CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

10th Meeting 2021, Session 6

18 November 2021

European Union (Continuity)(Scotland) Act 2021: Draft Policy Statement and Draft Annual Report

Introduction

1. Following the UK's departure from the EU there is no longer a requirement to continue to comply with EU law. However, Scottish Ministers have indicated that, where appropriate, they would like to see Scots Law continue to align with EU law.

2. Part 1 (section 1(1)) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 confers a power on Scottish Ministers to allow them to make regulations (secondary legislation) with the effect of continuing to keep Scots law aligned with EU law in some areas of devolved policy (the "keeping pace" power).

3. The Act requires Scottish Ministers to lay reports (first in draft form for consultation and then a final version) before Parliament on the intended and actual use of the power. There are two forms of reporting to Parliament, a Policy Statement and an Annual Report.

4. The draft policy statement and draft annual report were laid in the Scottish Parliament on 29th October and are attached at **Annexe A**.

5. The Act allows the Parliament 28 days to scrutinise both the draft documents and after the final versions are laid, a further 28 days.

6. At its meeting on 18th November the Committee will hear from Professor Kenneth Armstrong, University of Cambridge and the Human Rights Consortium Scotland (HRCS) and then the Cabinet Secretary for the Constitution, External Affairs and Culture. Written submissions from HRCS, the Law Society of Scotland and COSLA are attached at **Annexe B**.

7. A briefing note from Professor Armstrong on the application of the market access principles which he drafted for the Finance and Constitution Committee while the UK Internal Market Bill was being considered by the House of Commons is attached as **Annexe C**.

8. The Committee is required to submit its views on both documents by **Thursday 26th November**. The documents have also been circulated to other committees on the basis that they may also wish to submit views to the Scottish Government.

9. SPICe have published a briefing on the Scottish Government's policy commitment to align with EU law: Alignment with EU law and the Continuity Act (azureedge.net) and a blog: Scrutinising the Scottish Government's commitment to EU alignment – SPICe Spotlight | Solas air SPICe (spice-spotlight.scot).

Background

10. The European Union (Continuity)(Scotland) Bill was introduced in the Scottish Parliament by the Scottish Government on 18 June 2020. The policy memorandum stated that the purpose of the Bill "is to enable the Scottish Ministers to make provision in secondary legislation to allow Scots law to be able to 'keep pace' with EU law in devolved areas, where appropriate."[1]

11. The policy memorandum also stated that in "some cases it may be possible to align with EU law…using other specific legislative powers." However, in "many cases…separate legislative powers will not be available or sufficient" and therefore "it is 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."[2]

12. The policy memorandum also set out possible alternative approaches to the introducing the "keeping pace" powers. The policy memorandum stated that the "main alternative to introducing a keeping pace power would be the introduction of primary legislation to create subject-matter-specific powers." But this approach "would potentially consume a significant amount of parliamentary time, sometimes with short notice, limiting space for the remainder of the legislative agenda."[3]

13. The Scottish Government also provided examples of where secondary powers within existing primary legislation would not be sufficient to allow Scottish Ministers to "keep pace" with EU law and would therefore require primary legislation. This included drinking water standards under the Water (Scotland) Act 1980. The policy memorandum stated that the powers under that Act "are not sufficiently broad to implement fully future changes to the Directive, which was agreed at a political level in February 2020" and the "final version of the recast Directive is expected to be published later in the year." The policy memorandum stated that the keeping pace power "will enable the Scottish Ministers to be able to respond quickly and efficiently to continue to regulate drinking water to the standards desired by the Scottish Government."[4]

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[1] Policy Memorandum (parliament.scot) paragraph 5
[2] Policy Memorandum (parliament.scot) paragraph 26
[3] Policy Memorandum (parliament.scot) paragraph 29
[4] Policy Memorandum (parliament.scot) paragraph 40

14. Other EU Directives identified in the policy memorandum include two 2019 directives relating to contracts for the supply of digital content and services and which "harmonise contract law in this field across the EU" The policy memorandum states that this "is likely to be a source of economic growth in the coming years and the Scottish Government may choose to mirror all or some of the devolved aspects of these changes". It also states that the Directives "will both need to be implemented by June 2021" and the "keeping pace power would permit such action and parliamentary scrutiny of any decision."[5]

15. The policy memorandum also refers to an EU insolvency regulation and a 2019 Directive to be implemented in part by Member States by June 2021. This Directive makes changes to certain insolvency provisions and the policy memorandum states that "the Bill would give the Scottish Ministers the ability to make changes to domestic law in the event that they would wish to keep in step with developments in EU Regulations and Directives in relation to restructuring and fresh start for entrepreneurs."[6]

16. Other examples provided in the policy memorandum in explaining why the keeping pace power is required include food and livestock legislation. The policy memorandum stated that without "a power to keep pace with changes to EU law Scottish Ministers would lose the ability to introduce, amend or update secondary legislation on livestock matters in line with EU legislation."[7] A further example provided is environmental issues. The policy memorandum states that "changes may be required for a range of reasons in order to ensure that the regulations are up to date and fit for purpose."[8]

Non-statutory commitments

17. The policy memorandum states that "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." As noted by SPICe, throughout Parliament's consideration of the Continuity Act, the Scottish Government committed to work with the Parliament to agree an appropriate and proportionate decision making framework for future alignment with EU law.

18. The Scottish Government stated in response to the Finance and Constitution Committee's Stage 1 report on the Bill that it is -

[5] Policy Memorandum (parliament.scot) paragraph 44
[6] Policy Memorandum (parliament.scot) paragraph 45
[7] Policy Memorandum (parliament.scot) paragraph 42
[8] Policy Memorandum (parliament.scot) paragraph 43

"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."[9]

19. The Scottish Government also committed in its response to the Stage 1 report 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."[10]

- "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."[11]

Draft Policy Statement

20. The Scottish Ministers must publish, a statement (first in draft form and then a final version) of their policy on—

(a) the approach to be taken,

(b) the factors to be taken into account, and

(c) the process to be followed,

when considering whether to use the keeping pace power.

21. The draft policy statement states that maintaining alignment with EU law is a priority of the Scottish Ministers and this will be achieved in a range of different ways,

[9] Letter template Michael Russell (parliament.scot)
[10] Letter template Michael Russell (parliament.scot)
[11] Letter template Michael Russell (parliament.scot)

legislative and non-legislative. It also states that the intention however is that "this commitment is implemented primarily through the existing policy development process."[12]

22. The Scottish Government states in the draft policy statement that the keeping pace power "is intended for circumstances in which secondary legislation is the most appropriate vehicle for maintaining alignment and specific powers are not available, or not appropriate, to give effect to the policy intention of the measure proposed." On this basis it "therefore acts as a backstop, providing flexibility so that the most appropriate legislative vehicle can be used depending on specific circumstances."[13]

Draft Annual Report

23. The Scottish Ministers must, for each reporting period, prepare and lay before the Scottish Parliament a report explaining—

- how the keeping pace power has been used during the reporting period;
- how that use of the power contributes or has contributed towards maintaining and advancing standards in specified policy areas;
- how they intend to use the power following the reporting period;
- how their intended use of the power would contribute towards maintaining and advancing standards in these areas;
- any use of the power that has been considered by the Scottish Ministers during the reporting period.

24. The annual report states that "the power has not been used over the reporting period" and "Ministers have no current plans to use the power under section 1(1) of the Act, however use of the power may be considered within the upcoming reporting period as necessary."

Committee Clerks
November 2021

[12] ede6ec7e12574a7c8e34927b03ccf1b0.pdf (parliament.scot)
[13] ede6ec7e12574a7c8e34927b03ccf1b0.pdf (parliament.scot)

DRAFT STATEMENT OF POLICY BY THE SCOTTISH MINISTERS IN EXERCISE OF THE POWER IN SECTION 1 OF THE UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

Introduction

In accordance with section 6 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ("The Act"), the Scottish Ministers make the following draft statement explaining their approach, the factors to be taken into account and the process to be followed when considering use of the regulation making power under section 1 of the Act.

This statement is laid in the Scottish Parliament in draft in accordance with section 7 (3) for a period of 28 days, during which time the Scottish Ministers will have regard to any representations made to them regarding it.

In laying a copy of the final policy statement before the Scottish Parliament for approval under section 7(1), the Scottish Ministers will also lay, in compliance with section 7(4), a document describing how they have had regard to any representations made about this draft statement in accordance with section 7(3)(b) in preparing the final statement.

Background

The UK's decision to leave the European Union has not changed the EU's importance to Scotland nor our commitment to it.

For nearly 50 years Scotland has been a fully integrated part of the EU; woven into the European economy and benefitting from the high standards of the EU's social and regulatory protections. Through our membership of the European Single market and Customs Union, Scotland has embraced EU membership and in turn contributed to the EU's success.

The Scottish Government's European Strategy, *The European Union's Strategic Agenda for 2020-24: Scotland's Perspective* published in 2020 and the paper *Steadfastly European: Scotland's past, present and future* earlier this year reaffirmed Scotland's commitment to work in partnership with the EU to realise our shared values and address global challenges.

Consistent with this commitment, Scotland will seek to align with the EU where appropriate and in a manner that contributes towards maintaining and advancing standards across a range of policy areas. It will do so to protect the health and wellbeing of people in Scotland, maintain Scotland's international reputation, and, by protecting the standards that Scotland enjoys, ease the process of Scotland's return to the EU.

Statement of Policy

Approach

Maintaining alignment with EU law and the high standards that Scotland has enjoyed as part of the EU is a priority of the Scottish Ministers. This will be achieved in a range of different ways, legislative and non-legislative. Scottish Ministers will make use of whichever means is most appropriate for the circumstances of each case. The power provided in section 1 of the Act aims to maintain the Scottish Ministers' ability to make subordinate legislation where appropriate in order to keep devolved Scots law aligned with EU law as it develops.

It is the intention however that this commitment is implemented primarily through the existing policy development process. There will also be instances where Primary legislation is more appropriate than secondary legislation to maintain alignment. Where secondary legislation is appropriate, in some cases, it may be possible to align with EU law using specific domestic powers that cover the subject matter of the EU legislation. Where this is the case, although it is still legally possible to use section 1(1) of the Act to align, the policy is in line with the approach previously taken to the use of section 2(2) of the European Communities Act 1972 to implement EU law. Specific domestic powers should be preferred, unless there is good reason for not using these powers.

The power in section 1 of the Act is intended for circumstances in which secondary legislation is the most appropriate vehicle for maintaining alignment and specific powers are not available, or not appropriate, to give effect to the policy intention of the measure proposed. This recognises that primary legislation will not be appropriate in all cases and alignment could be constrained by the overall limit of legislative time available to the Parliament to align with EU law which would previously have been achieved by using the powers in section 2(2) of the European Communities Act 1972. The power therefore acts as a backstop, providing flexibility so that the most appropriate legislative vehicle can be used depending on specific circumstances.

Factors to be taken into account

Scottish Ministers' default position, for the reasons set out above, will be to align with EU law. There will however be occasions, such as technical provisions only relevant to EU member states, where such alignment would not assist the intended outcome, or where the constraints under which Scottish Ministers currently operate, in particular as a result of the working of the UK Internal Market Act, mean that they judge that to align in full at this time would not serve Scotland's wider interests.

In coming to that view, Ministers will take account of the full range of interests, whether economic, social, environmental or other. They will also give due regard to the purpose referred to in section 2(1) of the Act, i.e. to contribute towards maintaining and advancing standards in, but not limited to, environmental protection, animal health and welfare, plant health, equality, non-discrimination and human rights, and social protection.

1. Legislation

- That specific domestic powers could not achieve the desired outcome or there is a good reason for not using these powers;
- primary legislation would not be more appropriate
- the financial implications, benefits and risks of the proposed legislation.

2. Purpose

- that due regard has been given to the purpose referred to in section 2(1) of the Act, that the regulations contribute towards maintaining and advancing standards in, but not limited to, environmental protection, animal health and welfare, plant health, equality, non-discrimination and human rights, and social protection and;
- that regulations will not breach the limitations on the use of the power proscribed at Section 3;

3. Existing Legislative Obligations

- The effect (if any) of the provision on:
  - retained EU law
  - equality legislation being the Equality Act 2006, the Equality Act 2010 or any subordinate legislation made under either of those Acts.
  - Convention rights within the meaning of section 1 of the Human Rights Act 1998, and other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom
  - employment and health and safety and matters relating to consumer protection.
- That due regard has been given to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

4. Consultation

- The Scottish Government's approach to outcomes based policy making recognises that consultation is an essential part of the policy making process, and values the views, insights and expertise of those who are directly and indirectly affected by Ministers policy decisions. In considering use of the Continuity Act power, the Scottish Government will pro-actively engage with relevant stakeholders and local Government, and ensure that representations are considered as part of the decision making process, along with a range of other available information and evidence.

Process

In seeking to give effect to the purpose of the power under section 1(1) of the Act, that is maintaining and advancing standards in a range of policy areas, the Scottish Government will gather information to support, assess and consider the case for the regulations proposed. This will include, but not be limited to, close monitoring of activity in the EU institutions.

This will take into account, in addition to the factors to be considered detailed above, the Scottish Government's International Framework, its purpose, achievement of the national outcomes detailed in the national performance framework, and the Scottish Government's approach to outcomes based policy making.

Irrespective of Brexit, the Scottish Government continues to engage in international exchanges and learning opportunities across relevant policy areas, to understand how domestic policy relates to the European and wider international context.

Policy areas work closely with, and are supported by, officials within the Scottish Government's External Affairs, Legal and Brussels directorates. This assists the Scottish Government to understand and influence EU policies that affect Scotland's citizens, organisations and the economy, and maintain and advance the standards Scotland enjoys as a result of the UK's previous membership.

Review

Ministers will keep this statement of policy under review and may publish a revised policy statement from time to time if in their view this is considered necessary and appropriate in maintaining the effective use of the power in section 1(1) of the Act.

Where the Scottish Ministers make a statement under section 9(9) of the Act, they will as soon as reasonably practicable review the policy statement, and either revise and publish the revised policy statement, or lay before the Scottish Parliament a document explaining why, in their opinion, it is not necessary to revise the policy statement.

Conclusion

The UK's decision to leave has not changed Scotland commitment to work in partnership with the EU to realise our shared values and address global challenges. Scotland will therefore seek to align with the EU where appropriate and in a manner that seeks to contribute towards maintaining and advancing standards across a range of policy areas. Doing so will also ease the process of Scotland's return to the EU.

This policy statement sets out that the Scottish Government will consider a range of factors to ensure that use of the power to maintain alignment with the EU where appropriate is both effective and efficient.

SCOTTISH MINISTERS
29 October 2021

DRAFT REPORT BY THE SCOTTISH MINISTERS IN EXERCISE OF THE POWER IN SECTION 1(1) OF THE UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021 FOR THE REPORTING PERIOD 29 MARCH 2021 – 31 AUGUST 2021 AND THE INTENDED FUTURE USE OF THE POWER UNDER SECTION 1(1) IN THE UPCOMING REPORTING PERIOD

Introduction

1. In accordance with section 11(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ("The Act"), the Scottish Ministers lay the following draft report detailing use of the power under section 1(1) of the Act during the initial reporting period following commencement on 29 March 2021 and 31 August 2021 ("the current reporting period") and how Ministers intend to use the power in the upcoming reporting period.

2. The report is laid in draft for a period of 28 days during which time the Scottish Ministers will have regard to any representations made to them regarding how they intend to use the power under section 1(1) in the upcoming reporting period.

3. In laying a copy of the final report before the Scottish Parliament under section 10(1), the Scottish Ministers will also lay, in compliance with section 11(5), a document setting out a summary of any representations about the draft report made during the consultation period, and how they have had regard to those representations in preparing the report.

4. This draft report contains details of the matters required under section 10(1):

- how the power under section 1(1) has been used during the reporting period,
- how that use of the power under section 1(1) contributes or has contributed towards maintaining and advancing standards,
- how Ministers intend to use the power under section 1(1) in the upcoming reporting period,
- how their intended use of the power will contribute towards maintaining and advancing standards, and
- any use of the power under section 1(1) that has been considered by the Scottish Ministers during the reporting period.

Policy Statement

5. The Scottish Government's policy statement on use of the power under section 1(1) of the Act sets out the process and factors to be taken into account in considering its use.

6. This aims to provide flexibility by acknowledging that primary legislation may not necessarily be appropriate in maintaining and advancing EU standards in every situation, and that in some cases the factors to be considered may determine that use of the regulation making power is the appropriate method by which to achieve alignment with EU law and ensure the maintenance and advancement of standards.

Draft Report

7. **How the power under section 1(1) has been used during the reporting period:**

The power has not been used over the reporting period.

8. **How that use of the power under section 1(1) contributes or has contributed towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e) of the Act:**

Not applicable as the power has not been used over the reporting period.

9. **How the Scottish Ministers intend to use the power under section 1(1) in the upcoming reporting period:**

Ministers have no current plans to use the power under section 1(1) of the Act, however use of the power may be considered within the upcoming reporting period as necessary.

10. **How that will contribute towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e) of the Act:**

Not applicable as Ministers have no current plans to use the power during the upcoming reporting period.

11. **Any use of the power under section 1(1) that has been considered by the Scottish Ministers during the reporting period:**

Ministers have not considered use of the power during the reporting period.

Next Reporting Period

12. Under section 10(2) of the Act the next report will be made following 31 August 2022, detailing the use and considered use of the Act during the next reporting period and any planned use in the subsequent reporting period.

SCOTTISH MINISTERS
29 October 2021

Written submission from Human Rights Consortium Scotland

The Human Rights Consortium Scotland is Scotland's civil society network to protect human rights. The Consortium has over 140 organisational members from across civil society, including health, disability and environmental organisations. We work in partnership with the Scottish Universities Legal Network on Europe (SULNE), funded by The Legal Education Foundation, on a project that aims to ensure that Scottish civil society has legal understanding and collaborates well around any impacts of UK withdrawal from the EU (see www.civilsocietybrexit.scot for more information).

Our members continue to be very concerned around the impacts of EU withdrawal on the communities that they represent and work with. Ten Scottish organisations including Scottish Rural Action, SCVO, Health and Social Care Alliance Scotland, and Scottish Environment LINK, recently published 'Asking some important questions: a collation of Scottish civil society questions for UK and Scottish Governments after UK withdrawal from the European Union'. **We commend this to the Committee as a valuable resource about some of the sector's key Brexit-related concerns.**

We welcome this opportunity to give views on the draft Policy Statement and Annual report related to 'keeping pace' powers in the European Union (Continuity) (Scotland) Act 2021.

- **Steps to maintain alignment whenever this will advance rights and standards**

We welcomed the inclusion in the Continuity Act of the clear purpose that these 'keeping pace' powers should be used to contribute towards 'maintaining and advancing standards in, but not limited to, environmental protection, animal health and welfare, plant health, equality, non-discrimination and human rights, and social protection'. We note that the draft Policy Statement says:

'In seeking to give effect to the purpose of the power under section 1(1) of the Act, that is maintaining and advancing standards in a range of policy areas, the Scottish Government will gather information to support, assess and consider the case for the regulations proposed. This will include, but not be limited to, close monitoring of activity in the EU institutions.'

We recognise that this Policy Statement is very specifically addressing the Continuity Act's 'keeping pace' powers, as required by the legislation. Nonetheless, we welcome clarification and further detail in the final Policy Statement (or an accompanying Scottish Government publication) that places specific consideration of whether to use these fast-track keeping pace regulations firmly within the context of broader decision-making about *whichever* mode of legislative or other vehicle will best meet the core purpose of maintaining or advancing rights and standards. The process could usefully set out firstly, the Government approach and purpose to monitoring EU law and policy developments; the approach and criteria used to identify those that both relate to devolved competence and would serve to maintain

or advance rights and standards in Scotland; and then thirdly, decision-making around *which* legislative or other vehicle will be used in order to do so. As currently written, this draft Policy Statement narrowly only addresses the approach to the question of whether or not to use these specific powers - not the broader and more important question of what steps the Scottish Government will take to monitor, identify and then develop the legislation or policy to align with EU law for the purpose of maintaining or advancing rights and standards by whichever means is most desirable. **Will the Scottish Government, in the final Policy Statement or an accompanying document, publish details on its whole approach to ensuring alignment with EU law and policy for the purposes of maintaining or advancing rights and standards?**

- **Consultation on use of 'keeping pace' powers**

We welcome the draft Policy Statement's key principle of consultation based on the Scottish Government's approach to outcome-based policy making. We note that it states 'In considering use of the Continuity Act power, the Scottish Government will pro-actively engage with relevant stakeholders and local Government…'. **We welcome clarity and confirmation: that 'relevant stakeholders' includes civil society organisations; of the forums or approaches that will be taken to such engagement including making sure that this is accessible and transparent; and that this engagement will be for the broader purpose of 'keeping pace', not only narrowly about these Continuity Bill powers.**

- **Recent consideration of using the powers**

We note that the draft Report must include where any use of the power under section 1(1) has been considered by the Scottish Ministers during the reporting period. The draft Report states that there has been no such consideration.
One of the key areas of debate during passage of the Continuity Bill through Parliament was the openness of decision-making around these powers, and that this should not be simply left to the discretion of Ministers but that Parliament and other stakeholders should be a core part of the decision-making process. Scrutiny of decision-making about EU alignment is key, and there was recognition that this included decisions about when *not* to align with the EU (including using these powers) as well as decisions about when to do so. We would therefore seek clarity around this lack of consideration of the use of these powers. For example, what monitoring of EU law and policy has been carried out by the Scottish Government? Has there been any identified areas where EU alignment would be beneficial for maintaining and advancing rights and standards in Scotland? Is the lack of consideration of these powers been because of the clear decision to use another legislative vehicle, or there has been simply no discussion or work done about whether to use the powers in any way? **Much greater clarity on the definition of 'no consideration' of the use of these powers would be valuable.**

- **Keeping up with the EU**

Two briefings written by Professor Tobias Lock for the Human Rights Consortium Scotland outline a range of soft law and hard law recent and upcoming social policy

developments in the EU, the first briefing published in March 2021 and another in August 2021.
We note that the EU Accessibility Act is an EU Directive that was transposed after the transition period ended and so does not apply to the UK. As Professor Lock states in the March briefing, 'Its overall purpose is to create a more inclusive society and to facilitate independent living for disabled people', and it 'is a major attempt at improving the accessibility of certain products and services for disabled people.'
'The Accessibility Act will result in economic operators, i.e. those marketing products and those offering services, to comply with certain accessibility requirements. As a result, all products within the scope of the Accessibility Act, notably computers including their operating systems, ATMs, self-service machines (for ticketing or check in), smartphones, TVs, and the like will have to be manufactured to a common standard that ensures their accessibility for persons with disabilities. In a similar vein, service providers must provide certain services, notably transport services, banking services, e-books, ecommerce services, in a way that ensures they are accessible.'

Other developments we highlight from these briefings are the European Commission's recommendation on energy poverty including recommendations for social policy measures to combat energy poverty. The European Commission is considering legislative proposals around combatting gender-based violence against women, including work harassment on grounds of sex.

We are unclear on the extent to which these EU law developments and others, fall within devolved competence, advance rights and standards in Scotland, and/or are impacted by UK Common Frameworks or the Internal Markets Act provisions. **We welcome the Committee's questioning of whether the Scottish Government has considered these areas of EU law development and others.**

- **National Mechanism for Monitoring, Reporting and Implementation**

The National Taskforce on Human Rights Leadership, of which the Consortium was a member, included in its recommendations that:

'Further consideration should be given to the development and strengthening of effective monitoring and reporting mechanisms at all levels and duties at both national and public authority levels, recognising that this will be important to secure better compliance with the framework. It should include consideration of a National Mechanism for Monitoring, Reporting and Implementation, as recommended by the First Minister's Advisory Group on Human Rights Leadership[1].'

One of the core purposes of this NMMRI was defined by the FM Advisory Group as 'Monitoring the EU and reporting relevant rights developments to the Scottish Government, Scottish Parliament and the public for consideration of adapting any

[1] National Taskforce on Human Rights Leadership recommendations, available at: https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/

such developments within devolved areas of competence[2].' The Scottish Government accepted the Taskforce recommendations. **It would be valuable for the Committee to ask the Scottish Government about what steps it is now taking to consider the establishment of this Mechanism.**

In particular, we highlight that 'keeping up with the EU' is about far more than only hard EU law but also about soft law and wider policy initiatives and developments. We welcome the Committee's consideration of the extent to which the Scottish Government has, or is, putting in place the mechanisms required to consider this fuller picture.

- **Advancing human rights**

It is vital that the Scottish Parliament embrace every opportunity to advance human rights protections in law and human rights realisation in people's lives. We strongly welcome the Parliament's role as a human rights guarantor, and the strong cross-party support for human rights. For example, the unanimous passing of the Incorporation of the UNCRC (Scotland) Bill was an excellent example of the Scottish Parliament's commitment to human rights leadership.

During the Brexit process, we regrettably lost a key pillar of human rights protections through the decision not to retain the Charter of Fundamental Rights. This consultation now comes in the midst of UK Government plans to 'overhaul' the Human Rights Act 1998 (HRA), and Bills such as the Nationality and Borders Bill, which roll back on rights protections. These regressive measures on rights protections in law threaten to significantly water down government accountability on human rights and reduce the ability of individuals to have a voice. The HRA has made law and policy across the UK and in Scotland better because it is a vital safeguard against any unintended infringements of an individual's basic rights and freedoms. The HRA makes Scotland a safer and fairer place to live. Human rights are also a key pillar of devolution, and any steps that undermine the HRA at Westminster would undermine devolution itself.

The European Union is a signatory to the European Convention on Human Rights, as is the UK - it is this Convention that is incorporated directly into our law through the Human Rights Act. **We welcome the Committee's reiteration of their support for human rights and specifically for the ECHR and the Human Rights Act.**

- **The Istanbul Convention**

34 member states of the Council of Europe have ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). In addition, 12 member states have signed it – along with the European Union itself. The Convention is the first legally binding international instrument on preventing and combating violence against women and

[2] First Minister's Advisory Group on Human Rights Leadership, available at: https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf

girls at international level. It establishes a comprehensive framework of legal and policy measures for preventing such violence, supporting victims and punishing perpetrators.

The UK Government signed the Convention on 8 June 2012 but has not ratified it. The UK Government has said that it is committed to ratification but that amendments to domestic law – to take extra-territorial jurisdiction over a range of offences – are necessary before this can be done. There have been repeated calls for this ratification to be prioritised, including in a February 2015 report by the Westminster Joint Committee on Human Rights.

The Committee could ask the Scottish Government about discussions it has had with the UK Government on what they are doing to urgently progress ratification of this important Convention. We will quickly fall behind other countries in the EU on rights and standards if we do not do so.

Written submission from Scottish Environment LINK

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with 42 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society. This response has been drafted by LINK's Governance Group.

What are your views on the policy statement?

• Scottish Environment LINK welcomes the draft policy statement on the exercise of the 'keeping pace power' included in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. We consider the keeping pace power to be a necessary and practical tool that can enable the maintenance and progress of environmental standards in Scotland outwith EU membership, as well as key human and social rights.

• During the Act's passage in late 2020, LINK members argued for guidance to be provide direction on the use of the keeping pace power to shape future policy and to aid decision making as to when to (or, in some cases, when not to) align with developments in EU law.

• The draft guidance reasserts the Scottish Government's welcome commitment to align with the EU "in a manner that contributes to maintaining rights and standards across a range of policy areas." We would like to see explicit mention that this includes environmental standards, in line with the wording of the Act.

• We agree with the approach set out on page 2 of the guidance but ask that more detail is provided on how the "existing policy development process" operates in order to more fully understand how decisions on whether or not to keep pace will be made.

• We agree with the assertion that primary legislation is not always the most appropriate vehicle for maintaining alignment with EU law. We would welcome greater clarity on how government will inform parliament and the public of why a decision for primary legislation, secondary regulation, or other means (such as guidance or case law) is made in each case.

• We agree with the list of factors to be taken into account on page 3 of the guidance.

• We ask that the final version of the guidance contains much greater clarity on the process of "gathering information to support, assess and consider" areas with which to align as stated on page 4. The current draft is light on detail that would make the process clear to stakeholders outwith government. A decision-making framework would be helpful to see.

• We agree with the proposal to keep the statement of policy under review and hope that the points raised in this response can be considered in future drafts.

What are your views on the annual report?

• We are content with the format of the report, though note it is difficult to fully assess whether it will provide sufficient information to stakeholders and parliament in future given that the keeping pace power has not yet been used.

• It would be helpful if, under part 9, the government could provide a forecast of changes to EU law and policy it anticipated needing to consider in future years. For example, legislative proposals emerging from implementation of the EU Biodiversity Strategy (e.g. nature recovery targets and commitments to protect 30% of land and sea by 2030) and proposals arising from the EU Circular Economy Action Plan (2020).

Written submission from The Law Society of Scotland

The Law Society of Scotland's Constitutional Law Sub-committee has the following comments to make to the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee inquiry into the Draft Statement of Policy Lead before the Scottish parliament by Scottish ministers in accordance with section 7(3) and the Draft Annual Report under section 10 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

What are your views on the draft Policy Statement

Legal Basis for the Policy Statement

Section 6(1) of the UK Withdrawal from the European Union (Continuity)(Scotland) Act 2021 ("the Continuity Act") requires Scottish Ministers to publish a statement of their policy on:
(a) the approach to be taken,
(b) the factors to be taken into account, and
(c) the process to be followed,
when considering whether to use the power under section 1(1).

Section 1(1) confers a power upon SM to make regulations "to keep devolved law in line with EU law" after the end of the implementation period (para 29 of the Explanatory Notes)

Section 7 of the continuity act sets out the procedure for publication of the policy statement.

Approach to be taken

The approach taken in the draft Policy Statement is that maintaining alignment with EU law can be achieved in various ways;
i.that Scottish Ministers" will make use of whatever means is the most appropriate in the circumstances of each case";
ii.that "Specific domestic powers [that cover the subject matter of the EU legislation] should be preferred, unless there is good reason for not using these powers".
iii. that the regulation making power in section 1(1) would only be used as a backstop where it was not appropriate to use primary legislation (e.g., due to the limit of legislative time in the Parliament) and "specific powers are not available, or not appropriate, to give effect to the policy intention of the measure proposed".

Our Comment

In paragraph 7 of the draft report, it is stated that the power under section 1(1) of the Continuity Act has not been used during the reporting period. Moreover, in paragraph 9 it is stated that the Scottish Ministers have no current plans to use the power in the upcoming reporting period, adding "however use of the power may be considered within the upcoming reporting period as necessary.".

The Policy Statement is vague as to when it would not be appropriate to use primary legislation or specific powers where they are available. Is it only not appropriate to

use available specific powers where there is a "good reason" for not doing so? It is suggested that the Scottish Government might be asked for further clarification.

There is no mention of how the division between devolved and reserved powers in an area might affect any proposed changes in search of alignment or the policy approach across an area of activity. Similarly, there is no mention of the potential impact of the United Kingdom Internal Market Act 2020.

We note the following paragraph:

Scottish Ministers 'default position, for the reasons set out above, will be to align with EU law. There will however be occasions, such as technical provisions only relevant to EU member states, where such alignment would not assist the intended outcome, or where the constraints under which Scottish Ministers currently operate, in particular because of the working of the UK Internal Market Act, mean that they judge that to align in full at this time would not serve Scotland's wider interests."

What criteria will Scottish Ministers apply to determine legislation which is only relevant to Member States? There could also be more clarity as to how the UK Internal Market Act 2020 is considered a constraint on Scottish Ministers.

We also note that EU law is not static, and it is important to emphasise the scale of its ongoing change. There is significant change on a year-to-year basis. In 2020 there were a total of 1356 legal acts adopted and a further 734 amending acts adopted: https://eur-lex.europa.eu/statistics/2020/legislative-acts-statistics.html. It is important to distinguish between UK wide divergence with the EU and divergence within the UK. The latter could occur because a devolved administration has chosen to align with the EU rather than the rest of the UK. It is also worth emphasising that keeping pace with EU law, as the Scottish Government has legislated to do, will require scrutiny from the Scottish Parliament. Even if Scottish Ministers were to adopt only a small fraction of the laws adopted by the EU this could be a significant undertaking.

Factors to be taken into account

The four specified and numbered factors (Legislation, Purpose, Existing Legislative Obligations, Consultation) could be clearer. Some are expressed not as factors to be taken into account "when considering whether to use the power under section 1(1)" but rather as factors for using that power. We also suggest that the factor of Consultation should really form part of the Process mentioned below.

Process

No mention is made of consultation with the Parliament or with other persons as part of the decision making process in determining whether to use the power in section 1(1).

What are your views on the Annual Report?

Legal Basis for the Annual Report

Section 10 of the Continuity Act requires Scottish Ministers to publish a report for each reporting period. The report should explain:

(a)how the power under section 1(1) has been used during the reporting period,
(b)how that use of the power under section 1(1) contributes or has contributed towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e),
(c)how they intend to use the power under section 1(1) in the period (of such length as they may determine) following the reporting period,
(d)how their intended use of the power under section 1(1) would contribute towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e), and
(e)any use of the power under section 1(1) that has been considered by the Scottish Ministers during the reporting period.

Our Comment

It would be useful to ask Scottish Ministers whether, during the period of the report, there have been occasions when they have considered it necessary (or desirable) to amend domestic law in order to align, or keep pace, with new EU law but they have decided, in light of their Policy Statement, that it would be more appropriate to use primary legislation or specific powers in order to do so rather than the power mentioned in section 1(1).

It would be useful to ask Scottish Ministers whether, during the period of the report, there have been occasions when they have considered EU law and decided not to exercise the powers to align or keep pace with EU law and that they should provide details of the EU law so considered.

The Scottish Minister's default position is to keep pace with EU law and the EU has been legislating since the UK's departure (see the table below). What assessment have Scottish Ministers made of EU law in 2020/2021 to see what, within devolved competence, should be reflected in Scots law, in accordance with their "keeping pace" policy?

Should the Scottish Ministers not state in the annual report their reasons for not having exercised their power in the reporting period and for having no plans to do so in the upcoming reporting period?

There should be more detail on things being discussed (and possible issues on the devolved/reserved boundary). For example, the forthcoming EU ban on lead shot (agreed in late 2020), to be implemented through REACH. Is Scotland going to align with this?

Written submission from COSLA

Constitution, Europe and External Affairs inquiries
Inquiry into the Scottish Government's international work
The UK Internal Market
Continuity Act - Policy Statement and Annual Report

Participation in international fora

COSLA has very close relationships at political and policy level with our fellow organisations from the rest of Europe. Following the UK's departure from the EU we continue engaging with them via our pan-European organisation the Council of European Municipalities and Regions (CEMR), where several of our spokespersons have an equivalent role in Europe, the worldwide United Cities and Local Governments (where the COSLA President is Scotland's member of its World Council).

COSLA also nominates and sends representatives (as the Scottish Parliament does) to the Congress of Local and Regional Authorities of the Council of Europe (which met our leadership only last July to monitor the application of the European Charter of Local Self Government in the wake of the European Charter Bill being passed at the Scottish Parliament) and to the UK-EU Committee of the Regions (CoR) Contact Group, which is the internal body of the CoR providing a forum for continued political dialogue with the EU post-Brexit.

Furthermore, through our European and International membership bodies COSLA gets to participate in a number of international fora such as the United Nations High Level Forum for Sustainable Development, the UN climate summits (as indeed we will host our international peers in COP26) and various other bodies of the UN and the OECD.

COSLA has been scoping the international engagement opportunities available to Local Government with councils for some time. That informs a number of the points in this submission.

Partnership working with the Scottish Government

There are a wide range of decisions taken in international fora which impact on the responsibilities of the Scottish Government and local authorities.

While international participation often depends for the UK Government, both Scottish Government and COSLA have the ability to proactively engage through on their own capacity. However, there is also scope for a more strategic approach, working together, that is mutually reinforcing, in the public interest, and can enhance Scotland's international reputation.

Recent examples that show the value of such cooperation (both with the Scottish Parliament, as with the Scottish Government) are the European Charter of Local Self Government (Incorporation) (Scotland) Bill and preparations for the recent visit of the Council of Europe delegation monitoring the application of the Charter in Scotland and elsewhere in the UK.

Not all international engagement of the Scottish Government is suitable for partnership with Local Government; likewise not all Local Government international engagement happens through COSLA. Still, there is scope to ensure, that our respective engagement is coordinated and mutually reinforcing when it is in the Scottish public interest to do so.

For instance, we are aware that the Scottish Government is engaging at OECD on a range of matters such as rural innovation whereas we also engage at OECD, Council of Europe and various agencies of the UN system through our own means: for instance, COSLA's Environment and Economy Spokesperson spoke at the last UN High Level Forum on Sustainable Development.

Similarly, COSLA and the Scottish Government have their own direct links with the UK Government on international engagement, something that, if anything, will be even more relevant post-Brexit than was previously the case. We have argued during the preparation of the Integrated Review that a more joined up, partnership based approach between central, devolved and local governments is necessary.

We believe that the eventual renewal of the Scottish Government's International Framework and European strategy would benefit from our input, if we were given the opportunity to do so, just as we are developing with councils a Scottish Local Government international engagement strategy.

Finally, it is in our common interest to monitor closely and influence any new UK rules and guidance following EU withdrawal that might affect the way local authorities and Devolved Administrations operate abroad.

Repatriation of EU powers – Continuity Act 2021 Consultation to Local Government

COSLA and the Scottish Government have had productive cooperation during the legislative passage of the UK Internal Market Act 2020 and related matters that concern not just the consequences of EU Exit but its repercussions on Scotland such as the Common Frameworks, replacement of EU funding, future of rural areas or subsidy control.

COSLA particularly welcomed the introduction of Section 9 (7)(a)(ii) in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. This section provides for the consultation of Local Government in the EU Continuity Act 2021 whenever a Scottish Minister is keen to use the "keep pace" powers to align with new EU targets. This provision is an excellent example of partnership working between the Scottish Parliament, Scottish Government and local authorities through COSLA.

However, despite some initial conversations at officer level last year, this has not led to joint work to develop the specifics of the consultation arrangements with Local Government through COSLA. We have some good precedents of cooperation, so we are keen to start that work.

Town Twinning

COSLA was very pleased that the Scottish Government's Programme for Government indicated it was keen to build upon existing town twinning partnerships. These have existed for decades and COSLA, similar to other national associations of local authorities in Europe, supporting on behalf of our local authorities. Indeed, town twinning in its present form is an initiative that dates back to the founding of the Council of European Municipalities and Regions 71 years ago, and for which COSLA currently acts as coordinator, working in partnership with our peers from the other European countries.

We will be happy to coproduce with the Scottish Government a new post-Brexit town twinning approach. While it is welcome that the Scottish Government is taking an interest, it is important to build on the work that COSLA, councils and community councils have been doing over several decades.

We are developing the same approach with the UK Government, which is starting to support financially such town twinning activities. Thus, it is only right to do the same and ideally have an even deeper national partnership model in Scotland, not just for trade issues but also for the wider partnership that the Scottish Government and indeed COSLA is already actively pursuing with our European counterparts.

Finally, we welcome the Scottish Government offer of support for trade missions via the Scottish Chambers of Commerce, which we assume will be complementary to those carried out by the Scottish Cities Alliance with the funding of the Scottish Government.

UK internal Market and Devolution

COSLA has long sought involvement in the various UK-wide Common Frameworks to deal with repatriated EU powers that require UK-wide arrangements, that directly intersect with Local Government powers.

The UK and Devolved Administrations have agreed a new framework on Public Procurement, which sets out how they should work together where they agree that there are benefits to consistent approaches to procurement policy. This is the only Common Framework where some consultation has been carried out with Local Government, albeit at a very late stage.

While we can understand the triple pressures of 2020 (transition period, uncertain success of UK-EU negotiations, COVID work pressures), this must not be the case moving forward.

We continue to urge both Governments to fully involve us in developing post-EU exit UK and Devolved policy, including the Common Frameworks.

As mentioned previously we expect that the abovementioned consultation requirements to Local Government, introduced of the European Union (Legal Continuity) (Scotland) Act 2021, will help to address this need for proper consultation.

The UK Government made a statement at the House of Commons on 18 March 2018 promising a similar formal consultative arrangement for Local Government, but this is yet to be set up.

There are a few other pending Common Frameworks relating to Local Government such as waste, air quality and trading standards, and we have asked both Scottish and UK officials for a predictable calendar so, as a minimum, we can provide meaningful input, even if our stated aim remains for meaningful involvement from the outset.

Alignment and Divergence with the EU under the Trade and Cooperation Agreement (TCA)

In our successive policy positions on issues such as state aid and procurement we have never refrained from asking to maximise the flexibilities that the new EU-UK Trade and Cooperation Agreement (TCA) provides in terms of policy divergence.

Quite clearly COSLA expects that the UK and its constituent parts honour the level playing field provisions of the TCA (and as such we have a regulatory discussion with our EU peers through the UK-Committee of the Regions Contact Group, to which the Scottish Parliament also sends representatives).

That said many EU rules were created as a one-size-fits-all, lowest common denominator for 28 very different economies, with very different attitudes towards transparency, fair trade and enforcement of rules. Thus, it is right that the UK and Scotland, which are sophisticated economies with robust legal systems be able to make use of these new flexibilities.

Two key issues that we consistently argued for are ”buy local” clauses in procurement, and more localised and simpler state aid/subsidy control rules.

That said, these new flexibilities must both respect the level playing field across the UK and the EU and our trading partners. For instance, we welcome the UK Procurement Green Paper proposals for “buy local” clauses in UK Government procurement operations. However, procurement is devolved to Scotland and it is up to the Scottish Parliament to legislate if and how it decides to define “buy local” clauses in those areas governed by Scottish procurement regulations.

A yet untested but potentially important risk is the impact of the non-discrimination clauses of the Internal Market Act 2020, as the fear of potential remedial action being launched might deter one part of the UK from significantly departing from what other parts of the UK will be doing with these EU returned powers.

Level Playing Field and UK-EU regulatory dialogue

It is notable that the first meeting of the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development under the EU-UK Trade and Cooperation Agreement, on 12 October, covered a significant number of issues such as the UK's Subsidy Control Bill, the UK renewable energy schemes and their equivalent in the EU.

Given that many of these issues concern local and devolved competences, it seems appropriate, as COSLA has previously called for that we are part of or at least able to feed into that regulatory dialogue. We already do to an extent via the UK-EU Committee of the Regions Contact Group but, unlike the Parliamentary Assembly, this is an informal group that, unlike similar EU trade agreements, has not been included in the TCA. The UK Mission to the EU has also been useful as a point of information on these talks to the Brussels UK Offices and Organisations Group, of which COSLA and the Scottish Government EU offices are members.

This is in any case no substitute for a proper mechanism to feed into the UK Government engagement at a formal level. Interestingly, the Department for International Trade has started some useful engagement with respect to emerging trade deals with other countries that might be a useful starting point to consider for the TCA.

Application of the Market Access Principles of the United Kingdom Internal Market Bill

Finance and Constitution Committee

Briefing Paper
Professor Kenneth Armstrong, University of Cambridge
22 September 2020

Summary
Earlier briefings and evidence sessions have explored the key features of the United Kingdom Internal Market Bill which is currently completing its legislative stages in the House of Commons before its consideration in the House of Lords. The aim of this briefing is to consider the implications of the Bill in terms of the application of the **market access principles** contained in the Bill.

> *The Bill creates two market access principles: the mutual recognition principle and the non-discrimination principle. Both principles can be applied to relevant requirements in respect of the sale of goods or the provision of services.*

These principles serve to disapply relevant requirements in one part of the UK when goods or services are lawfully provided in another part of the UK. The requirements remain applicable to the sale of goods and the provision of services originating in a jurisdiction, but they cannot be applied to goods or services originating in another part of the UK and which comply with the rules applicable there.

By permitting access to the Scottish market under different regulatory conditions, it is apparent that the effectiveness of Scottish regulatory regimes may be impacted.
In this briefing, the impact of the Bill on the sale of goods is tested in respect of two recent interventions by the Scottish Government:

- The **Deposit and Return Scheme** (DRS) for single use containers
- **Minimum Unit Pricing** (MUP) for Alcohol.

As it has also been suggested that the market access principles could impact on the system by which water is provided in Scotland, this briefing also considers the impact of the Bill on the provision of **water services**.
The analysis suggests:

- Applying the market access principles, key aspect of the Deposit and Return Scheme may be rendered inapplicable, undermining the effectiveness of the scheme.
- As things stand, the market access principles would not disapply the current version of the Minimum Unit Pricing scheme for alcohol but could restrict the ability to modify the scheme following its review.
- The supply of water is not expressly excluded from the reach of the mutual recognition principle but the way in which the service is provided in Scotland may mean that access to the Scottish market could not be secured through the provisions of the Bill. Litigation to determine the reach of the Bill cannot be excluded.

The Deposit and Return Scheme Regulations

Aims of the Scheme

When its provisions come into effect:

- The marketing and sale of certain single use containers will be prohibited unless they are registered for use with the Scottish Environment Protection Agency;
- A refundable deposit of 20p will be levied on the sale of such containers;
- Producers will be required to keep data and information and to meet targets for the collection of their packaging covered by the scheme;
- Retailers will be required to operate return points for containers within the scheme or to provide a take back scheme for those products sold online.

Position under EU Law

Rules on deposit and return would fall within the scope of Article 34 TFEU which governs the free movement of goods. The Court of Justice of the EU has previously found that deposit and return schemes falling within the scope of Article 34 should be considered in light of their environmental objective and the proportionality of any consequential restriction on free movement ('Danish Bottles' case). In other words, the position under EU law is that the environmental and economic effects are balanced in light of the **proportionality** principle.

Similar to the minimum unit pricing rules for alcohol, the European Commission was notified of the Scottish Government's intention to adopt rules that were subject to the notification obligations under Directive 2016/1535. This gives the European Commission and the Member States an opportunity to review and raise any objections they might have at the draft legislative stage. The European Commission did not respond to the notification (it is not clear whether this was because no objections were raised or because of the obvious effects of the UK's withdrawal from the EU).

The Relative Scope of Application of the Market Access Principles to the Sale of Goods

The effect of the UKIM Bill is to disapply relevant requirements applicable in one part of the UK if they conflict with either of the market access principles. In respect of the sale of goods, the principles of mutual recognition and non-discrimination apply respectively to different types of regulatory requirements. **Characterisation of a requirement is, therefore, crucial to its legal treatment.**

If a requirement is caught by the mutual recognition principle, it will be disapplied in respect of its application to goods lawfully sold in another part of the UK with only a very limited capacity to apply the rule to prevent the movement of disease, or a pest or unsafe food. If a measure is within the scope of the non-discrimination principle then absent any direct discrimination, a measure has to be assessed in terms of whether:

- It puts incoming goods at a disadvantage, and
- It has a significant adverse effect on competition, and
- It has a legitimate aim within the meaning of the Bill.

In other words, the disapplication effect is triggered more clearly if a requirement falls within the scope of the mutual recognition principle.

Applying the Market Access Principles

Principle	*Mutual Recognition*	*Non-Discrimination*
Relevant Requirements Subject to the Principle	Characteristics of the goods or their performance; Presentation of the goods; Production of the goods; Animal tracing; Registration or approval or authorisation; Maintaining records or information; Anything else relating to the goods before they can be sold.	Circumstances or manner of sale; Transportation, storage, display, handling of goods; Registration or approval or authorisation; Regulation of businesses selling certain types of goods.
Specific Exclusions	Requirements that are: Necessary to reduce or prevent the movement of a pest or disease into that part of the UK; or Necessary to reduce or prevent the movement of unsafe food or feed into that part of the UK; or An authorisation covered by REACH regulation (chemicals); or Related to a tax, duty or similar charge.	Requirement that are: Directly discriminatory but a response to a public health emergency; or Indirectly discriminatory and pursues a legitimate aim of the protection of the life or health of humans, animals or plants, or protects public safety or security
General Exclusions for Relevant Requirements	The relevant requirement is applicable to the sale of goods on the day before the UKIM provisions comes into effect; AND There is no corresponding requirement to the relevant requirement in another part of the UK. Re-enactment (without substantive change) of a statutory requirement does not affect its continuity for the purposes of this exclusion.	

Assuming the Bill enters into force by the end of the year, only relevant requirements applicable to the sale of a good before that date will be potentially excluded from the scope of the Bill.

Although the Regulations were made on 19th May 2020, Part 2 of the Bill which governs the deposit and return scheme; relevant obligations on retailers in Part 5; and the enforcement provisions in Part 7, enter into force on 1 July 2022. The provisions in Part 3 relating the registration of producers come into force on 1 January 2022. As these provisions would not have applied to a sale of goods on the day before the UKIM provisions come into effect, the provisions of the Bill are applicable to the Deposit and Return Scheme Regulations.

The Prohibition on the Sale of Containers that are not Registered

Confusingly, registration requirements appear to fall under both the mutual recognition principle and the non-discrimination principle. As the non-discrimination principle does not

apply to the extent that the mutual recognition principles does apply then one approach might be to see whether the type of registration or authorisation scheme is more related to the product and production process (and so the mutual recognition principle applies) or more related to issues concerning the retail and sale of the goods (where the non-discrimination principle applies).

That only products of a certain composition fall within the scope of the scheme and that producers selling those products must be registered tends to suggest that the scheme should be considered under the mutual recognition principle. To the extent that a product and a producer is within the scope of the Regulations, the application of the Regulations to products lawfully sold in another part of the UK (or imported into and sold in another part of the UK) would be disapplied by the operation of the UKIM Bill.

Unlike the current position under EU law, there is no possibility under the Bill for the restrictions on market access to be saved by reference to their environmental objective or for a proportionality analysis to be applied. The Bill would simply disapply the rules for drinks sold in single use containers lawfully sold in another part of the UK.

20p Deposit

The imposition of a 20p deposit is not a tax and so is not automatically excluded from the scope of application of the Bill. However, determining whether either the mutual recognition or the non-discrimination principle should apply is not without its difficulties. In the *Scotch Whisky* Association case relating to MUP, the Court of Justice of the EU found that the rules on minimum unit pricing for alcohol – which impacted on the price of goods – were in principle a restriction on market access. However, as the Bill makes clear that the market access principles only have application within the terms of the Bill and are not free-standing legal principles it is more necessary to determine why the levy falls within any of the categories of requirements detailed in the Bill.

There is no express inclusion of requirements in relation to pricing and so it might be suggested that this falls outside the scope of the Bill. However, it could be argued that imposition of the deposit falls within the scope of something which has to be done in relation to the goods before they can be sold. That would bring it within the mutual recognition principle and for the reasons given previously, the environmental objective would not save the requirement from disapplication in respect of goods coming from another part of the UK.

Failing that, and perhaps more appropriately, the deposit could be characterised as the terms on which single-use drinks containers may be sold and would be subject to the non-discrimination principle. While the requirement is not directly discriminatory it would have to be determined whether it was indirectly discriminatory. That the requirement makes it 'less attractive' to sell such goods in Scotland would be relevant in determining whether there was indirect discrimination. Whether there was a significant adverse effect on competition between goods would then be taken into account to determine whether the non-discrimination principle had been breached. The claim might be made that there is no breach because the impact is the same on goods regardless of which part of the UK they come from. But if there was a significant impact, it is also clear that the protection of the environment is not a legitimate aim recognised by the Bill as a means of saving indirectly discriminatory measures.

Accordingly, if the mutual recognition principle applies, the requirement would be disapplied for goods originating in another part of the UK. If that principle does not apply,

there is a more complex assessment of whether the rule has a significant adverse effect on competition between goods. If it does, there is no relevant legitimate aim to protect it against disapplication when applied to goods originating in another part of the UK.

There is obvious legal uncertainty as to how different requirement will be characterised and, therefore, what the legal consequences will be. This is likely to lead to protracted litigation through the court system with the possibility that different courts within and between jurisdictions will arrive at different conclusions.

Producer Obligations – Data Collection and Targets for Container Collection

The requirements on producers to keep information and data for a period of four years would fall within the scope of the mutual recognition principle. It would be disapplied in respect of goods lawfully sold elsewhere in the UK.

The meeting of targets forms part of the system for producers to be registered. Failure to meet targets could lead to a producer losing its registration in which case it would not be able lawfully to place goods on the market in Scotland. Accordingly, this would likely to be considered as covered by the mutual recognition principle and disapplied in respect of goods originating in another part of the UK.

Retailer Obligations

There are a range of obligations on retailers that include the operation of returns points and a take back scheme for containers covered by the Regulations. This could fall within the scope of the non-discrimination principle in that it relates somewhat to the storage and handling of goods (albeit once they have been sold). Given that the requirement are not different depending on the origin of the goods and so not directly discriminatory, they could be considered to be indirectly discriminatory if they made the sale of goods in Scotland less favourable for producers selling in other parts of the UK and if there was a significant adverse impact on competition.

The operation of a take-back service in the context of online retail sales may be more problematic. It is clear that the retailer is subject to the obligation to provide a free takeback service regardless of whether the retailer has a registered or principal office in Scotland, or, where the site of sale is. That means that an online retailer in England selling drinks covered by the scheme to consumers in Scotland would be required to operate the takeback scheme. This could be considered to make the sale of goods less favourable and could have a significant impact on cross-border competition (on the basis that goods originating outside Scotland might prefer to use online sales as a retail method rather than having physical retail premises in Scotland). If the rules were found to be indirect discrimination, their environmental objective would not prevent their disapplication when applied to retailers based outside Scotland.

Conclusion: the environmental aims of the DRS are not relevant in terms of excluding the operation of the market access principles. Different aspects of the regime will trigger the application of the mutual recognition and non-discrimination principles. If the mutual recognition principle is triggered that aspect of the DRS is not applicable to containers lawfully sold elsewhere in the UK. If the non-discrimination principle applies, a more complex assessment is required of the effects of a requirement on competition. The relative application of these two principles is also uncertain making litigation likely.

Minimum Unit Pricing for Alcohol

The rules on minimum unit pricing for alcohol in Scotland are already in force and as such would not be subject to scrutiny in light of the Bill. Clause 4(4) of the Bill excludes statutory requirements:

- That were applicable the day before the entry into force of the provisions of the Bill, and
- That had no corresponding requirement in force in each of the other parts of the UK.

However, it needs to be recalled that in terms of section 2 of the Alcohol (Minimum Pricing) (Scotland) Act 2012, the provisions expire 6 years from their date of entry into force (May 2024). Scottish Ministers may, however, after 5 years order the continuation of minimum unit pricing. The continuation of the scheme would not itself bring minimum unit pricing within the scope of the UKIM Bill. Clause 4(4) of the Bill states that the re-enactment without substantive change of a statutory requirement maintains the continuity required to meet the conditions of the clause. And although minimum unit pricing has now been introduced in Wales, there are currently no such rules elsewhere in the UK.

The big problem might be if the Scottish Government – following its report on the effects of MUP required under the Act – decides to modify the operation of the legislation. While the UKIM Bill does not constrain Scottish ministers if they wish to maintain the scheme unchanged, the introduction of substantive changes would then bring it within the scope of the Bill. Although the Bill is not clear on the point, presumably the provisions of the Bill would only be applied to those modifications of the 2012 Act and not the entirety of the Act.

If modifications were made and the provisions of the Bill triggered then it would be crucial to know how minimum unit pricing would be characterised under the Bill. As was noted in respect of the 20p deposit, the Bill does not expressly bring pricing within its scope. Yet it was clear that under EU law, minimum unit pricing was considered to be a restriction on market access. The CJEU did not characterise the measure as a 'selling arrangement' – rules relating to the conditions of sale of a good which are broadly within the scope of the non-discrimination principle under the Bill – and so it might be considered that the mutual recognition principle ought to apply. However, this point was not sufficiently addressed during the course of the litigation so it may be possible to argue it either way.

If the mutual recognition principle is applied, there is no scope to seek to protect the rules because of their health objective. The requirements would be disapplied insofar as they were applicable to alcohol lawfully for sale in another part of the UK. If the non-discrimination principle is applied then it would have to be determined what sort of impact the rules had and if found to be indirectly discriminatory then the legitimate aim would have to be considered.

Conclusions: As things stand, the existing MUP for alcohol would not be subject to the market access principles under the Bill. However, and following a future review of the operation of the scheme, any modification of the operation of the scheme could result in the provisions of the Bill becoming applicable. Given that the legal tests would be different from those applied previously under EU law, there is evident scope for further litigation to determine the effects of the UKIM Bill on any new version of the MUP scheme.

Water Provision

There has been some discussion about whether the system for the provision of water in Scotland might fall within the scope of the Bill. Water is both a commodity (good) and a service and so could, in principle, be affected by the Bill and its market access principles. However, in respect of goods, Clause 14(2) of the Bill provides that:

> "*Goods" means any tangible movable, or corporeal moveable, thing, **but not water or gas** that is not offered for sale in a limited volume or set quantity.*

Therefore, if the provision of water does fall within the scope of the Bill it would be in respect of the provision of "services".

The Bill deals with services in the following way:

Principle	*Mutual Recognition*	*Non-Discrimination*
Application	**Authorisation Requirements** – a legislative requirement that a service provider must have the permission of a regulator before carrying on a business of providing particular services	Other **Regulatory Requirements** – a legislative requirement that would if not satisfied … prevent a service provider from carrying on a business of providing particular services
Specific Exclusions	Water Supply and Sewerage Services NOT excluded	Water Supply and Sewerage Services excluded
General Exclusion For Legislative Requirements	The relevant requirement: Is in force on the day before the day on which provision comes into force, OR Comes into force on or after the day on which provision comes into force if it re-enacts (without substantive change) a legislative requirement in force immediately before that day	

It is clear that "water supply and sewerage services" are specifically excluded from the operation of the non-discrimination principle. No such exclusion is made for the application of the mutual recognition principle which would cover authorisations to provide water services. Other utility network services – electricity, gas, postal, transport – are treated in the same way i.e. excluded from the operation of the non-discrimination principle but not from the mutual recognition principle.

<u>Scope of Application of the Mutual Recognition Principle – Authorisations</u>

The mutual recognition principle disapplies an authorisation requirement in one part of the UK where a person is authorised to provide those services in another part of the UK. In other words, the service can be provided in one part of the UK based on the authorisation obtained in another part of the UK. In the case of water services, the issue would then be whether this would mean that water companies in England could rely on the Bill to offer water services in Scotland without the need for an authorisation in Scotland.

An important question is whether the provision of water services in Scotland falls within the definition of an authorisation under the Bill namely, services are provided pursuant to a legislative requirement by which a service provider must have permission of a regulator to provide such services.

Scottish Water was created by the Water Industry (Scotland) Act. It still needs to be determined whether the statutory scheme is one in which a service provider must have the permission of a regulator. A "regulator" for the purposes means a person exercising regulatory functions. "Regulatory functions" includes imposing or securing compliance with "requirements, restrictions or conditions, or setting standards or giving advice in relation to the [service]". A "regulator" includes Scottish Ministers.

Scottish Water is designated as the public water supplier for the purposes of water quality regulation by the Drinking Water Quality Regulator for Scotland. However, the regulation of water quality is not the same as an authorisation to provide services (it would fall within the definition of regulatory requirements and would be subject to the non-discrimination principle were water supply services not excluded from it).

Scottish Water is a creature of statute established as a body corporate. While Scottish Ministers have extensive powers in terms of the composition and management of Scottish Water, its powers flow directly from statute. It is not providing services pursuant to a permission but rather has a statutory duty to supply pursuant to the Water (Scotland) Act 1980 as amended. As there is, then, no general statutory permission regime for the provision of water services, there is no legislative requirement capable of disapplication pursuant to the mutual recognition principle. Without being expressly excluded from the scope of the mutual recognition principle, the legislative scheme by which water services are provided in Scotland could be interpreted as not susceptible to the application of the mutual recognition principle as a means of providing market access for water companies in other parts of the UK.

Even if that interpretation was wrong and it was considered that Scottish Water was providing a service pursuant to a permission, the general exclusion for legislative enactments in force before the entry into force of the UKIM would apply. Obviously, any substantive change in that legislation could lead to the provisions of the Bill being triggered.

Conclusion: while water supply is excluded from the scope of application of the non-discrimination principle it is not excluded from the mutual recognition principle. However, applying that principle to the way in which water supply is organised in Scotland is not without its difficulties and it may be that the Bill alone would not provide a means of obtaining market access for water companies in other parts of the UK.

Final Point

The Bill empowers the Secretary of State to make changes to the activities included or excluded within its scope. Accordingly, the position could change once the Bill enters into force. Moreover, the analysis does not take into account the impact of any common frameworks which may be agreed. The Bill does not create an explicit mechanism by which the market access principles may be disapplied to the extent that a common framework is in place. It is unclear whether the ministerial power to amend the Schedules to the Bill would include suspending the market access principles where common frameworks exist.