

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

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

Delegated Powers Memorandum

Purpose

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. It describes the purpose of each of the delegated powers provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill is divided into 3 Parts (consisting of 47 sections) and 2 schedules.

- The Bill makes provision in connection with the withdrawal of the UK from the EU and seeks to provide the ability to align Scots law where appropriate with EU law in areas of devolved competence. In particular, the Bill provides for the conferral of a power by regulations to make provision in Scots law that corresponds to provision in certain EU instruments as they have effect in EU law at the end of the implementation period;
- the introduction of the guiding principles of the environment into Scots law; and

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- the formation of Environmental Standards Scotland, and its functions and powers.

4. The Scottish Ministers consulted from 16 February 2019 to 11 May 2019 on two matters; first on how regard is to be had by the Scottish Ministers to environmental principles equivalent to those contained in Article 191(2) of the TFEU when (i) developing policy and (ii) exercising other functions, as well as by other Scottish public authorities in exercising their functions; second on how to ensure effective environmental governance after EU exit. The Cabinet Secretary for Environment, Climate Change and Land Reform then undertook to Parliament to put in place the legislative and institutional arrangements required for future environmental principles and governance in Scotland.

5. Further information about the Bill's provisions are contained in the Explanatory Notes, Policy Memorandum and Financial Memorandum which are published separately.

Approach to use of delegated powers

6. The Bill contains a number of delegated powers which are explained in more detail below. The Scottish Government has carefully considered whether and how provisions should be set out in subordinate legislation rather than on the face of the Bill. In considering these issues, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:

- the potential frequency of amendment;
- the need to make proper use of Parliamentary time;
- ensuring sufficient flexibility to respond to changing circumstances and to make changes more quickly without the need for primary legislation; and
- the need to anticipate the unexpected which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

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Delegated Powers

7. The delegated powers provisions are listed below together with a short explanation of:

- what each power allows;
- who the power is conferred on;
- the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power; and
- the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why this procedure (if any) is considered appropriate.

Section 1(1) – power to make provision corresponding to EU law

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative or affirmative

Provision

8. Section 1 gives Scottish Ministers the discretionary power to continue to keep devolved law in line with EU law following ‘IP completion day’ (which is the day when the implementation period, agreed between the EU and the UK under the Withdrawal Agreement in October 2019, will end).

9. There are two aspects to the power in subsection (1)(a). In addition to enabling the Scottish Ministers to make provision corresponding to EU law as it develops after IP completion day (sub-paragraphs (i), (ii) and (iii)), the power also enables Scottish Ministers to make provision in relation to existing EU laws, which have been implemented or already have effect in Scots law (sub-paragraph (iv)) as can currently be done under section 2(2) of the European Communities Act 1972 (‘the ECA’). This aspect of the

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power recognises the value of Scottish Ministers having the power to refine an existing EU law scheme even where the need for refinement does not arise as a consequence of ‘post-implementation period’ developments in EU law.

10. Section 1(1)(b) of the Bill enables certain additional provision to be made to deal with matters arising from the operation of provision made under the main power (in line with the way section 2(2)(b) of the ECA operates).

Reason for taking power

11. Giving effect to EU law by secondary legislation is consistent with current practice, where new EU law is implemented using section 2(2) of the ECA. A substantial number of subjects are currently regulated under section 2 of the ECA. Whilst the ECA was repealed under the European Union (Withdrawal) Act 2018 (‘EUWA’), the European Union (Withdrawal Agreement) Act 2020 made amendments to EUWA to save and modify the effect of that repeal and to give effect to the continuation of EU law during the implementation period as per the Withdrawal Agreement. At the end of the implementation period, however, the ability to use section 2(2) will no longer be available and in many cases the only legislative route for regulating in a particular field, other than new primary legislation, will be lost. This power is intended, in part, to fill the gap that will be caused as a consequence.

12. The Scottish Government considers that there will be fields where its policy will be to voluntarily maintain regulatory alignment with EU rules. Particularly where there is no other subordinate legislation-making power to regulate in an area, a power to permit such alignment with post-implementation period developments in EU law would help the Scottish Government maintain, as appropriate, continuity of law in certain areas after IP completion day.

13. Whilst the position of the Scottish Government is to remain aligned with the EU on an ongoing basis, exceptions to that approach may be necessary in certain areas. For example, there may be areas where Scotland agrees with the EU policy objective behind certain developments in EU law but has identified a more effective or appropriate way to implement that policy in Scotland. The power in section 1 does not require

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Ministers to align with EU rules in every instance. Section 8(2) also means, for example, that the power does not require Scottish Ministers to implement the whole of an EU Directive or make provision corresponding to the whole of an EU regulation.

14. For further information about the Scottish Government's reasons for seeking this power, see paragraphs 23 to 46 of the Policy Memorandum for the Bill.

The use of the power

15. In relation to regulations made under subsection (1)(a)(i), (ii) or (iii), section 1(2) makes provision for Ministers to be able to adapt anything in new EU law which would not be relevant in relation to a non-member State: for example, anything which has no practical application in relation to Scotland. Section 1(3) and (4) set out what may be done with the different aspects of the power, such as providing for EU functions or functions already being carried out by a public authority in Scotland, to be sub-delegated or conferred on a different public authority.

16. The power is broadly equivalent in the Scottish context to the scope of the power in section 2(2) of the ECA. For example, any provision which could be made in an Act of the Scottish Parliament may be included in regulations under section 1(1), unless the limits on the use of the power apply.

Limits on the use of the power

17. Section 2 sets out some limits on the use of the power. These are that:

- it cannot be used to impose or increase taxation, make retrospective provision or create certain types of criminal offence (broadly, those punishable with a sentence of more than 2 years),
- it cannot be used to provide for the establishment of a Scottish public authority,
- the Scotland Act 1998 (and the protected subject-matters listed in section 31(5) of that Act), the Equality Act 2006 and the Equality Act 2010 are protected from modification,
- protections relating to judicial independence cannot be removed,

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- functions conferred on public authorities in Scotland must be broadly consistent with the purpose of the authority.

Choice of procedure

18. Section 4 of the Bill sets out the procedure which is attached to this power.

19. The Bill identifies some uses which are considered by the Scottish Government to involve decisions of significance justifying the affirmative procedure. Any regulations which contain the following provisions are subject to the affirmative procedure:

- abolishing 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;
- providing for any function of an EU entity or Scottish public authority to be exercised instead by an existing or different Scottish public authority or person,
- imposing a fee or charge (except where the alteration of the fee reflects changes in the value of money),
- creating, or widening the scope of, a criminal offence,
- creating or amending a power to legislate.

20. Where the provision in regulations made under section 1(1) does not fall under the categories noted above, negative procedure will apply, subject to a discretionary decision by the Scottish Ministers to apply affirmative procedure.

21. In recognition of the unique scale of the challenge posed by the UK's withdrawal from the EU and the many legislative demands on Parliamentary time as a consequence, together with the fact that it has become increasingly apparent that we need a power to deal with unforeseen circumstances, the Scottish Government considers the scrutiny procedures chosen for the power in section 1(1) represent a balance between allowing for effective and thorough scrutiny of the use of the power in section 1(1) whilst also ensuring there is sufficient flexibility in the system to allow the Government, where appropriate, to respond quickly to

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developments in EU law. The Scottish Government is fully committed to consulting where appropriate.

22. The proposed scrutiny procedure also broadly represents the similar approach which is taken in relation to the current powers to implement EU law under section 2(2) in the ECA. Allowing for a choice of procedure represents a sensible, pragmatic and efficient approach, which would allow negative procedure to be used for more technical matters and the affirmative procedure to be used when there are more significant policy implications. Many uses of the power may be mechanistic in nature and therefore appropriate for the negative procedure: for example, the updating of a list of permitted additives in an already existing regulatory scheme where it would be disproportionate to require affirmative procedure.

23. The Bill also makes provision for additional statutory checks on the use of the power by requiring under sections 5 to 7 for all instruments made under section 1(1) to be accompanied by written explanatory statements relating to the making of the instrument. Furthermore section 7(1) requires the Scottish Ministers to prepare and lay before the Scottish Parliament an annual report explaining how the section 1(1) power has been used.

Section 3(2) – duration of the section 1(1) power

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

24. Section 3(1) provides for the power under section 1(1) to keep devolved law in line with post-implementation period EU law to expire ten years after the power comes into force. Section 3(2) allows the Scottish Ministers to, by regulations, extend this period by up to five years and to extend any such further period, also by up to five years.

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Reason for taking power

25. The Scottish Government envisages the power in section 1(1) to be required only on a transitional basis, to avoid the emergence of regulatory lacunae on UK withdrawal, and in anticipation of discrete subject-matter-specific powers being legislated for. It is also considered to be appropriate for use in those sectors where it is intended that Scotland's laws in devolved areas should maintain regulatory alignment with EU law after UK withdrawal.

26. It is difficult to predict exactly how long such a power may be needed after UK withdrawal. A renewable period of 10 years is considered to strike an appropriate and proportionate balance, and ensures that the Scottish Parliament is involved in the decision to continue to allow the Scottish Ministers, in principle, to make provision to align with EU law.

Choice of procedure

27. The Scottish Government considers that affirmative procedure is appropriate for deciding whether a power should expire or continue to be exercisable. Any further use of the power, if the ability to use it is extended under this section, would be subject to the affirmative or negative procedure, as set out above.

Section 9(4) – power to add, remove, amend, or further define the guiding principles

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

28. Section 9(4) provides for the power to add, remove, amend or further define the guiding principles on the environment.

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Reason for taking power

29. The Scottish Government considers this power is necessary in particular to allow the Scottish Ministers to make provision ensuring that the guiding principles can be updated in light of any future developments in EU law, including in particular any updating of the principles in Article 191(2) of the Treaty on the Functioning of the European Union from which the guiding principles provided for in the Bill are derived.

30. The Scottish Government also considers it may be appropriate to use the power to add further environmental principles, either as a matter of domestic policy or as part of the implementation of international agreements (including between the UK and the EU). The Political Declaration made by the EU and the UK on 19 October 2019 refers to effective implementation of relevant internationally agreed principles.

31. The power to further define the principles is considered to be necessary to ensure that further provision can, as appropriate, be made about the meaning of the new guiding principles in domestic law.

Choice of procedure

32. The Scottish Government considers that, since this power will in particular be capable of being used to amend primary legislation, the affirmative procedure is appropriate.

Section 10(4) – power to specify matters to, or circumstances in, which the duties in sections 10(1) and (2) are not to apply

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

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Provision

33. Section 10(4) provides for the power to make regulations specifying further matters or circumstances (in addition to those specified in section 10(3) in relation to national defence or civil emergency; and finance or budgets) in relation to which the duties in sections 10(1) and (2) to have regard to the guiding principles on the environment when developing policy are not to apply.

Reason for taking power

34. The Scottish Government considers this power is necessary in case matters or circumstances come to light in relation to which it is not appropriate or necessary to apply the duties in sections 10(1) or (2), including if necessary as part of the implementation of international agreements (including between the UK and the EU).

Choice of procedure

35. The Scottish Government considers that the negative procedure is appropriate for this power, as it is likely to be used for technical matters.

Section 13(1) – duty to publish guidance on the guiding principles on the environment

Power conferred on: the Scottish Ministers

Power exercisable by: publication of guidance

Parliamentary procedure: laid before Parliament for 40 days before publication

Provision

36. Section 13(1) requires the Scottish Ministers to publish guidance on the guiding principles on the environment and the duties in sections 10 and 11 (the duties to have regard to the principles), as read with section 12 (the

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purpose of the duties). The guidance may in particular include provision about the matters in section 13(2). The matters listed in section 13(2) are:

- the interpretation of the principles;
- how the principles relate to each other;
- how the duties relate to other duties relating to the environment, including the duties in the Environmental Assessment (Scotland) Act 2005;
- complying with the duties;
- how those who are subject to the duties should demonstrate that they have complied and are complying with the duties.

37. A person who is subject to a duty in section 10 or 11 must have regard to the guidance in doing anything in respect of which the duty applies.

38. The Scottish Ministers are required to consult the parties specified in section 14(3), being a Minister of the Crown, each responsible authority who is subject to the duty under section 11 and such other persons as they consider appropriate, before laying the proposed guidance before the Parliament.

Reason for taking power

39. The Scottish Government considers that guidance is necessary to support compliance with the duty to have regard to the guiding principles by the Scottish Ministers, UK Ministers and responsible authorities (defined in section 11(2)). In particular it is thought that guidance is required as to how the principles are to be interpreted, how the duties relate to other environmental duties and how compliance with the duties is to be demonstrated.

40. The Scottish Ministers may include guidance on the interpretation of the principles. In doing so, they must have regard to the interpretation of the equivalent EU principles, from which the domestic guiding principles are derived, by the European Court from time to time (see section 9(3)).

Choice of procedure

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41. The guidance, must be laid before Parliament for 40 sitting days before it can be published,. The Scottish Ministers must not publish the guidance before the end of the 40 day period. If Parliament, during that period, resolves that the guidance should not be published, then the Scottish Ministers cannot publish it and it will require to be reviewed, adjusted – as necessary and appropriate – and any revised guidance laid for 40 sitting days. The Scottish Government considers that this procedure is appropriate for the publication of this guidance, as it is similar in nature to negative procedure for regulations, as the guidance will give technical explanation of the statutory provisions.

Section 17(1) – power to modify functions of Environmental Standards Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

42. Section 17(1) provides for the power to make regulations to modify Environmental Standards Scotland's functions for the purpose of implementing obligations arising from an agreement or arrangement between the United Kingdom and the EU. Environmental Standards Scotland's functions are set out at section 16, and in summary concern the monitoring, investigation and securing of public authorities' compliance with environmental law, and of the effectiveness of environmental law and how it is implemented and applied.

43. The Scottish Ministers are required to consult the parties specified in section 17(3), being Environmental Standards Scotland and such other persons as the Scottish Ministers consider appropriate, before making regulations under this power.

Reason for taking power

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44. The Scottish Government considers that the power is necessary to “future proof” the remit of Environmental Standards Scotland.

45. The timing of the negotiations between the UK and the EU of a future agreement is in parallel to the passage of this Bill. The transition period provided for by the Withdrawal Agreement, unless extended by agreement of both parties, will end on 31 December 2020 meaning that the ambition of both parties is to negotiate the future agreement by that date. The Political Declaration made by the EU and the UK on 19 October 2019 refers to the need for “appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement” for environmental standards. Although that is not as specific as the first Withdrawal Agreement negotiated in November 2018 which provided that the “United Kingdom shall implement a transparent system for the effective domestic monitoring, reporting, oversight and enforcement of its obligations pursuant to this Article and to Article 2 by an independent and adequately resourced body or bodies”, the Scottish Government considers it likely that the future agreement may contain obligations relating to environmental governance.

46. The Scottish Ministers will not be able to modify the functions of Environmental Standards Scotland for any other purpose. The power in section 17(1) can only be used to implement an agreement between the UK and the EU.

Choice of procedure

47. Affirmative procedure is considered to be appropriate because the provision allows for the amendment of primary legislation.

Section 39(5) – power to provide that legislation is not environmental law

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

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Provision

48. Section 39(5) provides for the power to make regulations to provide that a legislative provision is, or is not, within the definition of environmental law given in section 39(1).

Reason for taking power

49. The Scottish Government considers that power is necessary to “future proof” the remit of Environmental Standards Scotland.

50. Environmental Standards Scotland has functions relating to public authority compliance with environmental law, and to the effectiveness of environmental law. The definition of environmental law is therefore key to the body’s remit.

51. There are several reasons why the Scottish Ministers may require to amend the definition of environmental law. First, and as mentioned above, the timing of the negotiations between the UK and the EU of a future agreement is in parallel to the passage of this Bill. It may be necessary to amend the definition of environmental law to ensure that any environmental governance obligations created by the future agreement are fully implemented. Second, it may be necessary, where there is uncertainty as to whether a legislative provision falls within the definition of environmental law in section 39(1) to use this power to clarify the position. Third, there may be scenarios where it is appropriate to amend whether a legislative provision is outside or within the remit of Environmental Standards Scotland. An example of that could be where it was felt that an area of law was already subject to sufficient independent oversight, or where new oversight arrangements were put in place for a particular regime.

52. The Scottish Ministers are required to consult the parties specified in section 39(7), being Environmental Standards Scotland and such other persons as the Scottish Ministers consider appropriate, before making regulations under this power.

Choice of procedure

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53. Affirmative procedure is considered to be appropriate because the provision allows for the amendment of primary legislation.

Section 44 – Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if amending primary legislation, otherwise negative

Provision

54. This section provides that the Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purpose of, in connection with or for giving full effect to any provision of the enacted Bill or provision made under it.

Reason for taking power

55. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. It is appropriate to take a power to deal with anything that might emerge in the course of implementing the Bill, to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

Choice of procedure

56. Regulations made under this section which contain a provision which adds to, replaces or omits any part of the text of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type, and is considered to provide an appropriate level of scrutiny where there is a proposal to amend legislation.

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Section 45 - Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

57. This section provides that the Scottish Ministers may make regulations to bring the provisions of the Bill, with the exception of Part 3, which will come into force on the day after Royal Assent, into force on such day as the Scottish Ministers appoint. This section also provides that such regulations may include transitional, transitory or saving provision, and make different provision for different purposes.

Reason for taking power

58. It is usual practice for commencement provisions to be dealt with by subordinate legislation, and it is appropriate for those provisions in the Bill not coming into effect on Royal Assent to be commenced at such a time as the Scottish Ministers consider suitable.

Choice of procedure

59. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before Parliament as soon as practicable after being made.

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Section 46 – Repeal of Part 1 of this Act

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

Provision

60. This section provides that Scottish Ministers may make regulations to repeal Part 1 of this Bill.

Reason for taking power

61. Section 3 of the Bill provides that the power contained in section 1(1) extinguishes after ten years, unless it is extended under section 3(2). This section provides the power for Scottish Ministers to repeal the section 1(1) power in the event this does not occur or in the event that it is decided that the power should be repealed sooner.

Choice of procedure

62. Regulations made under this provision are subject to the affirmative procedure. The Scottish Government considers that affirmative procedure is appropriate for deciding whether a power should expire or continue to be exercisable.

Schedule 1, paragraph 2(7) – power to amend the minimum and maximum numbers of members of Environmental Standards Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

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Parliamentary procedure: negative

Provision

63. This provision allows Scottish Ministers the power to alter the number of members of Environmental Standards Scotland.

Reason for taking power

64. The Scottish Government considers that power is necessary to “future proof” the operation of Environmental Standards Scotland.

65. The Bill provides that Environmental Standards Scotland should consist of a member to chair the body and between four and six other members. We consider that this number of members will provide Environmental Standards Scotland with the necessary capacity and expertise to carry out present and future statutory functions. However, it is prudent to allow for some flexibility, for example to increase the size of the body in future, should there be a significant change in the scope of its powers.

Choice of procedure

66. Negative procedure is considered appropriate for what is essentially a limited power to make very specific amendments. It is also notable that there are similar powers in the Crofting Reform (Scotland) Act 2010, Police and Fire Reform (Scotland) Act 2012, Historic Environment Scotland Act 2014 and the Scottish Fiscal Commission Act 2016 and that they are all subject to negative procedure. The appointment of individual members being subject to Parliamentary approval (paragraph 2(2) of schedule 1) was also taken into consideration when determining the procedure.

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