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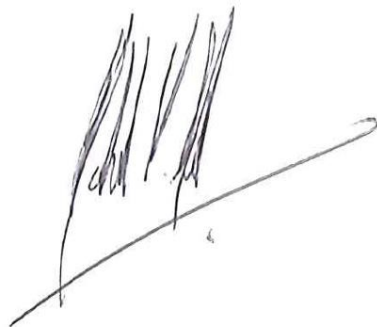
27 October 2020

Dear Bruce

UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) BILL – STAGE 1 REPORT

Thank you for the constructive Finance and Constitution Committee report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill at Stage 1, published on 7 October 2020. I am pleased that the Committee agrees to the general principles of the Bill. Ahead of the plenary debate, scheduled for 29 October, I enclose the Scottish Government's response to the main recommendations in the report.

My response also takes into consideration points raised at Stage 1 by the Delegated Powers and Law Reform Committee in their report published on 25 September 2020. A separate response to the Environment, Climate Change and Land Reform Committee will issue from my colleague Roseanna Cunningham, the Cabinet Secretary for Environment, Climate Change and Land Reform. I extend my thanks for careful scrutiny and consideration of the Bill at Stage 1 to all three Committees. I am copying this letter to the Conveners of the Environment, Climate Change and Land Reform and Delegated Powers and Law Reform Committees. I look forward to continuing to work with the Committees and the wider Parliament on the Bill.



MICHAEL RUSSELL

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

STAGE 1 REPORT – SCOTTISH GOVERNMENT RESPONSE

Below, the Scottish Government addresses the issues raised in the Committees' reports where either a response was sought or otherwise where a response ahead of the Stage 1 debate on the general principles of the Bill is considered helpful.

FINANCE AND CONSTITUTION COMMITTEE REPORT

Use of the power to align

36. The Committee supports the keeping pace power in principle and agrees that it would not be appropriate or workable for it to be absolute and inflexible. But the Committee does not accept that the use of this power should be entirely at the discretion of the Scottish Government and believes that there needs to be much greater clarity on how the Scottish Government proposes to use the power.¹

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

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

The Scottish Government is happy to commit to publishing the guidance which will be used to inform decisions on the use of this power. We anticipate that this guidance will set out the factors which should be considered prior to Ministers deciding whether to make regulations under section 1(1) of the Bill. This will also incorporate guidance on how Scottish Ministers intend to approach consultation when considering regulations under section 1(1). The Scottish Government does not therefore believe that the Bill needs to be amended to require this.

Decision-making frameworks and roles for Parliament, stakeholders and the wider public

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

40. The Committee welcomes the commitment from the Cabinet Secretary to work with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. It is, therefore, essential that the Parliament gives serious consideration to the level of scrutiny of the keeping pace power which would be both appropriate and proportionate.

¹ This paragraph was agreed to by division - For 8 (Bruce Crawford, George Adam, Tom Arthur, Jackie Baillie, Angela Constance, Patrick Harvie, John Mason, Alex Rowley) Against 3 (Murdo Fraser, Alexander Burnett, Dean Lockhart) Abstentions 0

41. Specifically, what role should the Parliament, stakeholders and wider public have in relation to—

- **the decision on whether or not to keep pace;**
- **early engagement in the policy development process especially where there are opportunities for ministerial discretion in how to keep pace.**

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

The Scottish Government welcomes the views of the Committee and looks forward to engaging with the Parliament to discuss what mechanisms might be best put in place to ensure an appropriate role for the Parliament and others in this regard.

Scrutiny process and reporting requirements

42. The Parliament also needs to consider what level of information the Scottish Government should be required to provide to support the scrutiny process. Section 7(1) of the Bill requires the Scottish Government to provide a report to Parliament, on at least an annual basis, on how it has used the keeping pace power.

43. The Committee notes that if the Parliament wishes to have a more proactive role in influencing the use of the keeping pace power then this requirement is likely to be insufficient. One alternative option could be to amend the Bill to require Ministers to provide an annual report setting out its —

- **assessment of EU legislative priorities for the coming year;**
- **own priorities for the use of the keeping pace power including areas where it does not propose to keep pace.**

44. The Committee recognises that until now the Parliament has had a very limited role in the relation to the EU policy development process. The critical question for the Parliament and its committees is the extent to which that now needs to change in the context of the proposed decision-making framework discussed above.

The Scottish Government commits to providing a regular report addressing the EU's upcoming legislative priorities, and how they may impact on devolved interests.

The Scottish Government anticipates that this could be agreed as part of the Parliament's involvement in the decision-making framework on alignment, and that an amendment to the Bill is unnecessary. We would also note that the most appropriate moment in time to provide any such report may depend on publications at an EU level, for example of the European Commission's work programme, and that these do not necessarily reflect fixed commitments at an EU level, but often evolve over time after publication.

The use of secondary legislation

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

68. The Committee recommends that the Scottish Government gives serious consideration to the DPLRC's view that —

- **primary legislation is the most appropriate vehicle for domestic law to implement significant new policy proposals that have no equivalent in retained EU law and that this applies particularly to EU Directives;**
- **in the event that the power is not amended to that effect, the Committee recommends that the choice of procedure is expanded to include the super affirmative procedure.**

The Scottish Government would always use primary legislation where that is the most appropriate vehicle for legislative proposals. Possible examples might be when the EU were to bring forward law in an area in which it had gained new competencies, or in areas of major innovation. However, the Government is of the view that flexibility should be maintained as primary legislation would not necessarily be appropriate in every situation.

Attempting to limit the scope of the power in section 1(1) to exclude “significant new proposals” would not be practical given the significant legal difficulties involved in defining that on the face of the Bill. It is likely that any such amendment could lead to uncertainty and possibly challenge.

Both the concept of ‘existing standards in retained EU law’ and the concept of ‘technical areas’ would be extremely difficult to define in statute and could reasonably be interpreted differently by different people. The concept and content of retained EU law is already complex and such a limitation risks creating uncertainty and inflexibility over the ability of Ministers to exercise the power.

The Government considers such a limitation would undermine the purpose of this provision as it would lead to considerable legal doubt and risk of challenge about any exercise beyond the most minor and technical updating.

The power in the Bill is intended for circumstances which fall short of justifying primary legislation, and recognises the overall limit of legislative time available to the Parliament to align with EU law that would previously have been achieved by the European Communities Act 1972. The Bill therefore provides flexibility so that the most appropriate legislative vehicle can be used, depending on specific circumstances, while allowing alignment with EU law where that is in the best interests of Scotland.

The Scottish Government would expect that early engagement with the Parliament on proposals to align would provide an opportunity for the proposed legislative route to be discussed.

Similar objections apply to the DPLRC proposal to amend the Bill to apply a super-affirmative procedure where regulations under section 1(1) implement significant new policy proposals from EU law that do not exist in retained EU law or implement EU Directives in new policy areas where there is no equivalent in retained EU law. The difficulties in drafting definitions for “significant new policy proposals” or “new policy areas”, which such an amendment would require, would be significant and the likely effect of this proposal would be to proliferate unnecessarily and disproportionately the number of super-affirmative instruments to avoid legal risk, with undesirable implications for the resources of both the Government and the Parliament.

The Scottish Government considers the scrutiny procedures chosen for the power in section 1(1) represent a good balance between allowing for effective and thorough scrutiny of the use

of the power whilst also ensuring there is sufficient flexibility to allow the Government, where appropriate, to respond quickly where legislative changes are needed.

As the Committee notes, the Scottish Government is committed to working with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. It is the Government's view that using such a framework to provide for an appropriate level of consultation at the earliest stage of policy development is far preferable to devising and prescribing procedural requirements to take effect at the end of the process.

International obligations and trade deals

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

80. The Committee also notes that the use of the keeping pace power is likely to be influenced to some extent on the requirements of international agreements including trade deals. In our report on the Trade Bill LCM in October 2018 we noted that given future trade agreements may well limit the legislative competence of the devolved institutions it is therefore essential that they are involved at all stages of the trade negotiation process. More recently in our report on the Trade Bill LCM in October 2020 we restated this².

The power at section 1(1) may not be required to meet international obligations if appropriate delegated powers are conferred on the Scottish Ministers by a relevant UK Act. However, as stated in paragraph 25 of the Policy Memorandum, "In the event of the UK and EU agreeing a trade agreement, there may be a requirement for a form of dynamic alignment, however limited, with EU law. It is therefore prudent to legislate for this power to provide an effective and pragmatic mechanism for the Scottish Government to achieve this alignment." This was therefore intended as an example of when the power might be exercised in the absence of alternative powers – which is currently the case for a future agreement with the EU.

The Scottish Government is grateful to the Committee for its report on the Trade Bill LCM and agrees that devolved institutions should be involved at all stages of the trade negotiation process. The Scottish Government will continue to push for a greater role in the development and definition of UK wide trade policy and arrangements - from the formulation of mandates to the negotiation, finalisation and implementation of trade agreements to compliance with and enforcement of obligations at domestic and international level.

UK Internal Market Bill

87. The Committee notes that the mutual recognition and non-discrimination principles in the UK Internal Market Bill have the potential to significantly undermine the use of the keeping pace power in this Bill. Indeed, as the Committee states in our report on the Internal Market Bill LCM, we believe that the Internal Market Bill, and the market access principles in particular, undermine the whole basis of devolution³.

The Committee is correct to note that even where the Scottish Parliament and Scottish Ministers wish to maintain alignment with high EU standards at the end of the transition period,

² Alexander Burnett MSP, Murdo Fraser MSP and Dean Lockhart MSP dissented from this paragraph.

³ Alexander Burnett MSP, Murdo Fraser MSP and Dean Lockhart MSP dissented from this paragraph.

the UK Internal Market Bill risks undermining those devolved policy choices, and would force us, in some cases, to accept lower standards set elsewhere.

Essentially, the UK Internal Market Bill will enable lowering of food standards, environmental standards and put in doubt key public health policies such as minimum unit pricing, without any of the safeguards of the European Single Market. The Scottish Parliament has now voted decisively to withhold consent to the Bill. Under the Sewel Convention, the UK Government should now amend the Bill in order that relevant provisions do not apply to Scotland. To press on regardless of the view of the Scottish Parliament would represent a serious breach of that Convention. Of course, it remains the Scottish Government's view that the Bill should be withdrawn in its entirety as it is wholly unnecessary and seeks to breach international law.

Common Frameworks – interaction with the power to align with EU law

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

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

The Scottish Government has been clear that we will agree to common frameworks where these are in Scotland's interests, and where they are agreed and not imposed. The frameworks principles agreed at JMC in October 2017 make clear that frameworks must operate in a way that respects devolution and the democratic accountability of the devolved legislatures, and that frameworks must afford "at least equivalent flexibility" to tailor devolved policy choices as is currently afforded by EU rules.

As part of the guidance on the use of the power to align with EU law mentioned above, the Scottish Government will set out in practical terms how this power may and should interact with the operation of common frameworks, recognising that the scope for substantive policy divergence will vary from one frameworks area to another. As part of the post implementation and scrutiny of frameworks, the Scottish Government will consider any interactions between a power to align in particular areas and agreements to voluntarily manage divergence through common frameworks. We will also consider how best to set out our assessment of potential interactions as frameworks undergo formal scrutiny in the Scottish Parliament.

Common Frameworks – meaningful consultation

97. The Committee recognises the frustration felt by some of our witnesses regarding a lack of consultation with the Parliament, stakeholders and wider public. The Committee reported in January 2018 that the "process for agreeing common frameworks and the actual content must be arrived at through agreement and not imposed" and that "this process is not solely a matter for governments but must be transparent and inclusive." Nearly three years later there has been little if any public consultation.

98. The Committee remains very supportive of the Scottish Government's view that common frameworks should not be imposed by the UK Government and is supportive of a system of common frameworks for trade in the Internal Market, with the common

frameworks to be agreed between the devolved Governments and the UK Government. However, it is equally important that common frameworks are not effectively imposed on the Parliament and stakeholders without meaningful consultation and an opportunity to propose amendments.

The Scottish Government recognises that there has been a delay in developing frameworks to the point that they are ready for stakeholder and parliamentary scrutiny, but, as the Committee is aware, we are now seeing an increasing number of frameworks reaching that stage – there have been a number of successful stakeholder engagement sessions in recent weeks.

Work on frameworks development twice had to slow in 2019 to address the possibility of no deal exits in the spring and autumn, and the coronavirus outbreak has had a significant impact on policy teams' capacity in 2020. Despite strong and repeated requests from the Devolved Administrations, the UK Government refused to request an extension to the transition period, despite this being provided for by the Withdrawal Agreement and, we believe, acceptable to the EU. As a result, we are now operating to a hard deadline of year end to deliver all remaining frameworks to at least minimum operable levels.

The Scottish Government remains committed to full stakeholder and parliamentary scrutiny of frameworks as part of the process jointly agreed between the four UK Governments. Where frameworks have reached a minimally operable level by year end, they will be scrutinised and finalised in the agreed manner into 2021.

Common Frameworks – reporting

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

The Scottish Government will consider this recommendation further as part of the ongoing frameworks process, in particular how it would align with other reporting requirements and post implementation arrangements on common frameworks.

Expected volumes of SSIs

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

The volume of SSIs which might be made using this power, including those which might previously have been made by the UK Government under section 57(1), is dependent not only on the Scottish Government's actions, but also on factors such as the European Union's own legislative programme, as well as any UK-EU agreement and other international agreements which are outwith the control of the Scottish Government. It would not therefore be prudent, at this stage, to try to give an estimated volume of likely SSIs. In line with the Minister for Parliamentary Business and Veteran's current practice of providing committees with a forward look of what legislation it is anticipated will be referred to them, the Scottish Government will, where relevant, include information on what legislation is anticipated to arise from the power to align with EU law.

That said, the Scottish Government has made clear that we will seek to align with the EU wherever it is appropriate and in the best interests of Scotland to do so.

Resource implications

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

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

Discussions with the UK Government about the monitoring of the development of EU law have been focussed around EU laws which might impact on the functioning of any trade deal between the UK and the EU.

More generally, the Scottish Government will continue to maintain a presence at Scotland House Brussels, and, we understand, it is the UK Government’s intention to maintain the UK Mission to the EU. Given, however, the UK Government’s stated ambition to diverge from the body of EU law, it is likely that we will be unable to rely fully on it to provide information about new EU legislation which may be relevant to devolved areas.

The Scottish Government, led by the team in Scotland House Brussels, already seeks to actively monitor and engage with the development of EU law in areas of strategic priority to Scotland. This will continue to be the case after the end of the implementation period, though clearly will be more challenging. These arrangements can be expected to require some additional resources to operate effectively, but the precise nature of the arrangements and the necessary resources required as a result, will clearly depend, inter alia, on the extent of UK Government monitoring arrangements, and the volume of EU law with which we may be able to align, and that in itself is dependent on the resolution of current uncertainty around issues such as any EU-UK agreement and other Free Trade Agreements.

Decisions about whether to consent to the UK Parliament legislating in devolved areas where there may be agreement across the UK to align with the EU will continue to be taken on the same basis as they are now – Scottish Ministers will always ensure that the best interests of Scotland are at the forefront of those decisions. There have been no specific discussions with the UK Government about this.

There will certainly be some additional resource requirement for the Scottish Government in areas where it seeks to align with EU law but where the UK Parliament has previously legislated for the whole of the UK. Where the UK Government currently implements EU

obligations in devolved areas, however, this should not be taken to imply that there is no current resource burden on the Scottish Government, which must still assess the relevant EU obligation and how to respond to it. Under current arrangements, if that intended response is the same as the UK Government's, then it may be appropriate for the relevant legislation to be made for the whole of the UK, but the Scottish Government will still have a role in agreeing the detail of that legislation with the UK Government and in reviewing the final instrument to ensure that it meets the agreed objectives. A change of approach would mean a refocussing of this effort.

DELEGATED POWERS AND LAW REFORM COMMITTEE REPORT

As noted in the Committee's report, the Scottish Government wrote on 31 August to address questions asked by the Committee. That response can be viewed here:

https://www.parliament.scot/S5_Delegated_Powers/General%20Documents/CONTINUITY_BILL_-_DPLRC_-_letter_of_response_-_28_August_2020.pdf

Where the Scottish Government's views are not recorded in the letter of 31 August, or where clarification on points raised in the Committee's report of 25 September are considered helpful, further information is included below.

Sub-delegation

52. As the Committee did in its themes letter to the lead committee dated 9 September 2020, the Committee recognises that powers to legislate contained in EU delegated and implementing acts may in some circumstances be technical in nature. However, it considers that the ability to sub-delegate legislative or funding powers to a Scottish public authority, or such an authority's nominee, is particularly significant. While a similar ability to sub-delegate formed part of the power to correct deficiencies conferred on UK and Scottish Ministers under the 2018 Act, that applies in the context of deficiencies in existing EU law, rather than future EU law which may or may not be implemented in full.

53. Given the uncertainty over the potential use of this significant power, the Committee recommends that the lead committee asks the Scottish Government to give further consideration in advance of Stage 2 to the necessity of this aspect of the power to allow sub-delegation through subordinate legislation.

The Scottish Government will give further consideration to the points raised by the Committee in advance of Stage 2.

Appropriateness of not retaining a function or restriction

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

Section 1(2) is intended to ensure that regulations made under part 1 function properly in Scotland, outside of the European Union. This should be viewed through a similar lens to regulations made under section 8 of the European Union (Withdrawal) Act 2018 which address deficiencies in retained EU law.

Whilst section 1(2)(a) allows for provisions in EU law which have no practical application in Scotland to be omitted entirely from domestic regulations, and section 1(2)(b) allows for functions of EU entities to be omitted from domestic regulations, section 1(2)(f), by contrast,

addresses the situation where Ministers are not merely omitting these functions, but conferring them, or imposing restrictions as the case may be. The qualification at section 1(2)(f)(ii), like that in section 1(2)(a), is intended to make clear that those functions and restrictions must have some practical application in Scotland. Functions and restrictions which might not be appropriate are likely to be those which relate by definition to the functioning of the European Union and which serve no purpose outside of it.

Definitions in sections 39 and 40

119. The Committee is content with this power in principle on the basis that it is clarificatory in nature. The Committee considers that the affirmative procedure is appropriate to afford the Parliament the opportunity to conduct enhanced scrutiny of regulations that could determine the remit of a statutory body (i.e. ESS).

120. However, the Committee draws to the attention of the lead committee that the definitions of “environmental law”, “effectiveness of environmental law”, “environmental protection”, “environmental harm” and “the environment” in sections 39 and 40 of the Bill are very wide. With a view to ensuring greater certainty for ESS, those subject to enforcement by ESS, and the courts, the Committee calls on the Scottish Government to provide further details, such as an indicative list, of the legislation that would fall within the definition of “environmental law”.

The Scottish Government will give further consideration to these definitions in advance of Stage 2. However, it is the Scottish Government’s intention that these definitions are framed in broad and general terms in order to encompass all aspects of environmental law in Scotland in respect of which ESS will have an enforcement role.