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UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Parts 1 and 3

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The Scottish Government introduced the UK Withdrawal from the European Union (Continuity) (Scotland) Bill on 18 June 2020. Part 1 of the Bill provides for the introduction of a power to enable Scottish Ministers to continue to keep devolved law aligned with EU law. This briefing provides analysis of Parts 1 and 3 of the Bill. SPICe will also be publishing a further briefing covering Part 2 of the Bill.

4 August 2020
SB 20-49

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Executive Summary

The Scottish Government introduced the UK Withdrawal from the European Union (Continuity) (Scotland) Bill on 18 June 2020 [1] . The Scottish Government had previously delayed the introduction of the Bill because of the COVID-19 public health emergency.

Part 1 of the Bill provides for the introduction of a power (in section 1(1)) to enable Scottish Ministers to continue to keep devolved law aligned with EU law so far as appropriate following the end of the implementation period (31 December 2020) provided for in the European Union (Withdrawal Agreement) Act 2020

After the end of the implementation period there is no requirement to continue to comply with EU law because the UK is no longer a member state of the EU. As such, the power conferred by section 1(1) of the Bill provides a power that will be used, at the discretion of Scottish Ministers, to align Scottish laws to the laws of a union of which the UK (and therefore Scotland) is no longer a member.

A first UK Withdrawal from the European Union (Continuity) (Scotland) Bill was introduced in February 2018, but did not receive royal assent after it was considered by the UK Supreme Court. For more information on this see the section in this briefing 'Legal Challenge: the first UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill'.

This briefing analyses the constraints on, and complications for, Scotland being able to *keep pace* with EU law including:

- The effect of EU exit on the devolution settlement
- The UK's future relationship with the EU
- The UK internal market
- Trade agreements
- Replacements for EU funding

The briefing also poses a number of questions

- How can Scotland influence the development of EU law when it is not a member of the EU?
- How will the Scottish Government monitor the vast quantity of EU law being passed?
- How will decisions about what areas of EU law to keep pace with be made and what evidence will be used to make such decisions?
- How can the Scottish Parliament effectively scrutinise the use of the section 1(1) power?

SPICe has produced a set of Frequently Asked Questions on Brexit. The sections on EU law and institutions may be helpful background reading.

SPICe will also be publishing a briefing covering Part 2 of the Bill.

Political context to introduction

At the referendum on the UK's membership of the European Union (EU) in 2016, the UK voted to leave the EU by 52% to 48%. In Scotland 62% of those who voted supported staying in the EU [2] .

Since the referendum, the Scottish Government's position has been that Scotland is being taken out of the EU "against our will" [3] .

The Scottish Government has sought to influence the UK Government in negotiations with the EU to allow Scotland to enjoy a closer relationship with the EU, including, for example, a series of publications on Scotland's Place in Europe and proposals for Scotland to remain in the Single Market and Customs Union. It also introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (explored in more detail later in this briefing). These attempts to influence Scotland's future relationship with the EU have, however, been unsuccessful.

> “ 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 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.”
>
> Policy Memorandum, paragraph 4The Scottish Governemnt, 2020[4]

Whilst the Scottish Government has maintained its stance that Scotland would be best served by being an independent member state of the EU, it has worked with the UK Government and the administrations of the devolved nations in order to prepare Scotland for the UK's exit from the EU. This is part of its "pragmatic response to EU exit. [5] "

Regardless of the Scottish Government working with the UK Government to prepare Scotland's statute book for EU exit, clear tensions remain. These not only relate to fundamental constitutional principles (explored more in this briefing at 'constitutional circumstances and possible constraints') but also as the result of a clear difference of ideology in relation to the EU and the UK and Scotland's future relationship with it.

Most recently, this tension can be seen in the Scottish Government's drive to extend the implementation period beyond 31 December 2020 in light of the COVID-19 public health emergency, and the UK Government's determination to stick to the end of year deadline [6] .

Overview of key provisions in Parts 1 and 3 of the Bill

The following sections look at the provisions of Parts 1 and 3 of the Bill. Part 2 of the Bill will be considered in a separate briefing [1] .

Part 1: Alignment with EU Law

Some areas of law have always been determined at a UK level. For areas of law which are derived from the European Union (EU), the UK must continue to comply with that EU law until the end of the implementation period (also called the transition period) on 31 December 2020.

This means that from 1 January 2021, the UK will no longer need to comply with EU law. Responsibility for policy in areas which were previously dealt with at EU level will lie with the UK Government and/or the devolved governments.

Part 1 of the new Continuity Bill is concerned with continued alignment with EU law following the end of the implementation period (i.e. the point at which Scotland as part of the UK no longer needs to comply with EU law) .

To understand what the Bill is proposing, it is important to understand how EU law been brought into effect in Scotland to date.

- Section 2(1) of the European Communities Act 1972 (ECA) provides for directly applicable EU law (such as EU regulations) to have effect in domestic law automatically.
- Section 2(2) of the European Communities Act 1972 (ECA) provided UK Ministers with delegated power to give effect to EU law by regulations (secondary legislation) during the UK's membership of the EU. This power insofar as it can be exercised within devolved competence was transferred to Scottish Ministers by virtue of section 53 of the Scotland Act 1998.
- Section 53 provides for a general transfer of functions within devolved competence, including making secondary legislation, from UK Ministers to the Scottish Minsters
- Section 57(1) of the Scotland Act 1998 provides that despite the general transfer of functions under section 53, UK Ministers retain the power under section 2(2) ECA to make regulations for the purpose of giving effect to EU law in devolved areas.

The Scottish Government's Policy Memorandum to the Bill highlights that with the repeal of section 2 of the ECA the only existing delegated power to regulate in many areas of EU law will be lost. In effect, this means that in many policy areas, Scottish Ministers would have no power by which to align Scots law with EU law through secondary legislation after 31 December 2020. Rather, primary legislation would have to be introduced.

A keeping pace power would give Scottish Ministers a power similar to that contained in section 2(2) of the ECA; allowing them, by regulation, to transpose EU law into Scots law.

The Scottish Government's reasoning for legislating for a keeping pace power to allow continued alignment with EU law is set out in the Policy Memorandum which states:

> “ 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.”
>
> The Scottish Governemnt, 2020[4]

The Bill proposes replacing the powers conferred by section 2 of the ECA with the power in section 1(1). Whilst those powers are similar, it is important to remember that as an EU member state the UK was required to comply with EU law. After the end of the implementation period there is no requirement to continue to comply with EU law because the UK is no longer a member state of the EU. As such, the power conferred by section 1(1) of the Bill provides a power that will be used, at the discretion of Scottish Ministers, to align Scottish laws to the laws of a union of which the UK (and therefore Scotland) is no longer a member.

In a recent blog published by the UK Constitutional Law Association, it is argued that the keeping pace power:

> “ creates a substantial Henry VIII power. Such measures require strong justification and appropriate substantive and procedural constraints.”
>
> McCorkindale, 2020[7]

The powers contained in Part 1 of the Bill are in effect very similar to those contained in section 13 of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill as introduced. The section 13 powers were described by Professor Alan Page, professor of public law at the University of Dundee, in stage 1 evidence to the Finance and Constitution Committee as "a potentially major surrender by the Parliament of its legislative competence" [8] :

> “ “The desirability or otherwise of that as a policy objective is a matter for the Scottish Parliament, but its corollary is that the Scottish Ministers will be taking powers to implement EU instruments over which the Scottish Parliament will have had no say, a potentially major surrender by the Parliament of its legislative competence, and one which under the Bill as introduced may be extended indefinitely.””
>
> Page, 2018[8]

In oral evidence Professor Page expanded on this views on the section 13 provision, stating that:

> “ The approach would simply leave to ministers the discretion to decide which EU instruments to give effect to in Scotland. At that point, Scotland and the UK will no longer be a member of the European Union. Frankly, I would be astonished if we were to surrender—I chose the word “surrender” deliberately—the competence of this Parliament not just to Scottish ministers but to institutions in whose deliberations we would have absolutely no voice. If we are going to do that, the matter should be properly discussed, argued and decided. That is my objection to—or, rather, my surprise about the provision.”
>
> Finance and Constitution Committee 07 March 2018, Professor Page, contrib. 150[9]

Also in stage 1 evidence on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill , Professor Aileen McHarg then Chair of Public Law at the University of Strathclyde (now Professor of Public Law and Human Rights at Durham Law School) commented that:

> “ The obvious analogy to draw is with the power in section 2(2) of the European Communities Act 1972, which gives ministers the power to implement EU obligations by secondary legislation. As Alan Page said, that approach will be much harder to justify if we are not a member of the EU. If the provision is simply a way of allowing ministers more easily to implement changes that they think are desirable, it is quite hard to justify. However, if we get into a situation in which, as a consequence of whatever deal we negotiate for withdrawal, we actually have to keep pace with developments in EU law in certain areas, some kind of keeping-pace power will be much more justifiable. As with much of this stuff, it really depends on the post-Brexit constitutional landscape and the relationship with the EU. What those look like will affect the justifiability of the power.”
>
> Finance and Constitution Committee 07 March 2018, Professor McHarg, contrib. 152[10]

Dr Kirsty Hughes, Director of the Scottish Centre on European Relations, told the Finance and Constitution Committee that the section 13 powers in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill present a potential loss of legislative power for the Scottish Parliament:

> “ The provision provides for rather a bizarre situation. Let us consider the European Economic Area. Norway has been called a “fax democracy”, and its own review of the operation of the EEA said that there is a major democratic deficit. As Professor Page has said, at least in the EEA there is some ability to comment on EU law, although it is really rather minor compared with the ability of an EU member state, in that regard. On the other hand, Scotland would not be obliged—depending on what the final Brexit deal says—to implement EU law, so I suppose that doing so would be optional and one could pick and choose. However, why should the Scottish Government and not the Scottish Parliament decide that? As I said, at the moment we are heading for a free trade agreement, with perhaps a Canada-style deal. What would happen if Westminster were to vote for a comprehensive customs union with the EU? Would that cover agriculture and fisheries? What if we were to add the single market to that? That would transform the context of this debate. At best, it is a rather curious or, at worst, a strange power to give to the Scottish Government but not to Parliament. ”
>
> Finance and Constitution Committee 07 March 2018, Dr Hughes, contrib. 153[11]

The Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell MSP, told the Finance and Constitution Committee that:

> " The measure is largely technical. It will also lapse—unless Parliament decides that it should not. There are policy areas such as food standards and some areas of environmental standards in which we would be required to incorporate new EU law. Let me use an example from my constituency. If we are to continue to sell live shellfish in Europe, we will have to continue to observe food regulations, otherwise we will not be able to do it. Far from section 13 being as described, it is a technical measure. It is subject to parliamentary scrutiny and control and it is sunsetted."
>
> Finance and Constitution Committee 07 March 2018, Michael Russell, contrib. 286[12]

Section 1 - Power to make provision corresponding to EU law

Part 1 section 1 of the Bill provides Scottish Ministers with powers to make provision corresponding to EU law. This provision would allow Scottish Ministers to make regulations ensuring that in desired policy areas Scots Law continues to align with EU law following the end of the transition period.

The Policy Memorandum to the Bill notes at paragraph 21 that the Scottish Government considers that this power is necessary as it:

> " 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 and aligning devolved law with new EU law where that is appropriate and practicable."

As the explanatory notes highlight, the power provided by section 1 is discretionary. This means Scottish Ministers can choose when to use it. There is no compulsion on Scottish Ministers to ensure continued alignment and decisions could be taken on a case by case basis in different policy areas.

The power can be used in two ways within devolved competence:

- to enable Scottish Ministers to make provision corresponding to EU law as it develops after the implementation period, and
- to enable Scottish Ministers to make provision in relation to existing EU laws, which have been implemented or have effect domestically already.

Subsection (1)(a) sub-paragraphs (i)-(iv) set out the different types of EU law and retained EU law that provision may be made in relation to. All the different types of EU law are defined in section 8 of the Bill and are covered in more detail in the section of the briefing examining how EU law has been brought into effect in Scotland to date.

Subsection (1)(b) mirrors the power in section 2(2)(b) of the ECA. This is the power which can be used to deal with matters 'arising out of or related to' EU obligations and permits implementing provision which goes beyond the minimum necessary to implement an EU obligation.

Subsection (2) provides that Scottish Ministers in making regulations to keep pace with EU law may omit, for example, references to EU institutions, functions or provisions which are contained in the EU legislation but which would have no practical effect in Scots law. This is likely to be because the UK is no longer a member state of the EU and such references would not make legal sense.

Subsection (3) permits that functions identified in EU legislation as carried out by EU institutions and bodies or public authorities in member states, may be carried out by Scottish public authorities.

Subsection (4) sets out some of the ways in which the power to modify any provision of retained EU law relating to the enforcement or implementation of EU legislation as set out under subsection (1)(a)(iv) can be used. Subsection (4) would allow, in cases where an EU function is already being carried out by a public authority in Scotland, that function to be further sub-delegated or conferred on a different public authority.

Subsection (5) provides that, where a Scottish public authority has been given a function by virtue of regulations made under subsection (1), the Scottish Ministers may by regulations enable it to charge fees or other charges in connection with carrying out that function. It contains an illustrative list of some of the things that this power may do.

Subsection (6) establishes that the power may be used to make any kind of provision that could be made by an Act of the Scottish Parliament. According to paragraph 39 of the Explanatory Notes to the Bill, this means:

> " for example, that the power may be used to modify retained EU law in so far as that is otherwise within the scope of the power by virtue of subsection (1) (and subject to any restrictions which may be imposed by section 30A of the Scotland Act (introduced by section 12(2) of the European Union Withdrawal Act))."
>
> Scottish Government, 2020[13]

Section 2 - Limitations on the section 1(1) power

Part 1 section 2 details the limitations on the use of the power provided in section 1(1). Section 2(1)(a-i) provides that the power cannot be used to do any of the following:

1. impose or increase taxation,
2. make retrospective provision,
3. create a relevant criminal offence,
4. provide for the establishment of a Scottish public authority,
5. remove any protection relating to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office, or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008 (guarantee of the continued independence of the judiciary),
6. confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes of the authority,
7. modify any of the matters listed in section 31(5) of the Scotland Act 1998 (protected subject-matter),
8. modify the Scotland Act 1998, or

9. modify the Equality Act 2006 or the Equality Act 2010.

Subsection (2) does permit the removal of judicial protection or the making of a modification set out in the Equality Act 2006 or the Equality Act 2010 if alternative provision is made in the regulations that is equivalent to the protection being removed or the provision being modified.

Section 3 - Duration of the section 1(1) power

Section 3 provides for a time limit on the use of the power set out in section 1(1). Section 3(1) provides that the Scottish Ministers' power to regulate expires ten years from the date it comes into force.

Subsection (2) provides that Scottish Ministers may, on a rolling basis, extend that 10-year period by periods of up to five years. Any extension would require regulations to be laid in the Scottish Parliament subject to the affirmative procedure. The affirmative procedure means the regulations cannot be made unless a draft of them has been laid before and approved by the Scottish Parliament

There is no limit placed on the number of times the power can be renewed for a further five years.

Subsection (3) provides clarification that whilst the power set out in section 1(1) expires, the regulations made under the power do not expire.

The duration of the power in the current bill differs from the provisions in the first UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill which was passed by the Scottish Parliament in 2018 but did not received Royal Assent (more details on the previous bill are provided later in this briefing).

Under the previous Bill as introduced Scottish Ministers would have had regulation making powers for up to five years after exit day, though the powers could have been extended for further five year periods. Any extension to these powers would have required Scottish Ministers to bring forward regulations subject to the affirmative procedure. During the passage of the Bill, the provisions on duration were amended to provide that they were in place for three years and could be extended by one year on two occasions. The result was that Ministers' powers would have expired after a maximum of five years.

Section 4 - Scrutiny of regulations under section 1(1)

Section 4 sets out how regulations made under the power in section 1(1) are scrutinised at the Scottish Parliament. Subsection (2) sets out that an instrument made under section 1(1) is subject to the affirmative procedure where it:

- 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 any person,
- provides for a function mentioned in section 1(3) or (4) (broadly, functions of EU entities or conferred by EU legislation) to be exercisable by a Scottish public authority,

or by a different Scottish public authority (as the case may be), or by any person whom the Scottish public authority authorises to carry out functions on its behalf,

- falls within section 1(5), regarding the charging of fees or other charges in connection with the exercise of a function by a Scottish public authority, except for provision which relates only to altering the amount of a fee or charge to reflect changes in the value of money,
- creates, or widens the scope of, a criminal offence,
- creates or amends a power to legislate.

Where an instrument made under section 1(1) does not fall into the categories listed at subsection (2) and set out above, it is subject to the negative procedure. Use of the negative procedure means an instrument can be made but is subject to annulment by the Scottish Parliament within 40 days if there is an objection to it. More detailed information on the negative and affirmative procedure is available on the Delegated Powers and Law Reform Committee web page.

Sections 5 and 6 - Explanatory statements

Section 5 provides that Scottish Ministers must make explanatory statements to accompany instruments or draft instruments made under section 1(1) when they are laid. Sections 5(2) and 6 provide for the type of statements required to be made and sets out what the statements should address.

These sections require:

- A statement setting out the instrument or draft; why, in the Scottish Ministers' opinion, there are good reasons for making the provision contained in the instrument or draft; the law before Implementation Period completion day which is relevant to the provision, and the effect (if any) of the provision on retained EU law.
- A statement as to whether the instrument or draft amends, repeals or revokes any provision of equalities legislation, and if it does, explaining the effect of each such amendment, repeal or revocation.
- A statement to the effect that, in relation to the instrument or draft, the Scottish Ministers have, so far as required to do so by equalities legislation, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.
- A statement explaining the effect (if any) of the instrument or draft on— (a) rights and duties relating to employment and health and safety, and (b) matters relating to consumer protection, so far as it is within devolved competence (within the meaning of section 54 of the Scotland Act 1998) for the instrument or draft to have any such effect.

Whilst the requirement to provide these statements would effectively provide the Scottish Parliament with an explanatory note for the instrument and should aid scrutiny, it should be noted that the Parliament already receives a Policy Note with all instruments it considers, albeit that it is not a statutory requirement.

The rest of section 5 lists other occasions on which Scottish Ministers must make a statement (in writing) when using the power in section 1(1). This includes:

- subsection (3) which requires a statement to be made if an instrument or draft instrument is laid when the Scottish Parliament is in recess.
- Subsection (4) provides that if the Scottish Ministers fail to make a statement required by subsection (2) or (3) when the instrument or draft is laid, they must make a statement explaining why they have failed to do so.
- Subsection (6) disapplies the requirements for explanatory statements in relation to any instrument or draft instrument where an equivalent instrument or draft (ignoring any differences relating to procedure) has previously been laid before the Parliament. According to the Explanatory Notes, this approach mirrors the approach set out in paragraph 16 of schedule 8 of the European Union (Withdrawal Act):

  " Paragraph 16 of schedule 8 of the EUWA imposes a similar requirement for certain statements to be made (on or after IP completion day) in relation to Scottish statutory instruments (SSIs) which amend or revoke subordinate legislation made under section 2(2) of the ECA. The requirement applies to SSIs or draft instruments to be laid before the Scottish Parliament and it applies whether the SSI is made under powers conferred before, on or after IP completion day but it does not apply to powers under the EUWA itself. The duty falls on the Scottish Minsters or other authority making the instrument. In the event that the Scottish Ministers are required to make an explanatory statement under both section 6 of this Bill and under paragraph 16 of schedule 8 of the EUWA, it would be possible for the Scottish Ministers to make a single statement."

  Scottish Government, 2020[13]

Section 7 - Reports relating to the exercise of the section 1(1) power

Section 7(1) requires Scottish Ministers to prepare and lay before the Scottish Parliament a report explaining how the section 1(1) power has been used during the 'reporting period'.

The reporting period is defined in subsection (2) as one year from the day which section 1(1) comes into force.

Further reports are required each year during the total period in which regulations may be made under section 1(1). In effect, this means an annual report whilst Ministers are able to make regulations under the keeping pace power.

Section 8 - Interpretation of Part 1

Section 8(1) defines several of the terms in Part 1 of the Bill. These terms include definitions for different forms of EU legislation as set out in the EU Treaties. The different forms of EU legislation are discussed in more detail in the section on the briefing on How has EU law been brought into effect in Scotland to date?

Subsection (2) provides that references in section 1(1) to an EU Regulation, EU Directive or other EU legislation include references to any part or provision of that legislation.

The effect of this subsection when considered with the power provided in section 1(1) is to allow Scottish Ministers not only to choose which EU laws to keep pace with, but also to allow them to keep pace with only part of such law.

The explanatory notes to the Bill also set out a link between Section 6 of the EUWA and the power in Section 1(1) of the Bill. The explanatory notes state:

> " Section 6(1) of the EUWA makes clear that CJEU[i] judgments passed after the end of the implementation period are not binding on domestic courts in the UK. Section 6(2) of the EUWA establishes that, despite section 6(1), domestic courts may have regard to CJEU judgments delivered after the end of the implementation period in so far as any such judgments are relevant to any matter before the court or tribunal. In so far as a court may need to interpret provisions implemented under section 1 of this Bill, it is considered likely to be relevant for a court to have regard to any case law of the CJEU interpreting the corresponding EU legislation. Section 6 of the EUWA also makes provision regarding the interpretation and application of retained EU law. As a general proposition, section 6(3) makes clear that UK domestic courts remain bound by judgments of the CJEU and domestic courts passed before IP completion day ('retained EU case law'), albeit the Supreme Court and the High Court of Justiciary in Scotland may choose to depart from such CJEU case law. This aspect of section 6 could potentially be relevant in so far as the power under section 1 is used to modify retained EU law. The 2020 Act introduced amendments to section 6 of the EUWA to confer a new power on UK Ministers to make regulations providing for circumstances in which lower courts (to be specified under the power) may also not be bound by such retained EU case law. The regulations may also set the test that is to apply in deciding whether to depart from such case law. Depending on how the new power in section 6 is utilised, the resulting regulations could potentially have implications for the interpretation of provision made under section 1 of this Bill. "
>
> Scottish Government, 2020[13]

Part 3: General

Section 42(1) sets out the purpose of the Bill.

> " The purpose of this Act is to make provision in connection with the withdrawal of the United Kingdom from the EU in consequence of the notification given under section 1 of the European Union (Notification of Withdrawal) Act 2017 "
>
> Scottish Government, 2020[1]

Section 42(2) provides that any provision of or made under the Act which is incompatible with EU law, is to have no effect until any relevant EU law ceases to have effect in Scotland. This section concerns a timing issue in relation to the legislative competence of the Scottish Parliament: while the UK is still subject to EU law obligations (i.e. until the end of the Implementation Period at 11pm on 31 December 2020), the Scottish Parliament cannot pass legislation which is incompatible with EU law (under s. 29(2) of the Scotland Act 1998). At the end of the implementation period on 31 December 2020 the limits on the

i CJEU - Court of Justice of the European Union.

Scottish Parliament's legislative competence in section 29(2)(d) of the Scotland Act 1998 (i.e. "A provision is outside that competence so far as it is incompatible with EU law") fall away.

> " 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 Reference , 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. "
>
> Policy Memorandum, paragraph 13

Subsection (3) reflects the possibility that different provisions of EU law might cease to apply on different days and that the date of the end of the implementation period could change. The date of the end of the implementation period changing is, however, highly unlikely given that the UK Government has indicated formally that it will not seek an extension to the implementation period [14] and the deadline for requesting any extension under the Article 50 withdrawal process has now passed.

Legal context on introduction

How has EU law been brought into effect in Scotland to date?

Many of the laws in the UK come from having been part of the EU. These laws cover issues from workers' rights to the labelling of food.

European Union legislation

EU legislation is divided into primary, secondary and tertiary forms.

- The treaties (primary legislation) are the basis or ground rules for all EU action.
- Secondary legislation which includes regulations, directives and decisions is derived from the principles and objectives set out in the treaties. Article 288 of the Treaty on the Functioning of the European Union provides the basis for legal acts of the European Union. Regulations and decisions become binding automatically throughout the EU on the date they come into force. Directives must be incorporated by EU countries into their own statute books through implementing legislation.
- Tertiary legislation consists of delegated and implementing acts. This is legislation which supplements, amends or implements the rules set out in directives, regulations and decisions.

Whilst the UK was a member state of the EU, and during the implementation period, UK Ministers and Scottish Ministers have domestic powers to make regulations (secondary legislation) to implement EU law. Domestic regulations implementing EU law cover various issues, for example, workers' rights and the labelling of food.

Section 53 of the Scotland Act 1998 gives Scottish Ministers powers to make regulations (secondary legislation) within devolved competence, including for the purpose of giving effect to EU law.

Section 57(1) of the Scotland Act 1998 provides that despite this transfer to the Scottish Ministers under section 53, UK Ministers also retain powers under section 2(2) ECA to make regulations for the purpose of giving effect to EU law in devolved areas.

Although the UK left the EU on 31 January 2020, EU law continues to apply during the implementation period (due to last until 31 December 2020).

To avoid a legislative cliff edge on 31 December 2020 (where EU laws applied up until the end of the implementation period, but not from one minute past it) the UK Government has worked to preserve the legal position which exists immediately before the end of the implementation period. This legal continuity will be achieved by taking a "snapshot" of all of the EU law that applies in the UK prior to the end of the implementation period and bringing it within the UK's domestic legal framework as a new category of law, known as "retained EU law".

The creation of this new category of UK law was one of the main purposes of the European Union (Withdrawal) Act 2018. The Act aims to ensure that the UK has the laws it needs after the end of the implementation period. This could include, for example, the law on the nutrition and health claims made on food, or on ensuring environmental protection in marine areas.

How will this change after the end of the transition period?

From 1 January 2021, the UK will no longer require to comply with EU law. Responsibility for policy in areas which were previously dealt with at EU level will lie with the UK Government and/or the devolved governments.

Scottish Ministers will continue to have powers in devolved areas and the Scottish Parliament will continue to legislate for Scotland in respect of devolved matters. The UK Parliament has the power to pass law in all policy areas for the whole of the UK and it will continue to have that power.

As explained above, "EU retained law" will have created a “snapshot” of all of the EU law that applied in the UK immediately before the end of the implementation period. This "EU retained law" will become part of the UK's domestic legal framework.

The UK will, however, be able to amend the policy underlying retained EU law after the end of the transition period (i.e. with effect from 1 January 2021) by making new domestic laws (laws which apply to all of the UK or to one nation of it).

Legal challenge: the first UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

The Scottish Government introduced the first UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill on 27 February 2018. A SPICe briefing on that Bill is available.

Section 13 of the Bill provided Scottish Ministers with powers to make regulations to ensure that where appropriate Scots law in devolved areas could continue to comply with EU law after the UK left the European Union. Scottish Ministers would have had such powers for up to five years after exit day due to a sunset clause, though the powers could have been extended for further five year periods. Any extension to these powers would have required Scottish Ministers to bring forward regulations which are subject to the affirmative procedure in the Scottish Parliament. This was amended during the Bill's parliamentary passage to three years extendable by up to one year on two occasions meaning the power could only last for 5 years at most. Comment on how section 13 powers from the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill compare to the section1(1) powers in the current Bill are provided in this briefing at Part 1: Alignment with EU law.

The original Continuity Bill as introduced did not include provisions in relation to the EU's environmental principles but such provisions were added in by amendment to the Bill at its Stage 3 consideration.

Following the parliamentary passage of the Bill, and a reference under section 33 of the Scotland Act 1998 by the Attorney General and the Advocate General for Scotland, the Supreme Court ruled that some provisions of the Bill were outside the legislative competence of the Scottish Parliament. The Bill could not be submitted for Royal Assent in its unamended form. A SPICe briefing on the Supreme Court ruling is available.

The Supreme Court ruling did not find section 13 of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill to be beyond the competence of the Scottish Parliament.

On 5 April 2019 the Scottish Government wrote to the Presiding Officer with an update on the Continuity Bill, the letter stating that:

> " Scottish Ministers have reluctantly come to the conclusion that we should not at this point move for its reconsideration. This decision has been taken following a series of meetings with representatives of parties across the Chamber...I can confirm the Government's intention to bring back the provisions on keeping pace with EU law in new legislation. 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 Scottish Government, 2019[15]

Constitutional circumstances and possible constraints

Although the power to keep pace provided for in the Bill is broad, there are factors which may shape the scope of its use in practice.

Some of these factors, such as the effect of legislation on the operation of the devolution settlement, are known and their likely impact can already be anticipated and to some extent assessed.

There are other matters, such as the UK's future relationship with the EU; how the UK structures its internal market and what trade agreements it negotiates, which are of huge significance but the impact of which are, as yet, unknown. To the extent that much of this relates to reserved matters the Scottish Ministers have no formal role in influencing the future shape of these and the Scottish Parliament has no legislative competence in these areas.

For many sectors, this complicated landscape may create uncertainty now and for some time to come.

In summary possible constraints on *keeping pace* with the EU include:

- The effect of EU exit on the devolution settlement
    - The European Union (Withdrawal) Act 2018
    - The European Union (Withdrawal Agreement) Act 2020
    - UK wide legislation
    - Common frameworks
- The UK’s future relationship with the EU
- The UK internal market
- Trade agreements
- Replacements for EU funding

This section of the briefing seeks to explore some of these issues and how they relate to Scotland's ability to keep pace with EU law.

The effect of EU exit on the devolution settlement

The UK's exit from the EU has brought the devolution settlement into sharp focus.

Responsibility for areas of law derived from the EU until the end of the implementation period (31 December 2020) will, from 1 January 2021, return to the UK and lie with the UK Government and/or the devolved governments.

Initial analysis by the UK Government identified 111 areas of law which previously rested with the EU which intersect with the devolved competence of the Scottish Parliament [16] . There are, however, some areas where the UK and Scottish Government disagree on who has competence. State Aid is an example of this - the UK Government believing it is a reserved matter and the Scottish Government believing it is not reserved and is therefore devolved.

At the same time as these EU competencies return to the UK, the need to comply with EU law falls away. The impact of this is a potential expansion of the legislative powers of the Scottish Parliament and of the executive powers of the Scottish Government. This is because the competencies returning from the EU in devolved areas would (if nothing was done) be held by the Scottish Parliament, and could be exercised without the need to comply with EU law.

Below is an overview of the key legislative and constitutional constraints on the devolution settlement as a result of the UK leaving the EU. The overview is not an exhaustive list of all factors which may influence the operation of devolution.

The European Union (Withdrawal) Act 2018

Section 12 of the European Union (Withdrawal) Act 2018 amended the Scotland Act 1998, inserting section 30A. Section 30A provides that:

> “ An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.”
>
> Scotland Act 1998, section 30A

Section 30A imposes a restriction on the Scottish Parliament so that it cannot pass an act which modifies retained EU law, nor delegate powers to Scottish Ministers to modify such law, where UK Ministers have made regulations.

This restriction only applies to areas where the EU had competence immediately before the end of the implementation period. As such, section 30A does not shrink the current competence of the Scottish Parliament, but it can be used to freeze competence so that the Scottish Parliament's competence is not increased by leaving the EU.

The purpose of these powers is to ensure that the current parameters of devolved competence in relation to EU law are retained for a period of up to five years from the date any regulations are made, while replacement common frameworks are developed and implemented.

No regulations have yet been made by UK Ministers under section 30A. The power to make regulations will expire on 31 January 2022.

The power in section 1(1) of the Bill provides for Scottish Ministers to keep pace with EU law in areas of devolved competence, but the scope of competence may be narrow. Whilst the Section 30A powers cannot apply to areas within devolved competence immediately before the end of the transition period, they could apply to any areas previously within the competence of the EU. That means, for example, that Scottish Ministers could exercise the keeping pace power in some areas but may not be able to in others particularly if UK Ministers exercise the Section 30A power (which as yet they have not). In addition, two other ways in which the ability of the Scottish Parliament to legislate on matters governed

by EU law after the end of the transition period might be legally curtailed are through an Order in Council made by UK Ministers under section 30 of the Scotland Act limiting its competence or an Act of the UK Parliament expressly limiting its competence.

The European Union (Withdrawal Agreement) Act 2020

The European Union (Withdrawal Agreement) Act 2020 gives UK and Scottish Ministers a suite of new powers in devolved areas that go beyond correcting deficiencies.These powers have been conferred concurrently, meaning that either UK Ministers or Scottish Ministers can act.

The effect of these regulations may be to change policy. UK Ministers will not normally make such regulations in devolved areas without the consent of the Scottish Ministers. That agreement is a legal requirement in some cases, but not in all.

The suite of concurrent powers includes:

- powers to implement long term obligations for the recognition of citizens' rights under the Withdrawal Agreement
- powers to deal with separation issues such as the regulation of goods placed on the market, and
- powers to implement the Ireland/Northern Ireland protocol.

There are also other powers conferred on UK Ministers in devolved areas, created or amended in the instruments made under the European Union (Withdrawal) Act 2018 to correct deficiencies as well as powers in other Brexit related legislation, such as the Direct Payments to Farmers (Legislative Continuity) Act 2020 and the Agriculture and Fisheries Bills currently being considered by the UK Parliament.

As yet it is unclear how regulations made under such legislation will change the overall legislative and policy landscape in Scotland. What can, however, be said is that the power to keep pace provided for in the Bill will, in practical terms, likely face constraint by the exercise of powers by both UK and Scottish Ministers which exist in other legislation.

UK wide legislation

The UK Parliament has always had the power to make laws for Scotland in devolved areas and it will continue to have that power. The UK Parliament will not normally pass primary legislation (an Act of Parliament) in devolved areas without seeking the consent of the devolved legislatures. This is through the process of legislative consent.

A number of 'Brexit Bills' have been, or are still to be, introduced in the UK Parliament. These Bills provide the legal basis in areas after the end of the implementation period.

In many areas, only some of the Bill's provisions are applicable to Scotland. The UK Agriculture Bill, for example, makes provision for a new environmental land management scheme for England only, while making provision for UK-wide reporting on food security.

The Scottish Government lodged a legislative consent memorandum and motion for the UK Agriculture Bill on 4 May 2020. The Scottish Government agreed with the UK Government that consent is required for some parts of the Bill, but only recommended consent on some of the provisions.

The Scottish Parliament has the right to withhold legislative consent as it has done on previous occasions. Nevertheless, the UK Parliament has shown that it is willing to legislate in Scotland even where legislative consent is withheld. The future willingness of the UK Parliament to legislate in devolved areas, even without legislative consent, will be a significant factor in the operation of the devolution settlement in the UK's post EU era.

UK wide legislation will have an impact on Scotland's ability to keep pace with EU law in devolved areas. It may be the case that the Scottish Parliament has agreed to a legislative approach which is at odds with future developments in EU law thus constraining Scottish Ministers' ability to use the section 1(1) power in practice, or it may be that the UK Parliament legislates without consent for Scotland in areas in which Scottish Ministers would wish to exercise the keeping pace power. In either case, a question is raised about the potential effectiveness of the provisions in Part 1 of the Bill.

A further factor to consider is Scottish Acts being made as a result of the UK leaving the EU. The Agriculture (Retained EU Law and Data) (Scotland) Bill, for example, will allow Scottish Ministers to be able simplify or improve the European Union (EU) Common Agricultural Policy (CAP). This Bill is the first piece of primary legislation introduced in the Scottish Parliament which grants powers to amend retained EU law as a result of EU exit in a particular subject area.

Common frameworks

In many areas, the requirement to comply with EU law has created policy alignment and a similar, or in some cases identical, regulatory regime across the UK. At the end of the implementation period, policy divergence within the UK is a possibility, albeit one which in some areas may not be desirable.

The UK, Scottish and Welsh Governments have therefore agreed that common approaches will continue to be required in some areas after the end of the implementation period. These common approaches, termed 'common frameworks', can be developed so that rules and regulations in certain areas remain the same, or are at least similar, across the UK after 31 December 2020.

In October 2017, the Joint Ministerial Committee (European Negotiations) - a meeting between the UK government and the Scottish and Welsh Governments (officials from the Northern Ireland Assembly attended in an observer capacity as the Northern Ireland Executive was not functioning at that time) developed an underlying set of principles to guide the work in creating common frameworks. These principles are set out below.

Common frameworks will be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a crossborder element;
- safeguard the security of the UK.

2. Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
- maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory, as is afforded by current EU rules;
- lead to a significant increase in decision-making powers for the devolved administrations.

Both the Scottish and Welsh Governments have made clear their strong opposition to any imposition of common frameworks without devolved consent. For example, on 24 September 2019, speaking in the Scottish Parliament, Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell MSP, stated that:

> " All such frameworks must be agreed, not imposed, and they must recognise and respect devolution. That is a crucial issue for the Scottish Government."
>
> Warden, 2020[17]

The Bill's Policy Memorandum also notes that:

> " 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."
>
> Policy Memorandum, paragraph 23

Common frameworks can have basis in legislation or be implemented non-legislatively through, for example, concordats. More information about common frameworks in available on the SPICe Post-Brexit Hub.

Some progress has been made on common frameworks, but not as much as expected. In part this may be due to the public health emergency created by COVID-19 but, even prior to March 2020, progress seemed to have stalled somewhat. Giving evidence to the Finance and Constitution Committee on 19 June 2020, the Cabinet Secretary for the

Constitution, Europe and External Affairs, Michael Russell MSP provided an update on the development of common frameworks:

> " The four-country board on the frameworks has already concluded that it will not be possible to finish the work this year. That is quite clear. The impact of Covid has had a huge effect on that work. We hope that three full frameworks might be completed by the end of the year. We should remember that we are talking about in the region of 23 or 24 frameworks; there is still quite a variety. It looks as though frameworks on nutritional labelling and compositional standards, emissions trading systems and food safety and hygiene law might be completed this year. The first of those to come to the Parliament would be on emissions trading, for which the consultation with stakeholders has been completed. However, that is not guaranteed; it is, in essence, the best-case scenario. That would leave another five full frameworks outstanding. We would have to make interim arrangements on issues ranging from fisheries management and support and agricultural support—which, of course, are closely related to the negotiations—right down to late payment of commercial transactions. Those frameworks would all need to be in the pipeline. That number of frameworks being completed is considerably less than any of us would have wanted, but none of them might be possible if there is no agreement on having a level playing field. If there is no agreement on a level playing field, it is very difficult to see a basis for those common frameworks—in particular, with regard to the involvement of Northern Ireland. There is no certainty that that could happen. I imagine that, as a best case, we might get three frameworks through."
>
> Finance and Constitution Committee 19 June 2020 [Draft], Michael Russell, contrib. 8[18]

SPICe published a blog on 25 June 2020 A progress report on common frameworks detailing progress made to date.

Without common frameworks in place it is difficult to know how far the keeping pace power provided to Ministers within the Bill will be exercisable in practice. That is to say, common frameworks agreed between governments may, in effect, remove the ability to legislate in an area because a common approach has been agreed and provided for elsewhere. It is also important to note that in spite of the UK Government's agreement to consider common approaches, UK legislation is being made which will shape future arrangements without reference to common frameworks (see section on UK wide legislation).

The UK's future relationship with the EU

In spite of the aspirations expressed in the , the UK's future relationship with the EU (i.e. what arrangements will look like between the UK and EU from 1 January 2021) is unclear. Yet, the future relationship will be influential across sectors - from trade policy and security arrangements to living and working abroad - the shape of the UK/EU relationship will set the agenda for years to come.

Whatever is agreed between the UK and EU on the future relationship will be central in terms of how Scottish Ministers may need to, or indeed wish to exercise the power to keep pace provided for by section 1(1) of the Bill.

> “ 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.”
>
> Policy Memorandum, paragraph 11The Scottish Governemnt, 2020[4]

As Professor Nicola McEwen has observed, the end of the implementation period is not necessarily the end to continued regulatory alignment between the UK and EU:

> “ Significant UK regulatory divergence is not inevitable. Obligations to ensure a level playing field are central to the EU’s negotiating mandate in the future relationship negotiations with the UK. For its part, the UK government is adamant that it will ‘*not accept nor agree to any obligations where our laws are aligned with the EU or the EU’s institutions, including the Court of Justice*’, as succinctly put by Michael Gove, the Chancellor of the Duchy of Lancaster. But regulatory autonomy doesn’t necessarily imply divergence from EU law. The UK government could choose to exercise its sovereignty by mirroring EU law in domestic law. This is the difference between policy ownership and policy divergence. However, despite Boris Johnson’s recent reassurances that ‘*We are not leaving the EU to undermine European standards, we will not engage in any kind of dumping whether commercial, or social, or environmental*’, the refusal to commit to regulatory alignment has raised regression concerns.”
>
> Professor Nicola McEwen, Co-Director, Centre on Constitutional Change, Devolution and Alignment with EU Laws 19

After five rounds of the EU-UK future relationship negotiations there have been few signs of progress. Key sticking points revolve around level playing field provisions, fisheries, and governance of the future relationship. In addition, an exchange of letters between the chief negotiators ahead of round four suggested that the negotiations were not moving quickly.

Whilst a deal on the future relationship remains possible before the end of 2020, it is very unlikely it will cover all the different areas covered in both the EU and UK negotiating texts. As time moves on, it is probable that both sides will seek to focus on some key areas to ensure the basis of an agreement with negotiations continuing in other areas into 2021. This may result in a free trade agreement and possibly an agreement on fisheries, whilst in other areas such as security and transport a new agreement might need to wait.

Phillip Rycroft confirmed this in his appearance with the Scottish Parliament's Culture, Tourism, Europe and External Affairs Committee on 4 June 2020:

> “ We might get a free-trade agreement, but there are plenty of other domains—I have mentioned security; other examples are transport, energy and UK engagement in EU programmes—which might not be sorted out within that timescale. I suspect that even if we get a deal, we will still see negotiations continuing into next year on various aspects of our future relationship.”
>
> Culture, Tourism, Europe and External Affairs Committee 04 June 2020, Philip Rycroft, contrib. 15[20]

Whilst the nature of the future relationship with the EU is yet to be resolved, the value and efficacy of the keeping pace power provided to Scottish Ministers under the Bill would appear to be unclear. The Bill is legislating in case the powers are required.

An alternative approach could be for the Scottish Parliament to pass any primary legislation it deemed appropriate and re-assess the need for devolved powers to keep pace with EU law once the future relationship is agreed.

UK internal market

The UK does not have an internal market defined in law as it has been part of the European Union Internal Market. The UK internal market and how it operates will impact on a wide range of Scottish organisations, including Scottish businesses, environmental and consumer organisations.

A UK internal market would seek to replace, to some degree, the internal market which has been the result of EU membership. Although common frameworks may be agreed to implement similar regimes in some sectors (see section on 'common frameworks'), the concept of a UK internal market goes beyond these arrangements. UK wide legislation and changes to legislation as a result of the powers given to Ministers under the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020 are already shaping the future of arrangements within the UK.

> “ A narrowly-drawn internal market provision would probably add little to whatever emerges from the discussions about policy frameworks. A broadly drawn one could impinge severely on devolved competences, leading to centralization, especially if it were entrusted to Westminster and not accompanied by strong rules about subsidiarity and proportionality ”
>
> Professor Michael Keating, University of Aberdeen, Written submission to the Finance and Constitution Committee inquiry on the UK internal market [21]

If UK legislation were to set the terms of an internal market, this may place legal constraints on the Scottish Ministers' ability to exercise the keeping pace power in devolved areas provided for in the Bill. A White Paper containing proposals for a UK internal market Bill was published on 16 July. Ahead of its publication, the Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell MSP stated that the proposals "ignore the reality and history of devolution" [22] .

The proposal to include a mutual recognition principle in UK internal market legislation appears to propose that that any good which meets the rules and standards required in one of the UK's nations should as a result be able to be sold in any of the four nations.

The Scottish Government has suggested that these proposals could mean that “a reduction in standards in one part of the UK would have the effect of pushing down standards elsewhere in the UK, in direct contradiction of the preferred approaches of stakeholders and decisions taken by the devolved parliaments”.

Whilst the parameters and objectives of an internal market remain uncertain, it may be challenging for Scottish Ministers to be able to use a keeping pace power to, as the policy memorandum states, 'ensure certainty, stability and predictability' [4] . It could be the case, for example, that keeping pace with developments and regulatory requirements at an EU level might place Scottish business at an economic disadvantage to its counterparts in other parts of the UK. This is discussed in more detail in a recent SPICe blog.

Trade agreements

As with the future relationship and the UK internal market, the shape and scope of future trade agreements will likely have an impact on the ability of Ministers to use the keeping pace power.

Whilst trade agreements are yet to be negotiated and concluded, the Trade Bill is currently going through the UK Parliament and the Scottish Government is expected to lay a legislative consent memorandum in relation to aspects of the Bill which are within devolved competence or which alter that competence. The Bill makes provisions about the implementation of international trade agreements; the establishment of the Trade Remedies Authority and its functions; and makes provision about the collection and disclosure of information relating to trade.

The system of regulatory alignment is also likely to be heavily influenced by trade agreements and any regulatory requirements imposed by them. In essence this means that Scotland's ability to keep pace in devolved areas may face legal constraints, or it may be undesirable for Scotland to keep pace on some aspects of EU law.

Replacement of EU funding

When the transition period ends, the UK will no longer be able to participate in EU funding programmes such as the Common Agricultural Policy and the Structural Funds. How the UK Government chooses to replace this funding (for example a UK Shared Prosperity Fund) and the rules around spending may provide a further limitation on the way in which the keeping pace power can be used.

The keeping pace power and the scrutiny challenge

Section 1(1) of the Bill proposes in summary, to confer on Scottish Ministers a power exercisable by regulations to keep pace with EU law. The Bill does not specify in which policy areas this keeping pace power would be used.

The generality of the power provided to Scottish Ministers under section 1(1) means that it would be for Scottish Ministers to decide in which policy areas and under what circumstances Scots law should keep pace with EU law. This could be on a case by case basis, in an ad hoc manner. Very little information is provided on the details of how Scottish Ministers plan to use this power. Paragraph 21 of the Policy Memorandum to the Bill states that Scotland should be able to keep pace with EU law "where appropriate":

> “ 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, 2020[23]

The lack of specificity on the intended use of the power, or a routemap as to the areas in which Scotland may wish to keep pace with the EU and the rationale for this, raises a number of questions about how and when the power will be exercised.

Furthermore, without an idea of how Ministers intend to assess whether use of the keeping pace power is appropriate, there are significant questions over how effective scrutiny of Ministers' decisions to use the power can be carried out.

Some key questions are explored in more detail in the following section on this briefing:

- How can Scotland influence the development of EU law when it is not a member of the EU?
- How will the Scottish Government monitor the vast quantity of EU law being passed?
- How will decisions about what areas of EU law to keep pace with be made and what evidence will be used to make such decisions?
- How can the Scottish Parliament effectively scrutinise the use of the section 1(1) power?

How can Scotland influence the development of EU law when it is not a member of the EU?

Scotland, as part of the UK, was a member state of the EU. Member states exert influence in the EU through its seven institutions, namely:

1. the European Parliament

2. the European Council
3. the Council of the European Union (simply called 'the Council')
4. the European Commission
5. the Court of Justice of the European Union
6. the European Central Bank
7. the Court of Auditors

When it comes to deciding policy and passing legislation, four institutions have particular significance. These are:

- the European Parliament to which EU member states elect representatives
- the European Council which is made up of the heads of state or government of all EU member states and makes decisions on broad political priorities and important initiatives whilst not wielding legislative power.
- the Council of the European Union, generally known as the Council which represents EU member state governments.
- the European Commission which is the executive branch of power in the EU. It acts in the EU's general interest with complete independence from national governments and is accountable to the European Parliament.

The EU's standard decision-making procedure is known as 'Ordinary Legislative Procedure'. This means that the directly elected European Parliament has to approve EU legislation together with the Council of the European Union. It is the European Commission which proposes legislation.

As such, the EU's legislative process includes key roles for the European Commission, the European Parliament and for the governments of member state (in their roles in both the European Council and the Council of the European Union). The roles of the European Parliament and the Council of the European Union in particular provide direct opportunities for all the EU's member states to influence and ultimately decide on the detail of EU law.

When the UK was a member state, Scotland's specific interests could have been represented either by the UK Government in the Council or by Scotland's MEPs. As the UK is no longer a member state of the EU it does not send representatives to these key EU institutions. The effect of this is that the UK is no longer able to directly influence the development of EU law. The Policy Memorandum to the Bill recognises this loss of influence stating:

> “ 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. 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.”
>
> The Scottish Governemnt, 2020[4]

The Scottish Government has an office in Brussels through which it can try to influence policy indirectly and maintain links with European counterparts. Giving evidence to the Culture, Tourism, Europe and External Affairs Committee on 20 February 2020, Cabinet Secretary Michael Russell highlighted the increasingly important role of this office after Brexit:

> “ We have a very effective group of people in Brussels who work on our behalf. Their job will now become more important, because they must make sure that our view is heard and that our contacts continue.”
>
> Scottish Parliament Official Report, 2020[24]

Nevertheless, EU law can no longer be directly influenced by Scottish MEPs in the European Parliament nor can the Scottish Government seek to influence the UK government to represent its position in the Council, Commission or the European Council. This issue was highlighted in a recent blog by Professor Nicola McEwen for the Centre on Constitutional Change:

> “ These regulatory powers could significantly enhance the Scottish government’s authority vis-à-vis the Scottish parliament. It would also mean that Scottish ministers would be implementing laws made by the EU institutions over which neither they nor any Scottish parliamentarians had had any say.”
>
> Professor Nicola McEwen, Co-Director, Centre on Constitutional Change, Devolution and Alignment with EU Laws, April 2020

The provisions in this Bill mean that Scotland could be keeping pace with EU legislation, and thus aligning with EU policy, over which it has had no direct influence in developing at a formal level.

Paragraph 20 of the Policy Memorandum notes, nonetheless, that;

> “ 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.”
>
> Policy Memorandum, paragraph 20 [4]

How will the Scottish Government monitor the vast quantity of EU law passed?

At present, some EU law is directly applicable in the UK without need for further action by either the UK or Scottish Government. Other EU legislation requires domestic implementing legislation before it becomes national law - usually achieved via secondary legislation.

In 2019, the EU adopted 397 new legislative acts and amended a further 127 legislative acts [25] . In addition, it adopted 70 non-legislative acts and amended 79 non-legislative acts. 518 implementing acts were adopted and a further 359 implementing acts amended.

These figures show the extent and scale of EU legislation: all of which could be kept pace with under the power in section 1(1) of the Bill.

It is not clear how the Scottish Government plans to track all such future EU provisions, nor how it will decide which measures it wishes to keep pace with. The Scottish Government has given no decisive indication of its capacity to track all the different pieces of EU legislation either from its Brussels office or through its policy directorates in Scotland. Even in a process of selective alignment, it would be necessary, or certainly desirable, to track developments across policy areas even where alignment may not eventually be sought.

The Policy Memorandum notes that the Scottish Government will "provide further details" on how it plans to monitor EU developments as "consideration proceeds".

> “ 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.”
>
> Policy Memorandum, paragraph 33

Giving evidence to the Culture, Tourism, Europe and External Affairs Committee on 20 February 2020, Cabinet Secretary Michael Russell MSP also highlighted the potential challenges of seeking alignment as a non-EU member state:

> “ In discussing alignment, we will need to be alert to what is happening. It is harder for a country that is outside the EU to be fully aware of all the issues that arise. Inevitably, alignment will have to be a selective process. We simply could not cope with—nor would we wish to cope with—the huge demand for alignment in every area, but we will need to have our antennae switched on and be aware of the changes that take place and the things that we will need to do.”
>
> Scottish Parliament Official Report, 2020[24]

How will decisions about what areas of EU law to keep pace with be made and what evidence will be used to make such decisions?

Given the Scottish Government's acceptance that alignment will not be sought in every area, it follows that a selection process will take place on what EU law to keep pace with. The Cabinet Secretary told the Culture, Tourism, Europe and External Affairs Committee that:

> “ The Scottish Government will do all that we can to maintain dynamic alignment on environmental and labour standards, and close co-operation with the EU. ”
>
> Scottish Parliament Official Report, 2020[24]

The Bill does not set out any detail on how Scottish Ministers will monitor EU law, nor how they may work to prioritise following developments at an EU level in certain policy areas. No provision is made to set out a framework for decision making on which areas of EU law to keep pace with.

The Scottish Government states in paragraph 21 of the Policy Memorandum to the Bill that the keeping pace power "would ensure consistency and predictability" for people and business both in Scotland and in the EU. It is currently unclear how consistency and predictability would be achieved given the breadth of the section 1(1) power and the lack of clarity on areas in which it will likely be used.

Likewise, the Bill's accompanying documents do not provide any indication of how the Scottish Government will identify which areas of EU legislation it wishes to keep pace with. Whilst the Policy Memorandum identifies some potential examples of how the power might be used in areas such as drinking water, food and livestock updates, environmental issues, supply of digital content and services and EU insolvency legislation, no criteria has been set out for how decisions to keep pace will be made. The Policy Memorandum instead states that:

> “ 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.”
>
> The Scottish Governemnt, 2020[4]

As explained in the 'Overview of key provisions' section of this briefing the Bill provides a particularly wide power which could be used to align Scots law with EU law in any area. The Policy Memorandum indicates that the approach to powers may change over time, with the broad power being supplemented or superseded by specific powers in distinct areas. The Policy Memorandum states that:

> “ The power might well eventually be supplemented, or may in time be replaced, by specific powers to keep pace in subject areas... ...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 Scottish Governemnt, 2020[4]

Whilst the Scottish Parliament would maintain a scrutiny role over any regulations, the Scottish Government will only lay instruments in areas it wishes to keep pace with; it will not produce a comprehensive report to the Parliament of the legislation it has not chosen to keep pace with. In effect, there will be no programmed oversight of Scottish Ministers' decisions not to keep pace. This raises two questions:

- how fully the Parliament can understand the scale of Ministers' use of the section 1(1) power?
- how will the Parliament maintain an understanding of how well Scots law is aligned with the full range of EU laws in the future?

How can the Scottish Parliament effectively scrutinise the use of the section 1(1) power?

The process of the UK's exit from the EU has created scrutiny challenges for the Scottish Parliament.

On 25 March 2019, the Scottish Parliament's Finance and Constitution Committee wrote to parliamentary committees. The letter set out the Finance and Constitution Committee's agreement to seek "explore a more coordinated approach with other Scottish parliamentary committees to developing the Scottish Parliament's scrutiny role in relation to the new powers arising from the UK's withdrawal from the EU".

The Finance and Constitution Committee's letter highlighted developments in three areas:

1. UK legislation in devolved areas which previously would have been within the competence of the EU
2. international treaties including trade deals which cover devolved areas and which would previously have been negotiated by the EU
3. common UK frameworks which the UK Government and the Scottish and Welsh Governments agree will be needed post-Brexit.

The interplay between the UK and Scottish Parliament on EU legislation prior to the UK's withdrawal from the EU has been explained by the Institute for Government:

> “ EU matters are reserved to the Westminster Parliament under the devolution settlement: Scottish Government ministers are very rarely present at Council meetings and do not negotiate or vote on behalf of the UK Government. However, EU matters affect Scotland’s devolved policy remit and its citizens, and so the parliament performs a scrutiny role. The Scottish Parliament has moved from a centralised scrutiny system, with work being undertaken by a single European and External Relations Committee, to a mainstreamed scrutiny system, with subject committees considering EU proposals relevant to their policy area, and the European and External Relations Committee only considering overarching proposals. Committees can hold evidence sessions or exchange letters with Scottish or UK Government ministers to discuss their position on proposals and make their views heard, but they do not have the power to mandate ministers. ”
>
> Munro, 2016[26]

In the Bill's Policy Memorandum, the Scottish Government acknowledges an alternative approach to introducing a keeping pace power would be the introduction of primary legislation to create subject-matter-specific powers. However, the Scottish Government argues that this would not be a practical approach because:

> " 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."
>
> The Scottish Governemnt, 2020[4]

The issue of lack of Scottish influence on the development of EU law and the consequent need for an effective scrutiny process was raised by Murdo Fraser MSP with the Cabinet Secretary for the Constitution, Europe and External Affairs at the Finance and Constitution Committee meeting on 19 June 2020. Murdo Fraser asked the Cabinet Secretary:

> " After the end of December, we will no longer be part of the EU, so any new EU laws that are made from that point onwards will have no input from us and there will be no consultation with any stakeholders in Scotland at all. The Scottish Government seems, in the bill, to be proposing that Scottish ministers will have the power, at their discretion, to determine whether those new EU laws will become part of Scots law. There would be no need for any primary legislation or detailed consultation, or any parliamentary scrutiny of those new EU laws. They would simply be imposed by regulation. Is that not just a power grab by Scottish ministers?"
>
> Scottish Parliament Official Report, 2020[27]

In response, the Cabinet Secretary said:

> " No. Your assumption is wrong, and your view of the position is perhaps coloured by a somewhat hostile view of European law. First, law cannot be made by the Scottish Parliament in any form or type without scrutiny. There are various levels of scrutiny, but there is scrutiny, and it is clear that there will be scrutiny through the normal legislative process. There is no mechanism to make law without scrutiny, so your assumption is false. Secondly, the principle behind the bill is very clear, and it is not as you have stated. It is for the Scottish Parliament, not the UK Government, to take a view on the extent to which devolved law aligns itself with the law of the EU. That is an unexceptional point of view and you would have to reject the whole premise of devolution if you did not accept it. In all those circumstances, in areas in which we have competence, it is right that we have the choice to decide whether we align ourselves with EU law, as we do now for a number of practical reasons, one of which concerns standards. We want to maintain a connection to the highest standards and to stretch ourselves so that we can continue to have those high standards in, for example, food safety and water quality."
>
> Scottish Parliament Official Report, 2020[27]

Section 4 of Part 1 of the Bill provide details on the parliamentary procedure for regulations made under section 1(1) of the Bill (as explained in the section of this briefing on section 4). In certain cases the affirmative procedure will be used meaning that the instrument cannot be made without the approval of the Parliament. In all other areas, the negative

procedure will apply unless Ministers decide to lay them under the affirmative procedure. Where the negative procedure applies the instrument becomes law unless a motion is agreed by the Parliament to annul it. Whilst secondary legislation is subject to parliamentary scrutiny, there are fewer opportunities for scrutiny and influence than for primary legislation. Secondary legislation is a 'take it or leave it' prospect for the Parliament. Unlike with primary legislation, there is no opportunity for MSPs to amend a regulation and the timescale for the process is also much reduced.

Aside from the robustness of the scrutiny process for the significance of the legislation potentially being made under section 1(1) powers, there is also the issue of what Scottish Ministers will need to provide the Parliament in order to undertake its scrutiny role. With primary legislation, various documents are required on introduction including explanatory notes; a policy memorandum and a financial memorandum. As outlined earlier in this briefing (see the section on the key provisions) sections 5 and 6 set out that Scottish Ministers must make certain explanatory statements when instruments and draft instruments made under the section 1(1) power are laid. These requirements are not, however, as comprehensive as the supporting documentation requirements for primary legislation. No financial overview needs to be provided, for example.

Statements do not need to be provided where "an equivalent" instrument or draft instrument has previously been laid (section 5(6). There is no time limit on this exception. As such, it is possible that equivalent instruments may be made on a cyclical basis without the need to update the Parliament on the Scottish Ministers' views as to why there are good reasons for making the provision (among other things), in spite of the fact that the policy and legislative landscape in the area may have changed since the last regulation was made.

Section 7 of the Bill provides the Scottish Parliament with a further opportunity to consider the Scottish Government's use of the section 1(1) power as it requires Scottish Ministers to prepare and lay before the Scottish Parliament a report explaining how the power has been used during the 'reporting period' which is defined as annually from the day which section 1(1) comes into force.

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