Finance and Constitution Committee

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

1 Introduction

This briefing deals with Parts 1 and 3 of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill ('the Bill') with some comments also on one aspect of part 2. The background to Part 1 of the Bill is that the existing EU law constraint on the exercise of the legislative and executive powers of the Scottish Parliament and Scottish Government will be removed from the end of 2020 (unless the transition period is extended) as a consequence of the UK leaving the EU. Also, all the law in force that is derived from the UK's EU obligations continues in force from the end of 2020 unless and until modified by subsequent domestic legislation. This body of law is described as 'retained EU law'. However, EU law will not stand still. It is continually being added to and revised. 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, and not the UK Government. Therefore, the purpose of Part 1 of the Bill is "to allow Scots law to 'keep pace' with EU law in devolved areas, where appropriate …" (Policy Memorandum, para 4.). Keeping pace with the development of EU law in areas of devolved competence will, therefore, require substantial and continuing legislative action. The relevant provisions of this Bill are similar though not identical to provisions included in Part 3 of the previous UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill passed on 21st March 2018.

2 The Keeping Pace Power

One way of ensuring that the law in devolved areas keeps pace with EU law would be to bring forward primary legislation (e.g. an Act of the Scottish Parliament) whenever a change in Scots law is required in order to align it with EU law. Another possibility would be to use existing statutory powers of the Scottish Ministers to make subordinate legislation in the relevant policy areas to make the necessary changes. This Bill introduces a third way of keeping pace, a general power to make subordinate legislation in any area of devolved competence in order to maintain alignment with EU law.

The scope of the keeping pace power

Section 1(1)(a)) of the Bill confers on the Scottish Ministers power to make regulations for the following purposes:

- Aligning the law in devolved areas with the provisions of EU regulations, EU tertiary legislation or an EU decision;
- Implementing an EU directive;
- Enforcing any such EU legislation.

The power may be used only so far as the relevant EU legislation has effect <u>in EU law</u> after IP completion day (IP completion day being the end of the implementation period in the UK-EU Withdrawal Agreement and the day when the UK ceases to be bound by EU law).

Section 1(1)(b) confers an additional power to make regulations for the purpose of dealing with matters arising out of, or related to, the operation of any rights, powers, liabilities, obligations or restrictions created by regulations of the nature described above or any remedies or proceedings provided for by those regulations.

Section 1(6) states that regulations under "(1) may make any provision that could be made by an Act of the Scottish Parliament." In other words, regulations made to keep pace with EU law may amend or repeal primary legislation, an example of the "Henry VIII power." Section 1(6) also makes clear that these powers can only be used within devolved competence.

Sections 1(2) to 1(5) give further detail on things that may be done in the exercise of the power. These include power to provide for functions exercised by EU entities or public authorities in the member States to be exercised instead by a Scottish public authority.

The power is, therefore, broad enough to enable the Scottish Ministers to make by regulations such changes in Scots law as are necessary order to keep it aligned with EU law to the extent that it is possible for a non-member of the EU to maintain alignment.

Limitations on the keeping pace power

Section 2 sets out specific limitations on the exercise of the keeping pace power.

Such regulations may not, amongst other things, impose or increase taxation, make retrospective provision, create a criminal offence punishable by more than 2 years imprisonment, remove any protection of the independence of judicial decision-making, modify the Scotland Act 1998 or the protected subject-matter listed in the Scotland Act 1998 or modify the equality legislation. If keeping pace with a particular development of EU were to require any of these outcomes, primary legislation would be necessary.

Duration of the power

Regulations may not be made more than 10 years after the power coming into force, although the Scottish Ministers may by regulations extend that period by up to 5 more years on two occasions. The maximum period possible during which the power may be exercised is, therefore, 20 years after it comes into force. These provisions give the power a much longer life than did the original Continuity Bill. It permitted regulations to be made only for a period of 3 years from exit day with a possibility for further extension to a maximum of 5 years in total.

Regulations extending the period are subject to the affirmative procedure.

Scrutiny of regulations made under the keeping pace power

The Scottish Ministers are obliged to make four statements to the Parliament when seeking to exercise the power. These are:

- an explanatory statement;
- an equalities legislation statement;
- a discrimination statement; and

- a statement on employment and health and safety and consumer protection.

The explanatory statement should explain (i) the instrument or draft instrument that is being laid before Parliament, (ii) why the Scottish Ministers think that there are good reasons for legislating in this way, (iii) the law before IP completion day which is relevant (i.e. both Scots law and UK law) and (iv) the effect (if any) the regulation will have on retained EU law

The equalities legislation statement must indicate whether the instrument or draft amends, repeals or revokes any provision of equalities legislation,[1] and if it does, explain the effect of that change.

The discrimination statement must state that the Scottish Ministers have 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.

The statement on employment, health and safety and consumer protection must explain the effect (if any) on rights and duties relating to employment and health and safety, and on matters relating to consumer protection so far as these matters are within devolved competence.

These statements must be laid before the Parliament when the instrument or draft instrument is itself laid before the Parliament. If the instrument or draft is laid during recess, Ministers must make a statement explaining why it was laid at that time. If Ministers fail to make either statement when the instrument or draft is laid, they must make a statement explaining why they have failed to do so. The Scottish Ministers must also report annually on the use made of the keeping pace power. Each such report must be laid before the Parliament as soon as practicable after the end of the period to which it relates.

These obligations to make statements are part of the process of scrutiny of the exercise of the keeping pace power. In addition, regulations are subject to either affirmative or negative procedure. Affirmative procedure is required where the instrument:

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

All other regulations which might be made under the keeping pace power are subject to the negative procedure.

As noted above, section 1 of the Bill creates a substantial Henry VIII power. Such measures require strong justification and should be accompanied by appropriate substantive limits and procedural safeguards. The Committee may wish to examine whether the justifications and safeguards are adequate.

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[1] I.e. the Equality Act 2006, the Equality Act 2010 or any subordinate legislation made under either of those Acts.

3 Comparison with the current arrangements for implementing EU law

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

- A specific Act of the UK Parliament;
- subordinate legislation made by UK Ministers under section 2(2) of the European Communities Act 1972;
- A specific Act of the Scottish Parliament;
- subordinate legislation made by the Scottish Ministers under section 2(2) of the European Communities Act 1972;

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

The Memorandum of Understanding ("MoU") on Devolution,[2] state that it is the responsibility of the lead Whitehall Department to formally notify the devolved administrations at official level of any new EU obligation which concerns devolved matters and which it will be the responsibility of the devolved administrations to implement. It also states for matters falling within the responsibility of the devolved administrations, it is for them to consider, in bilateral consultation with the lead Whitehall Department, and other Departments and devolved administrations if appropriate, how the obligation should be implemented, including whether the devolved administrations should implement separately, or opt for GB or UK legislation. Whitehall Departments are to liaise closely with the Scottish Government about the implementation by UK legislation of EU obligations in reserved areas, particularly where these could touch on areas which fall within the responsibility of the devolved administrations.

In the event of a no-deal Brexit, these arrangements for co-ordination of implementation of EU obligations will no longer be needed. If there is an agreement on the future relationship of the UK and the EU which imposes an obligation on the UK to 'keep pace' with specific aspects of EU law then such arrangements may continue to be needed in those areas.

The keeping pace power conferred by Part 1 of the Bill, will (subject to the points discussed below) enables the Scottish Government to continue to translate future changes in EU law into Scots law by subordinate legislation much as they have done up till now under Section 2(2) of the 1972 Act. The scope of the power is similar in that it applies to all areas of EU law over which the Parliament has competence and the arrangements for parliamentary scrutiny are broadly similar in that most Scottish statutory instruments are likely to be subject to the

[2] The Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013), available at: (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf)

negative rather than the affirmative procedure. The most substantial difference is the existence of a time limit on the exercise of the power.

4 Common frameworks, the UK internal market and future trade deals

The Bill raises issues relating to common frameworks, the UK internal market and future trade deals made by the UK with third countries.

Common frameworks

The UK Government's proposal to create common frameworks has been driven by concerns over the possible adverse economic and social effects of future divergence in policy between different territories within the UK that might result from the greater effective policy freedom that the UK legislatures would have after the UK leaves the EU. The UK Government has two basic concerns. One is that policy differences might create barriers to economic and social exchange between different parts of the UK. The other is the possible effect on future trade deals and other international agreements with other nations. In order to keep its side of the bargain, the UK Government has to ensure that such agreements are implemented throughout the UK. Agriculture provides a good example. Thus, for example, agricultural subsidies, is in general a devolved matter. This means that agricultural subsidies might become different in each of the historic nations of the UK. That might mean that there was not a 'level playing field' for the sale of agricultural products across the UK. Also, the nature and level of agricultural subsidies is likely to be an issue in negotiation of future trade deals.

The UK Government published a frameworks analysis in March 2018 identifying 24 policy areas in which it thought frameworks would be required, a further 82 where they might be required and 49 where no further action was required.[3] A revised frameworks analysis published by the Cabinet Office in April 2019 indicated that the number of policy areas in which legislative common frameworks might be required was only 21.[4]

The UK, Scottish and Welsh Governments have agreed that once the UK leaves the EU there will be a requirement for some common UK frameworks to replace some of the common EU frameworks, but there has been disagreement as to how this should be achieved. In the event, without the agreement of the Scottish Parliament, the UK Parliament amended the Scotland Act 1998 by adding section 30A which gives UK Ministers power to make regulations 'freezing' devolved legislative competence in specified areas which fall within the extended competence resulting from leaving the EU. As yet, this power has not been exercised but it could in future be exercised in any policy area in which the UK and Scottish Governments cannot agree a common framework and the former considers that legislation is necessary to create such a framework. The Scotland Act has also been amended to impose a similar limitation on the competence of the Scottish Government. Therefore, any competence

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[3] *Frameworks Analysis: Breakdown of Areas of EU Law that intersect with devolved competence In Scotland, Wales and Northern Ireland*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL__Frameworks_analysis_for_publication_on_9_March_2018.pdf

[4] *Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern* Ireland, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

restrictions imposed will constrain subordinate legislation and ministerial decisions as well as Acts of the Scottish Parliament. This means of changing devolved competence is additional to that in section 30 which allows devolved competence to be modified by Order in Council. And, of course, it is always possible for devolved competence to be modified by a specific Act of the UK Parliament.

After the end of the transition period, there will, therefore, be three ways in which the competence of the Scottish Parliament to legislate on matters governed by EU law might be curtailed:

- An Act of the UK Parliament expressly limiting its competence.
- An Order in Council made by UK Ministers under section 30, SA limiting its competence;
- Regulations made by UK Ministers under section 30A, SA limiting its competence;

The ability of the Scottish Government to make subordinate legislation or to take specific decisions and actions after the end of the transition period might also be legally curtailed in these ways.

These constraints on competence would not be affected by the enactment of the Bill in its current form as the Scottish Parliament cannot alter its own competence and the Bill does not seek to do so. So, although the Bill confers a general power on the Scottish Ministers to make regulations to align the law in devolved areas with EU law, the scope of that power may in future become more constrained as the UK Parliament and UK Government will be able to carve out exceptions to devolved competence by any of the methods described above. The Scottish Ministers can be prevented from achieving alignment with EU law wherever doing so conflicts with the desire of the UK Parliament and UK Government to create a common framework the content of which is different from EU law. Therefore, the dynamic alignment with EU law desired by the Scottish Government will be achievable only so far as the UK Parliament and UK Government are willing to permit it.

UK Internal Market White Paper

The latest indication of the UK Government's views on UK-wide common frameworks is contained in the White Paper, *UK Internal Marke*t (CP 278, July 2020). The Foreword states that, under the plans in the White Paper, the UK will continue to operate as a 'coherent Internal Market' and there will be a 'Market Access Commitment' which will guarantee that UK companies can trade unhindered in every part of the UK. Although described as a White Paper, the document does not set out detailed proposals for legislation; rather it is described as a consultation and seeks the views of businesses, academics, consumer groups and trade unions on the policy options set out in it.

The UK Government intends there to be a legislative underpinning for the UK Internal Market. It will seek to introduce new legislation that 'will commit, to all citizens and businesses, free access to the economic activity across the UK' in order to ensure continued market access across the UK. This will be delivered through the principles of mutual recognition and non-discrimination. It considers that without such a legislative underpinning, unnecessary regulatory barriers could emerge between the different parts of the UK. This legislative underpinning will operate on a UK-wide basis, taking into account the obligations that apply

under the Northern Ireland Protocol and will ensure full unfettered access for Northern Ireland goods to the UK market by the end of this year.

The mutual recognition and non-discrimination principles apply to both goods and services. The purpose of a mutual recognition system is to ensure that goods and services that comply with regulation in one territory will be recognised as complying with regulation in another. The non-discrimination principle makes it unlawful for a government to regulate in any way that gives less favourable treatment to goods, professionals or service providers originating in or from another territory to that given goods, professionals or service providers. originating in its own territory.

A mutual recognition system for the UK would encompass three areas of regulation: goods, professional qualifications and services. Mutual recognition already applies to most service within the UK under the Provision of Services Regulations 2009 (SI 2009/2999). These regulations have broad application and areas not within the scope of the regulations will also be outside the scope of the UK Internal Market proposals. The excepted areas include financial, healthcare and transport services.

The Government considers that there remains an important role in relation to the Internal Market for independently-delivered functions removed from the political influence of the UK Government and that of the devolved administrations. The two functions are monitoring the Internal Market and business and consumer engagement. It proposes to create an independent monitoring mechanism of the UK internal market which would provide administrations, legislatures and external stakeholders with reporting into the functioning of the UK Internal Market. There are no specific proposals for the two independent functions; the White Paper notes that the range of potential vehicles for delivering these functions would include an independent body with close links to the UK Parliament and devolved legislatures; an expert committee; or a body accountable directly to the UK Parliament. It invites proposals on the most effective way of implementing these independent functions.

The UK Government also considers that it is important that the UK continues to have a uniform approach to subsidy of businesses to replace the under the EU rules on State Aid which are enforced by the European Commission.

No detail of the nature and terms of the legislative underpinning for the UK Internal Market is given. It is not clear for example how general or specific the legislative statement of the mutual recognition and non-discrimination principles will be. It is not clear either whether the principles and their application will be defined in more detail by subordinate legislation. Nor is it clear how the new provisions providing the legislative underpinning will affect devolved competence or how they relate to existing provisions affecting devolved competence such as sections 30 and 30A of the Scotland Act.

5 Issues arising from Part 2 of the Bill: Guiding Principles on the Environment

Part 2 of the Bill gives effect to guiding principles on the environment. Section 9 of the Bill introduces the guiding principles on the environment which are derived from the equivalent principles provided for in Article 191(2) of Title XX of the Treaty on the Functioning of the European Union.

Section 10(1) states that the Scottish Ministers must, in developing policies (including proposals for legislation), have regard to the guiding principles on the environment. Section 10(2) states:

> Ministers of the Crown must, in developing policies (including proposals for legislation) so far as extending to Scotland, have regard to the guiding principles on the environment.

Section 11 imposes a duty on 'responsible authorities' to have regard to the guiding principles. Section 12 states that the purpose of the duties imposed by sections 10 and 11 are protecting and improving the environment and contributing to sustainable development.

Section 13 requires the Scottish Ministers to publish guidance on the guiding principles and the duties in sections 10 and 11 as read with section 12. The guidance may include, amongst other things, provision complying with the duties and how those who are subject to the duties should demonstrate that they have complied and are complying with the duties and a person who is subject to one or other of the duties must, in doing anything in respect of which the duty applies, have regard to the guidance published under this section.

Sections 10(2), 12 and 13 impose duties on Ministers of the Crown. These provisions, therefore, address the issue of how to ensure that executive powers which are exercised at UK level, but are exercised in relation to devolved subject matters, comply with the same standards as those imposed on devolved public authorities. The provisions if read literally would apply to all policy development by Ministers of the Crown which extends to Scotland. However, section 101 of the Scotland Act 1998 states that a Bill must be read as narrowly as required to be within devolved competence. So, the duties imposed on UK Ministers and UK public authorities will apply only when they are making environmental decisions in relation to Scotland which relate to devolved matters. They would not be bound by the Continuity Bill when taking decisions on reserved matters.

There is, however, a possible doubt over competence arising from the decision of the Supreme Court in the case on the first Continuity Bill, *The UK Withdrawal From The European Union (Legal Continuity) (Scotland) Bill* .2018] UKSC 64. Section 17 of the first Continuity Bill purported to require UK Ministers exercising delegated legislative powers under UK legislation in relation to matters of retained EU law to obtain the consent of the Scottish Ministers before making regulations in devolved areas. The Supreme Court held that s 17 was ultra vires because it was an attempt to condition the future exercise of the UK Parliament's power to make laws for Scotland, and hence amounted to an unlawful modification of s 28(7) of the Scotland Act 1998 which expressly confirms the power of the UK Parliament to legislate for Scotland.

Section 10(2) of the current Bill is different from s 17 of the first Bill in that it imposes only a duty to have regard to the guiding principles/guidance and it does not make the exercise of any decision-making power conditional upon compliance with those principles/guidance. However, it might be argued that the difference is one of degree only, because section 10(2) would permit legal challenges to the exercise of relevant UK Ministerial powers on the ground of failure to have regard to the guiding principles/guidance and so the UK Parliament would have to expressly set aside the duty in order to free UK Ministers from it. This argument is discussed in more detail by McCorkindale, McHarg & Mullen in 'The Continuity Bill is Dead; Long Live the Continuity Bill – Regulatory Alignment and Divergence in Scotland Post-

Brexit' (available at: https://ukconstitutionallaw.org/2020/07/30/christopher-mccorkindale-aileen-mcharg-and-tom-mullen-the-continuity-bill-is-dead-long-live-the-continuity-bill-regulatory-alignment-and-divergence-in-scotland-post-brexit/).

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