU law, the Scottish Government believes that it is prudent and pragmatic to provide for a general power to update and refine this law in domestic law for an appreciable period of time, initially 10 years (expected to be equivalent to two sessions of the Scottish Parliament). The Bill therefore provides that the power to make provision corresponding to EU law after the end of the implementation period expires 10 years after the Bill comes into force, unless extended by regulations, subject to the affirmative procedure, again for a period not exceeding five years, or is extended again for any such further period of up to five years, and further periods thereafter. If the power is no longer required within this period, for example on re-accession, it will no longer be used.

Potential uses of the power

39. In order to understand the likely use of the power, some examples of how the power could be used in the near term are set out below. This is not

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an exhaustive list and there may be innovations across the range of EU responsibilities during the proposed period within which the power would have effect during which it is necessary to react to the implications of UK withdrawal from the EU.

Drinking water

40. Drinking water standards are primarily governed in Scotland under the Water (Scotland) Act 1980, regulations made under that Act and under the ECA. They are largely derived from the transposition of the EU Drinking Water Directive which is based on advice from the World Health Organisation. The powers contained within the 1980 Act are not sufficiently broad to implement fully future changes to the Directive, which was agreed at a political level in February 2020. The final version of the recast Directive is expected to be published later in the year. The recast Directive introduces a number of new requirements in relation to drinking water quality, quality of the water environment used for drinking water, leakage and reducing the use of plastic water bottles which the Scottish Ministers may choose to replicate. The availability of a keeping pace power will enable the Scottish Ministers to be able to respond quickly and efficiently to continue to regulate drinking water to the standards desired by the Scottish Government.

Food and livestock updates

41. An example of an area where the Scottish Government might use a keeping pace power is the regulation of food. A substantial amount of food regulation is made using section 2(2) of the ECA. This is done to implement, and to ensure enforcement and execution of, EU food law in Scotland.

42. In particular, new general rules such as those governing the place of provenance and country of origin of processed foods are expected from the Commission and are of specific interest to the Scottish Ministers. Similar considerations apply to livestock products, standards, labelling and classifications in the red meat, dairy and poultry sectors. Scotland and the UK have a deep, long-established and economically significant relationship with EU Member States in this sector. The EU regularly updates its specifications and standards in this field, maintaining rigorous standards of regulation within the sector and is highly likely to seek equivalence in standards for imports from Scotland after the conclusion of the

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implementation period. Without a power to keep pace with changes to EU law Scottish Ministers would lose the ability to introduce, amend or update secondary legislation on livestock matters in line with EU legislation.

Environmental issues

43. Using powers under section 2(2) of the ECA, amendments have previously been made to regulations implementing EU Directives, including regulations implementing EU Directives relating to the protection of the environment. Changes may be required for a range of reasons in order to ensure that the regulations are up to date and fit for purpose. These may include the need to address inconsistencies in interpretation across policy areas, to reflect changes in practice or the development of new technologies or to reduce unnecessary regulatory burdens, while maintaining a high level of environmental protection.

Other uses of the power

44. A further area of potential alignment is in relation to two 2019 Directives¹¹ relating to contracts for the supply of digital content and services, which will both need to be implemented by June 2021. These Directives harmonise contract law in this field across the EU. This is likely to be a source of economic growth in the coming years and the Scottish Government may choose to mirror all or some of the devolved aspects of these changes. The keeping pace power would permit such action and parliamentary scrutiny of any decision.

45. EU insolvency regulation continues to develop, and a 2019 Directive¹² to be implemented in part by Member States by June 2021, makes changes to certain insolvency provisions which Scottish Ministers and the Parliament may wish to replicate in the future. The Bill would give the Scottish Ministers the ability to make changes to domestic law in the

¹¹ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services and Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

¹² Directive 2019/1023 on preventive restructuring frameworks, and discharge of debt and disqualifications measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt

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event that they would wish to keep in step with developments in EU Regulations and Directives in relation to restructuring and fresh start for entrepreneurs.

46. Section 2 of the ECA has been used in a variety of other ad hoc ways in the recent past from a wide array of policy areas which would not lend themselves to primary legislation. Examples of such uses include publication restrictions for fatal accident inquiries, cross-border healthcare, criminal justice, and Environmental Impact Assessments. The provision of a keeping pace power to make these changes would provide the flexibility require to properly regulate across the Scottish Government and the clarity and certainty required for those who work and live in Scotland in line with EU legal frameworks.

47. The Scottish Ministers have made clear their desire to align with EU standards and regulations in devolved areas, where appropriate, as they develop, since this will help maintain regulatory equivalence to allow Scottish companies to continue to trade with the EU member states, as well as reflecting European best practice. There may, however, be instances where this is not appropriate or practical. A discretionary power to make provision corresponding to EU law is therefore the optimum approach to maintaining appropriate continuity of law and regulation in Scotland.

Consultation

48. A keeping pace power was contained in the 2018 Continuity Bill, which was scrutinised and passed by the Parliament under an expedited legislative procedure. That power has also been found to be within the Parliament's competence by the UK Supreme Court. Following cross-party discussions in early 2019, where the continued need for a keeping pace type power as a result of EU exit was deliberated, the Scottish Government committed to bringing forward new legislation to ensure Scots law can continue to align with EU law, where appropriate¹³. This approach has therefore been known to be the Scottish Government's policy for some time. Additionally, the power is largely a replacement for the provision contained in section 2 of the ECA which will no longer be available at the end of the implementation period. It is the Scottish Government's view that replacing the only existing means to regulate by secondary legislation in many areas does not necessitate consultation, especially as the Scottish

¹³ See paragraph 18

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Government intends to consult, where possible, on the content of any instruments made under this Bill which are of particular policy significance.

Environmental principles and governance

Background

49. EU environmental law is underpinned by four environmental principles: the precautionary principle, the prevention principle, the proximity principle and the polluter pays principle. After the end of the implementation period, the EU environmental principles will cease to have legal effect on the development of environmental law and policy in Scotland.

50. During the implementation period the four core environmental principles will continue to have legal effect in the development of EU environmental law alongside environmental governance arrangements provided by the Commission, with recourse to the Court of Justice of the European Union (“CJEU”). The vast majority of Scotland’s environmental law has been developed due to or as a consequence of European legislation developed with reference to the principles. The governance arrangements ensure that environmental law is correctly implemented and applied domestically, and monitor the effectiveness of delivery of environmental standards.

51. Following the 2016 referendum and the UK’s decision to leave the EU, the Scottish Government consulted in early 2019 on environmental principles and governance in Scotland following EU exit.¹⁴ As part of the consultation the Scottish Government committed to maintain or exceed EU environmental standards, following the UK’s departure from the EU.

Policy objectives

52. The Bill establishes guiding environmental principles, informed by the four EU environmental principles, as a matter of domestic law, which will be

¹⁴ ‘Environmental principles and governance after Brexit: consultation’: <https://www.gov.scot/publications/consultation-environmental-principles-governance-scotland-4/>
Analysis of responses: <https://www.gov.scot/publications/analysis-responses-consultation-environmental-principles-governance/>

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relevant in preparation of environmental policy and development of environmental regulation in Scotland, following EU exit.

53. By placing a duty on Ministers and a further duty on public authorities, the provisions in the Bill seek to ensure a continued role for domestic environmental principles informed by the four EU environmental principles following EU exit, through ensuring that they continue to inform the development of law and policy in Scotland.

54. Scottish Ministers may, by regulations made in exercise of powers in the Bill, add, remove, define or amend guiding principles on the environment. In relation to the guiding principles set out in Chapter 1 (section 9(1) (The guiding principles on the environment)) of the Bill, Scottish Ministers may only remove, define or amend a guiding principle to reflect the removal of, or amendment to, the equivalent principles in EU law. This provision supports the Scottish Government's commitment to maintain or exceed environmental standards following the UK's exit from the EU.

55. The purpose of the duties on the Scottish Ministers and public authorities under the Bill is to promote a high level of environmental protection and sustainable development in Scotland. This will be a key part of delivering on Scottish Ministers' commitment to maintain EU standards on environmental protection following the UK's exit from the EU.

56. The Bill requires the Scottish Ministers to publish guidance on the guiding principles. This will support the interpretation and implementation of the duty on the Scottish Ministers and public authorities to have regard to the principles. This will include guidance on how public bodies and the Scottish Ministers should demonstrate their compliance with their duties in relation to the principles.

57. The purpose of environmental governance is to ensure the complete and effective implementation of environmental law. Therefore the Scottish Government seeks through this Bill to establish a new Scottish public authority which will take on governance functions in connection with compliance by the Scottish Ministers and public authorities in Scotland, other than reserved bodies, with environmental law, in recognition of the fact that existing EU governance arrangements will be lost as a result of EU exit. This supports the ambition of the Scottish Ministers to maintain or

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exceed environmental standards following the UK's exit from the EU. The body will be called Environmental Standards Scotland.

58. The Bill confers a set of powers on the new governance body. Specifically these include the power to

- investigate when Ministers and other public authorities have failed to comply with environmental law;
- take enforcement action to support Ministers and public authorities remedying any failure to comply with environmental law; and
- take steps to improve the effectiveness of delivery of actions relating to environmental law.

Consultation

59. The Scottish Government's Consultation on Environmental Principles and Governance ran from the 16 February to the 11 May 2019. Over 100 substantive responses were received with a further 12,000 responses received as part of a wider environmental campaign.¹⁵ The "Fight for Scotland's Nature" campaign called on the Scottish Government to safeguard and build on EU environmental protections. The campaign called for a Scottish Environment Act that embeds EU and international environmental principles in Scots law so that they can underpin all environmental decision-making; creates an independent and well-resourced watchdog to enforce environmental protections in the same way that the European Commission and CJEU do today, and sets clear and ambitious targets for environmental protection alongside adequate financial resources. The Bill responds to the first two of these demands, with wider strategic issues being taken forward with the recent publication of the Scottish Government's Environment Strategy: vision and outcomes.¹⁶

60. The majority of non-campaign respondents also agreed that a duty should be applied to the Scottish Ministers to have regard to the four EU environmental principles. There was less consensus concerning the potential duty being extended to other functions exercised by the Scottish

¹⁵ https://consult.gov.scot/environment-forestry/environmental-principles-and-governance/consultation/published_select_respondent

¹⁶ <https://www.gov.scot/publications/environment-strategy-scotland-vision-outcomes/>

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Ministers and if all or certain specific functions should also be extended to public authorities.

61. There was a broad consensus that the governance gap following EU exit would need to be addressed at a domestic level and that measures would be required with regards to scrutiny, assessment of effective environmental policy and particularly the loss of the EU complaints function and EU enforcement powers.

62. There was strong belief that the loss of these functions following EU exit would have a negative impact on Scotland. There was support for a body to oversee these functions and a range of institutional models were suggested. However, with such an extensive range of views, no single model gained significant support above any other. Suggestions included extending the roles of existing public bodies, appointing a parliamentary commissioner or the creation of a new public body. There were also suggestions for the establishment of a new tribunal and/or court system.

63. The Scottish Government conducted a number of stakeholder workshops in support of the consultation, to facilitate understanding and engagement. The Scottish Government also worked with regulatory partners and other interested parties to identify proportionate and effective mechanisms for future governance that will complement Scotland's existing regulatory mechanisms.

64. The Scottish Government has considered the results of the consultation alongside discussions with regulators, business groups, environmental groups, law groups and other interested individuals in the development of these proposals. This included the discussion of the strengths and weaknesses of a wide range of institutional models for a new governance function. This consideration informed the conclusions of the Scottish Government that a new governance model needed to be established separate from any existing body and function, complementing the established roles of the Scottish Parliament and the Scottish courts. The Scottish Government will continue to engage with all interested stakeholders as part of the Bill's progress through the parliamentary process.

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Key provisions

Ministers' duties to have regard to the four guiding principles

Policy objectives

65. The Bill imposes a duty on the Scottish Ministers, and on Ministers of the Crown with respect to actions in Scotland, to have regard to four environmental principles. These are the precautionary principle, the principle that preventative action should be taken, the principle that environmental damage should be rectified at source, and the principle that the polluter should pay.

Key information

66. The duty will apply to policy development, including proposals for legislation, with the purpose of contributing to the protection and improvement of the environment and sustainable development. The principles are derived from the equivalent principles provided for in article 191(2) in the Treaty on the Functioning of the European Union.

67. The duty for Ministers to have regard to the guiding principles in developing policies (including proposals for legislation) is wider in scope than the duty applied to other authorities, whose duty applies when carrying out environmental assessments under the Environmental Assessment (Scotland) Act 2005.

68. Scottish Ministers may amend, add or remove environmental principles by regulations under powers conferred by the Bill. The core four domestic guiding environmental principles as set out in the Bill may be amended where the provision corresponds to an amendment to the equivalent core principles as they form part of EU law (as defined in section 126(9) of the Scotland Act 1998). Any such regulations will be subject to affirmative procedure in the Scottish Parliament and before laying must have gone through appropriate consultation as provided for in the Bill.

Consultation

69. The consultation indicated there was strong support, over 70%, for a duty to apply to the four guiding principles during policy development, including proposals for legislation. A number of responses expressed

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concern at the potential for conflict with other duties and responsibilities. Concern was raised regarding the framing of the duty ‘to have regard to’ with stronger alternatives suggested by a number of respondents. The Scottish Government believes that the principles provisions contained in the Bill will ensure that the guiding principles have a role in Scots law equivalent to that of the EU’s environmental principles in EU law.

Other authorities’ duty to have regard to the to the guiding principles

Policy objectives

70. The purpose of these provisions is to require public authorities in Scotland, other than reserved bodies, to have regard to the guiding principles set out in section 9 when making decisions of a strategic nature, which are likely to have significant environmental effects.

Key information

71. Matters in relation to which public authorities are to have regard to the four principles are equivalent to the plans and programmes for which an authority is required to undertake environmental assessment under the Environmental Assessment (Scotland) Act 2005. The environmental report will provide a means by which public authorities can demonstrate that they have fulfilled their duty to have regard to the four principles (other means may be developed or used if appropriate). Including relevant information on the four principles within the report can be addressed as part of existing requirements within the Environmental Assessment (Scotland) Act 2005.¹⁷ This gives public authorities the ability to demonstrate their intention to maintain high environmental standards.

Consultation

72. The consultation indicated there was strong support, over 70%, for a duty to apply to the four guiding principles during policy development, including proposals for legislation. There was a support for the duty to apply more broadly to other public authorities, although there was concern about the practical impact if it was extended to all functions exercised by public authorities, including individual regulatory duties. The Scottish Government believes that the approach adopted in this Bill is sufficient to

¹⁷ Sch.3, par. 5.

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maintain the role of the EU's environmental principles and effective and proportionate environmental governance in Scots law. The Scottish Government believes that applying the duties to the level of project and programme that is subject to the requirement to an environmental assessment captures the right level of strategic decision, and allows the authorities covered by this duty to use the existing assessment process to carry out this additional consideration with minimal resource cost.

Purpose of the duties

Policy objectives

73. The Bill provides for a purpose to support the principles duties. When carrying out the principles duties, Ministers and other public authorities must do so for the purpose of contributing to the protection and improvement of the environment and sustainable development. This purpose seeks to support the commitment to maintain or exceed environmental standards following EU exit.

Key information

74. The objective of the inclusion of this purpose is to ensure that the duty to 'have regard to' the principles of the environment supports protection of the environment and sustainable development.

Consultation

75. Over half of respondents supported the inclusion of the four guiding principles, however the same respondents also indicated that there should be other principles such as sustainable development, integration, non-regression and keeping pace. A number of respondents also suggested an overarching or high level objective to support the guiding principles. The Scottish Government believes that the inclusion of the four guiding principles and the purpose is sufficient to maintain the role of the EU's environmental principles and effective and proportionate environmental governance in Scots law.

Guidance

Policy objectives

76. Guidance is to be provided by Ministers to support the interpretation and implementation of the duty on Ministers and public authorities to have

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regard to the principles. This will ensure that there is a consistent application of the principles across government, and that the obligation on other public bodies can be implemented effectively and without significant resource cost.

Key information

77. The guidance, as set out in the Bill, will provide appropriate material on interpretation and scope of the principles, as well as their interactions with each other. It will also clearly set out how Ministers and other public bodies can demonstrate their compliance with the duty and is expected to provide advice and case studies for policy makers. It will set out advice that compliance with the duty in individual decision-making processes is considered and reported alongside the environmental assessment process.

Consultation

78. Over 69% of respondents agreed that there should be supporting guidance to guide application and interpretation of the duty. However, little was added by respondents on detail or requirements that may be needed.

Establishment of Environmental Standards Scotland

Policy objectives

79. The Bill aims to establish a Scottish public authority independent of Ministers which will take on the role of enforcing compliance by the Scottish Ministers and public authorities in Scotland, other than reserved bodies, with environmental law, and provide oversight of the effectiveness of environmental law. The objective is to ensure that there continues to be effective environmental governance following the end of the implementation period, and the consequential cessation of the role of the EU institutions. This will ensure that there is a transparent oversight of the performance of public bodies in Scotland, other than reserved bodies, in the effective and complete implementation of environmental law, reducing risks to the environment, and ensuring that standards that are set in legislation are upheld in the actions of public bodies and in regulatory practice. This will help to maintain the reputation of Scotland as a country with high environmental standards, and ensure transparency in those standards as the Scottish Government seeks to maintain close relationships with its European neighbours.

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Key information

80. The Scottish Government is strongly committed to maintaining the protection of the natural environment following EU exit. The need for domestic governance arrangements has been established from a wide range of sources including, amendments made to the 2018 Continuity Bill during its passage, the work and following report of the sub group of the Round Table on the Environment¹⁸, as well as responses to the 2019 Consultation on environmental Principles and Governance¹⁹.

Consultation

81. The results of the consultation concluded that most believe a new governance function will be required to replace the role of the European Commission. The creation of a new body was broadly supported by stakeholders. A wide range of future governance models was considered, including giving additional functions to existing public bodies.

82. The decision on the Scottish Government's proposed model for future governance was taken on the basis of criteria that that were set out in the consultation paper, and refined following the analysis of the responses. The criteria were that new governance arrangements should:

- Help Scotland to maintain or exceed environmental standards and to comply with international environmental obligations – fulfilling known or anticipated international commitments and the conditions of any future UK-EU relationship
- Be effective and proportionate in delivering strong environmental protection and robust in the face of challenging circumstances – by placing a strong emphasis on prevention, mediation and remedy and ensuring practical, cost effective, deliverability supported by an adequate level of resources and access to specialist expertise and skills.
- Be fair open and transparent – promoting ease of use and access, supporting delivery of Scotland's obligations under the Aarhus

¹⁸ <https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/>

¹⁹ <https://www.gov.scot/publications/analysis-responses-consultation-environmental-principles-governance/>

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Convention and improving public awareness and engagement with environmental policy.

- Fit Scottish circumstances and established methods of accountability – by being independent from Government, supporting parliamentary accountability and working with other existing institutional structures within Scotland, including the courts and tribunals.
- Respect the devolution settlement – while supporting beneficial cooperation with other UK countries and ensuring governance arrangements in the different parts of the UK can work together in a cohesive way.

Functions of Environmental Standards Scotland

Policy objectives

83. The Bill confers powers, functions and duties on the new environmental governance body, Environmental Standards Scotland. These provisions seek to create a proportionate and effective system of environmental governance in Scotland.

Key information

84. Environmental Standards Scotland will provide continuity of environmental governance, in place of the current EU governance regime. The Bill specifically makes provision for the body to investigate if public authorities fail to comply with environmental law and to allow appropriate steps to be taken to ensure failures are corrected. The new body is required to act objectively, proportionately, impartially and transparently. Environmental Standards Scotland will have powers to investigate whether public authorities fail to comply with environmental law and take steps to remedy any such failure. It will also have powers to investigate the effectiveness of delivery of environmental law and take steps to improve public authorities' effectiveness of delivery.

Consultation

85. Over half of respondents to the consultation believed there would be significant governance issues arising as a result of the loss of EU scrutiny and assessment of performance. There was a strong call for a fully independent body to oversee, effective scrutiny of environmental policy

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delivery as well as provide an equivalent complaints and enforcement role as that of the European Commission.

Alternative approaches

86. In the consultation exercise, the Scottish Government consulted on the existence of a governance gap following EU exit, and the significance of any gap. There was a broad consensus that there would be a governance gap, and that this would place environmental standards at significant risk. The Scottish Government therefore believes that the alternative approach of taking no steps to fill these gaps following EU exit is unacceptable, as it is not prepared to tolerate the risks to environmental standards. All parts of the UK are planning measures to ensure continuity of the effect of the EU environmental principles and a domestic system of environmental governance following EU exit.

87. There is no alternative to the introduction of primary legislation that would deliver the policy objectives. Failure to embed in Scots domestic law environmental principles equivalent to the four core EU environmental principles and put in place effective environmental governance arrangements at the end of the implementation period following EU exit would not support Scotland to maintain or exceed environmental standards, and potentially negatively affect Scotland's future relationship with the EU, and, depending on its contents, Scotland's compliance with any future trade agreement concluded between the UK and the EU.

88. In the consultation paper, the Scottish Government raised the possibility of additional environmental principles, and a wide range of principles were suggested. However, there was little consensus about desirable additional principles, and the Scottish Government decided that it would develop proposals based on the four EU environmental principles. As has been discussed, a wide range of alternative approaches to the model for future environmental governance were considered, including those suggested in the consultation exercise. The Scottish Government took a decision on the model that it would propose for future governance on the basis of the criteria set out at paragraph 82.

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Effects on equal opportunities, human rights, island communities, local government and sustainable development

Equal opportunities

89. An Equality impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website. The Scottish Government is satisfied that the provisions of the Bill are not discriminatory, nor do they create any adverse impacts, on the basis of gender, age, disability, sexual orientation, marital or civil partnership status, race or religion.

Human rights

90. The Scottish Government has considered the effect of the Bill on human rights.

91. The keeping pace power has no direct effect on human rights. Any exercise of the power may raise human rights issues which will be looked at as part of consideration of the use of the power.

92. The provisions of the Bill which relate to environmental principles and environmental governance have no direct effect on human rights.

93. The duties in respect of the environmental principles are imposed on the Scottish Ministers and responsible authorities. A responsible authority is defined in section 11(2) of the Bill by reference to the Environmental Assessment (Scotland) Act 2005. A responsible authority is any person, body or office-holder exercising functions of a public character excluding the Scottish Ministers.

94. The functions of Environmental Standards Scotland relate to public authorities. Section 37 of the Bill provides that “public authority” means a person exercising any function of a public nature, subject to the exclusions of the specific persons listed in the section.

95. Responsible authorities and public authorities are government organisations for the purposes of the European Convention on Human Rights and, as such, do not have victim status under the Convention.

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Island communities

96. The Scottish Government is satisfied that the Bill will have no differential effect on island communities.

Local government

97. The Scottish Government has and will continue to actively engage with Local Government as the Bill develops. It is not anticipated that there will be any differential effect on Local Government.

98. In developing any proposals for regulations under the keeping pace power, the Scottish Government will consult local government in line with normal practice for policy development, and consider in particular any resource implications for local government.

99. Local authorities will have to have regard to the guiding principles on the environment when they are making decisions and forming plans that would already require a Strategic Environmental Assessment. The Scottish Government will set out in guidance how consideration of the environmental principles can be built into the development of Environmental Reports. It is not expected that the consideration of the guiding principles will add significantly to the cost of carrying out an Environmental Report. As the guiding principles have informed the development of the majority of environmental law and policy in Scotland, an explicit consideration of the principles for individual decisions and plans is not expected to lead to major changes in outcome. However, there is an expectation that the explicit consideration and presentation of the principles will improve transparency and decision making.

100. Certain local authority functions will be caught in the scope of the new governance arrangements and Environmental Standards Scotland. The functions that will be in scope will include elements of planning and licencing functions, to the extent that they involve the exercise of regulatory functions with respect to environmental law. However, where a local authority is regulated by another body with respect to environmental law, for example with respect to its waste and recycling functions, the actions of the local authority will not be within the scope of Environmental Standards Scotland. In such cases, the role of Environmental Standards Scotland is to consider whether the regulator is correctly carrying out its regulatory functions, and to consider the overall effectiveness of an area of law. As

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will be the case with other public authorities, the provisions provide for cooperation and agreement between a local authority and Environmental Standards Scotland over any matter of concern, wherever possible.

Sustainable development

101. The Scottish Government is satisfied that the Bill will have no negative impact on sustainable development.

102. The keeping pace power will ensure that Ministers will have the ability, through secondary legislation, to update devolved law to reflect future EU standards, subject to parliamentary approval. The Scottish Government is committed to considering the possible impact any legislation might have on various sectors and matters, including environmental impacts, and therefore any future regulations made under this power will require appropriate Impact Assessments, including consideration of environmental assessment, to be undertaken. There is similarly, on its own, no direct impact of the keeping pace power on other plans and programmes, nor does the power itself have any impact on sustainable development or environmental protection.

103. The proposals on environmental principles and governance will be a continuation of the level of scrutiny in place while within the EU, and should therefore, if implemented as intended, have no impacts on the environment or on sustainable development. The introduction of the EU environmental principles into domestic law as guiding principles on the environment will continue the current effect of these principles. This will influence the design of policies and programmes, and can be expected to promote sustainable development and the implementation of EU level standards. This will be a clear continuation of the current effect of the EU principles through their impact on EU legislation and policy. Further to this, the introduction of proportionate domestic environmental governance will provide new domestic arrangements to replace the role of the EU institutions in ensuring the complete and effective implementation of environmental law. This will ensure the effective implementation of the intention at the time of the design and introduction of regulations with respect to design of policies and programmes, the promotion of sustainable development and the implementation of EU level standards. This will, in effect, be a continuation of the current EU governance arrangements.

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Policy Memorandum

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