

CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE**14th Meeting, 2022, Session 6****26 May 2022****Continuity Act**

1. The Committee is invited to consider the following documents laid in connection with the powers in Section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021—
 - SG/2022/88 – Statement of Policy by the Scottish Ministers
 - SG/2022/89 – Document describing how the Scottish Ministers have had regard to representation on the draft Statement of Policy and draft Annual Report
 - SG/2022/90 – Report by the Scottish Ministers
2. Section 1(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 confers a power on Scottish Ministers to enable them to make regulations to keep Scots law aligned with EU law where appropriate. The Act requires Scottish Ministers to lay a Policy Statement and an Annual Report before Parliament on the intended and actual use of the power, including a draft for consultation.
3. The Act allows the Parliament 28 days to scrutinise both draft documents, and after the final versions are laid, a further 28 days. The [draft Policy Statement](#) and [draft Annual Report](#) were laid in the Scottish Parliament on 29 October 2021, and in a letter to the Scottish Government on 25 November 2021, the Committee [reported](#) on its views on the draft documents.
4. On 10 May 2022, the Scottish Government laid in the Parliament a [revised Policy Statement](#) and [finalised Annual Report](#), in addition to a [document](#) setting out how the Scottish Government has considered the representations received regarding the drafts laid.
5. The following papers are attached—
 - **Annexe A:** Joint briefing from SPICe and Professor Tobias Lock, the Committee’s adviser, on the Continuity Act documents
 - **Annexe B:** SG/2022/88, SG/2022/89, SG/2022/90

**CEEAC Committee Clerks
May 2022**

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Constitution, Europe, External Affairs and Culture Committee

14th Meeting, 2022 (Session 6), Thursday, 26 May

Scottish Government Continuity Act reports

On 10 May 2022, the Scottish Government laid an updated draft statement of policy and an annual report on the Scottish Ministers exercise of the power in Section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. The Scottish Government also laid a document setting out how it had regard to representations made when the original draft statement of policy and draft annual report were laid in October 2021. This SPICe paper provides analysis of the new documents and sets out how the Scottish Government has considered the Constitution, Europe, External Affairs and Culture Committee's recommendations made in its [letter to the Cabinet Secretary for Constitution, External Affairs and Culture on 25 November 2021](#)

Background

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.

Whilst Scottish Ministers have a number of different legislative options for securing that alignment, Part 1 (section 1(1)) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (referred to in this blog as "the Continuity Act") 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).

The Continuity Act requires Scottish Ministers to lay reports (first in draft form for consultation and then a final version) before the Scottish Parliament on the intended and actual use of the keeping pace power. There are two forms of reporting to Parliament:

- a Policy Statement setting out policy on, and how decisions will be made about, the use of the keeping pace power, and;
- an Annual Report explaining how the power has been used during the reporting period, and how Scottish Ministers intend to use it in future.

Scottish Ministers laid drafts of the first [Policy Statement](#) and [Annual Report](#) on 29 October 2021.

The Scottish Government received two submissions in respect of the draft policy statement. These were from the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee in respect of their scrutiny of the draft policy statement and the Continuity Act, and the Rural Affairs, Islands and Natural Environment Committee.

SPICe has previously published a briefing on [alignment with EU law and the Continuity Act](#) and a blog on [scrutinising the Scottish Government's commitment to EU alignment](#)

The Committee's recommendations

In its [letter to the Cabinet Secretary on 25 November 2021](#), the Committee made a number of recommendations which focussed on the following issues:

- Post EU-exit, alignment is a policy choice rather than a requirement, so it is essential that the Scottish Parliament and civic society can have meaningful engagement and influence in the Scottish Government's decision-making process to align with EU law at a domestic level.
- Further information is required to aid scrutiny of the Scottish Government's overall commitment to EU alignment rather than just a focus on the use of the keeping pace power. Linked to this, consideration should be given to amending the draft documents to provide information on decisions to align and not to align with EU law rather than the narrow focus on the use of the power.
- Further information is required setting out what criteria the Scottish Government will use when considering whether to make use of the keeping pace power.
- A recommendation that the draft policy statement is amended to include details of how any future regulatory divergence between the UK and the EU will impact on the commitment to align with EU law. This should include consideration of how the operation of the TCA, the UK Internal Market Act and common frameworks will impact on the extent of possible EU alignment within Scotland.
- A recommendation that the draft policy statement is amended to include details of how the Scottish Government will keep abreast of the relevant implementing legislation and how it intends to keep pace with these measures.

- More information should be provided in the policy statement setting out how the Scottish Government intends to consult with stakeholders on the use of the keeping pace power. Linked to this, the Committee recommended that consideration be given to updating the draft annual report to provide details of all public consultations, including consideration of whether or not to align with EU law, that the Scottish Government has carried out during the reporting period and that that this information is provided annually.
- The committee recommended that there is an urgent need for Scottish Parliament and Scottish Government Officials to work together to develop proposals to facilitate effective scrutiny of the commitment to align with EU law. Within this recommendation, the Committee made the following proposals:
 - This should include developing proposals which deliver the Scottish Government's commitment to a decision-making framework which will facilitate an appropriate and proportionate level of scrutiny of Ministerial decisions to align with EU law. Consideration should also be given to how to ensure the involvement of businesses, local government, civic society and other stakeholders in the decision-making framework including a greater use of consultative forums which are open and transparent.
 - The Committee recommends that it should also include proposals for the timing and level of Scottish Government information to support parliamentary scrutiny and stakeholder engagement in relation to both the decision-making process around alignment with EU law and the implementation of decisions to align. This should include consideration of a website providing colour coded information to make clear what decisions the Scottish Government is taking about areas of EU law and policy to meet its commitment to align with EU law.
 - Finally, the Committee notes the proposal of the Law Society of Scotland in relation to a Memorandum of Understanding (MoU) between the Scottish Government and Scottish Parliament. We recommend that a MoU should be considered by officials in developing proposals to facilitate effective scrutiny of the commitment to align with EU law.

The draft statement of policy

The [new draft policy statement](#) reaffirms the Scottish Government's commitment to continued alignment where appropriate adding that this can be achieved through legislative and non-legislative means and not just through the use of the keeping pace power. The draft policy statement sets out where the keeping pace power might be used:

“Where the power in section 1 of the Act will have its place is in 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 provides essential flexibility so that the most appropriate legislative vehicle can be used depending on specific circumstances.”

The draft policy statement also acknowledges that decisions about continued EU alignment will be affected by whether an EU provision is relevant to a non-member state. It also highlights that other factors such as whether the impact of the UK Internal Market Act “and the constraints it places on devolved powers raises significant challenges in respect of achieving the desired policy effect”. Other influencing factors highlighted include the EU-UK Trade and Cooperation Agreement and existing international obligations.

The draft policy statement also commits Scottish Ministers to considering the purpose referred to in section 2(1) of the Continuity 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.”

The draft policy statement then sets out the considerations that Ministers will take into account when considering the use of the power. These come under 4 headings:

- Legislation
- Purpose
- Existing Legislative obligations
- Consultation

On the consultation process that the Scottish Government will follow, the draft policy statement states:

“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. This approach will be applied in full here. In considering use of the power in section 1(1) of the Act, the Scottish Government will pro-actively engage with relevant stakeholders. This would include local government as well as relevant organisations, fora or groups, and Ministers remain committed to an ongoing dialogue with parliament on its international and policy priorities. Ministers will ensure that representations are considered as part of the decision making process, along with a range of other available information and evidence.

This consultation supports, and is integral to, the Business and Regulatory Impact Assessment process. Consultation will also be informed by consideration of the European Commission’s annual work programme which details the EU’s legislative priorities for the coming year, the six-monthly presidency country’s programme and ongoing monitoring of key areas of the EU’s business by relevant policy directorates and Scotland House Brussels.

Ministers will also publish in relevant policy notes and consultation exercises information on how legislation relates to the commitment to align with the EU.”

The annual report

As with the previous version, the now [final annual report](#) states that for the reporting period 29 March 2021 – 31 August 2021 and for the intended future use of the power during the upcoming reporting period, Scottish Ministers have not used the keeping pace power and they have no plans to use it. The next annual report will be made following 31 August 2022 at the end of the current reporting period.

How Scottish Ministers have had regard to the Committee’s recommendations

As required by sections 7(4) and 11(5) of the Continuity Act, The Scottish Government has [set out how it has had regard to representations made about the draft statement and draft annual report in preparing the revised statement and finalised report](#). The Scottish Government has done this by setting out how it has responded to the recommendations from the Constitution, Europe, External Affairs and Culture Committee and the Rural Affairs, Islands and Natural Environment Committee. This section of the paper sets out how the Scottish Government has responded to the Constitution, Europe, External Affairs and Culture Committee’s recommendations.

| Committee Recommendation | Scottish Government response |
|---|---|
| An urgent need for Scottish Parliament and Scottish Government Officials to work together to develop proposals to facilitate effective scrutiny of the commitment to align with EU law. | Scottish Government officials have been engaging with officials of the CEEAC committee over the last year. This engagement assisted the Scottish Government in developing implementation of the Continuity Act leading to laying of the draft policy statement and draft report on 29 October 2021. |

Since this date officials have considered further how to assist the parliament in its scrutiny role, and how the Scottish Government can provide information on its use of the Continuity Act and wider policy of alignment... Officials will continue to engage with parliament in a structured manner to better support both organisations to understand the challenges that the post-EU exit landscape presents for Scotland.

There should be a focus on the European Commission's annual work programme and the priorities of the incoming presidencies of the European Union with the Scottish Government able to "signal what we expect to come through those processes and how we intend to remain aligned with the proposals and priorities."

The published draft policy statement notes that the Scottish Government will provide information annually on the EU's legislative priorities. The Scottish Government intends that this take the form of a response to the annual European Commission work plan, which sets out the legislation planned for the coming year. This will also reflect the priorities of the current EU presidency country.

This will provide the Scottish Government with an annual opportunity to set out that legislation which is expected to be materially relevant in maintaining Scotland's alignment with the EU. The information provided by the Scottish Government will set out specifically, as far as is possible at the work plan stage, the EU legislation which Scotland intends to align.

Consideration should be given to amending the draft documents to provide information on decisions to align and not to align with EU law rather than the narrow focus on the use of the power.

The policy statement has been updated to note that where relevant policy notes are provided for legislation the Scottish Government will include references to consideration of EU alignment. The Scottish Government will also seek to include such information within relevant formal consultations.

The draft policy statement should be amended to include details of how the Scottish Government will keep abreast of the relevant implementing legislation and how it intends to keep pace with these measures.

In addition to consideration and provision of information on the annual European Commission work plan and the priorities of the rotating presidency countries, the Scottish Government sets out the approach to monitoring developments in EU policy and law in

the process section of the policy statement. Critical to this is the European component of the Scottish Government's international work, including the support offered to policy directorates by Scottish Government Legal Directorate and the Scottish Government Brussels Directorate in understanding the policy positions and developments within the EU institutions.

This should include consideration of a website providing colour coded information to make clear what decisions the Scottish Government is taking about areas of EU law and policy to meet its commitment to align with EU law.

A comprehensive website of proposed EU legislation and the Scottish Government's intention to align would require significant resource both to sift the legislation produced and update the website. Much of the EU's legislation will not be relevant to Scotland, in that it will be specific to the single market, specific member states, or areas of policy that are not devolved.

The Scottish Government therefore considers that an approach to provide information focused on Scotland's priorities as detailed in this document and the revised policy statement provides a more proportionate level of information to support our existing approach to consultation and support scrutiny of the commitment to align.

The draft policy statement should be amended to include details of how any future regulatory divergence between the UK and the EU will impact on the commitment to align with EU law. This should include consideration of how the operation of the TCA, the UK Internal Market Act and common frameworks will impact on the extent of possible EU alignment within Scotland.

The policy statement has been updated to note that the Business and Regulatory Impact Assessment (BRIA) process is being updated to reflect the changed constitutional landscape. The updated BRIA will detail the need to consider and also assess any relevant impacts of the proposed measure on the Scottish Government's commitment to maintain alignment with the EU and the UK Internal Market Act. This builds on recent updates to the BRIA in respect of Scotland's obligations under World Trade Organisation rules.

In terms of the impact of UK Internal Market Act, a constraint could exist in realising the full effect of devolved policy resulting from a decision to align with

EU law. The market access principles of the Act mean that Scottish regulations may be dis-applied for goods or services coming from other parts of the UK with differing regulations to Scotland. So, while we may take the decision to align with EU law in relation to a specific policy, in practice, should that decision result in policy which diverges from other parts of the UK, the UK Internal Market Act could mean the effect (or outcome) of such a decision is dependent on whether and in what way the Act is engaged.

More information should be provided in the policy statement setting out how the Scottish Government intends to consult with stakeholders on the use of the keeping pace power.

Linked to this, the Committee recommended that consideration be given to updating the draft annual report to provide details of all public consultations, including consideration of whether or not to align with EU law, that the Scottish Government has carried out during the reporting period and that that this information is provided annually.

The Scottish Government's approach to consultation is detailed within the policy statement. 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. The Scottish Government considers that those affected by Ministers policy decisions would include where relevant, but not limited to, local government, the Scottish Parliament, civic organisations and other relevant fora. This approach will be applied in relation to each subject matter where alignment is an issue, just as it would to any where it is not.

In terms of reporting on the details of formal consultations, the required content of the annual report is set out at section 10(1) of the Continuity Act In the light of the additional steps we shall be taking in response to the Committees' comments (see below) we do not consider it would be proportionate to include details of all relevant public consultations.

The Scottish Government considers however that the information it has committed to provide on its approach to alignment will inform both parliament

and the wider public with an understanding of its approach to using the Continuity Act power and also the policy of maintaining alignment with the EU. This includes the inclusion of information on EU alignment within consultations where this is a relevant factor, and detail of the commitment to align within legislative accompanying documents where these are provided and consideration of the policy within the Business and Regulatory Impact Assessment (BRIA) process.

The Committee notes the proposal of the Law Society of Scotland in relation to a Memorandum of Understanding (MoU) between the Scottish Government and Scottish Parliament. We recommend that a MoU should be considered by officials in developing proposals to facilitate effective scrutiny of the commitment to align with EU law.

Scottish Government officials are committed to continuing their work with their parliamentary counterparts to consider the approach to scrutiny, to facilitate and build on the approach detailed in the revised policy statement and this document.

This work is ongoing, and will consider in the future the necessary and effective constitution of this engagement for both Ministers and Parliament's consideration as the approach detailed here is embedded in practice.

The committee stated that it was not clear why the report on the use of the Continuity Act power and planned use in the next period did not highlight the Scottish Government's consideration of its use in respect of Changes to Building Energy Standards and implementation of the EU recast Drinking Water Directive.

Section 10(1)(c) sets out that the Scottish Government must report on 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. Scottish Ministers determined that an appropriate length for this period would be the next reporting period.

Changes to Building Energy Standards and implementation of the recast Drinking Water Directive were not planned to be made within the next reporting period, but at a later stage.

Analysis and conclusions

The Scottish Government's revised draft policy statement shows some changes which take on board the recommendations of the Committee. These include a commitment to work with Scottish Parliament officials to agree develop proposals to facilitate effective scrutiny of the commitment to align with EU law (Members will wish to note that the first meeting of the Scottish Parliament and Scottish Government working group took place on 5 May 2022). The Scottish Government has also committed to provide information annually on the EU's legislative priorities based on the European Commission annual work programme and the six-monthly Council of the EU presidencies.

In relation to Scottish Parliament legislation, the Scottish Government has updated its draft policy statement to note that where relevant policy notes are provided for legislation, the Scottish Government will include references to consideration of EU alignment and also that the Scottish Government will seek to include such information within relevant formal consultations. The draft policy statement has also been updated to note that the Business and Regulatory Impact Assessment (BRIA) process is being updated and will detail the need to consider and also assess any relevant impacts of the proposed measure on the Scottish Government's commitment to maintain alignment with the EU and the UK Internal Market Act.

On consultation, the Scottish Government has committed to consult those affected by Ministers policy decisions and considers this would include local government, the Scottish Parliament, civic organisations and other relevant fora.

Whilst the Scottish Government has made a number of commitments in response to the Committee's report, a number of issues remain around transparency and scrutiny. For example, it is still not clear from the draft Policy Statement how the Scottish Government will make decisions about what EU law to align with and what they choose not to align with for policy reasons. In addition, there is no commitment to set out which EU laws it considered from an alignment perspective but decided not to align with. Reliance on high-level policy statements, such as the European Commission's work plan and priorities of the rotating Council presidencies, would not appear to be the best-suited means of approaching the question on whether to align with concrete pieces of EU legislation. Hence the Committee may wish to consider whether more transparency on which pieces of EU legislation have been considered for alignment – be it through use of the s.1 power or through the use of other powers as is the Scottish Government's expressed preference – would be welcome.

Linked to this, an ongoing issue for this Committee, and the Parliament will be the absence of an overview of the areas where Scottish Ministers have chosen to align, where Ministers have chosen not to align and as a result where Scots law has diverged from EU law. The Scottish Government's decision not to use the keeping pace power and its indication that it has no immediate plans to use the keeping pace power will exacerbate this issue as the reporting requirements included in the Continuity Act, namely the policy statement and the annual report relate only to the use of the keeping pace power and not alignment in general.

Next steps

The draft policy statement now requires parliamentary approval. It may not be published without parliamentary approval. If the Parliament resolves that the final policy statement as laid should not be approved, Scottish Ministers must review and revise the policy statement having regard to any views expressed by the Parliament.

While the committee has no formal role at this stage of the process it may wish to write once again to the Cabinet Secretary with its views on the revised documents.

Iain McIver, Senior Researcher, SPICe Research and Tobias Lock, Committee Adviser

23 May 2022

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.
The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot

Laid before the Scottish Parliament by the Scottish Ministers in accordance with section 7(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

10 May 2022
SG/2022/88

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 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 policy statement is laid before the Scottish Parliament for approval under section 7(1). In preparing this policy statement, the Scottish Ministers have had regard to any representations made to them, within the time period set out in section 7(3)(b), about the draft statement (SG/2021/292) which was laid on 29 October 2021. The Scottish Ministers also lay, in compliance with section 7(4), a document describing how they have had regard to these representations.

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 was 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 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 *Steadfastly European: Scotland’s past, present and future*, published in 2021, 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. The Scottish Ministers will make use of whichever means is most appropriate for the circumstances of each case. One such means is the power provided in section 1 of the Act which confers on the Scottish Ministers' ability to make subordinate legislation where appropriate in order to keep devolved Scots law aligned with EU law as it develops.

There will however be many instances where the best way to maintain alignment will be by means of primary rather than secondary legislation or indeed by non-legislative means such as a statement of policy or guidance.

Moreover, where secondary legislation is appropriate, it may be possible in some cases 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 approach will be in line with that 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.

Where the power in section 1 of the Act will have its place is in 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 provides essential 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. There will also be occasions where the UK Internal Market Act and the constraints it places on devolved powers raises significant challenges in respect of achieving the desired policy effect.

In coming to a view, Ministers will take account of the full range of interests, whether economic, social, environmental or other. This will be informed by the Business and Regulatory Impact Assessment process, which is being updated to reflect the changed constitutional landscape as a consequence of the UK's departure from the European Union. This will consider the commitment to align, the UK Internal Market Act, as well

as provisions of the UK Trade and Cooperation Agreement (TCA) with the EU and existing international obligations, including those with the World Trade Organisation.

Ministers 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.

In summary, considerations that Ministers will take into account when considering the use of the power include the following:

1. Legislation

- That specific domestic powers could not achieve the desired outcome or that there is a good reason for not using these powers;
- That 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 and;
- 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. This approach will be applied in full here. In considering use of the power in section 1(1) of the Act, the Scottish Government will pro-actively engage with relevant stakeholders. This

would include local government as well as relevant organisations, fora or groups, and Ministers remain committed to an ongoing dialogue with parliament on its international and policy priorities. Ministers will ensure that representations are considered as part of the decision making process, along with a range of other available information and evidence.

- This consultation supports, and is integral to, the Business and Regulatory Impact Assessment process. Consultation will also be informed by consideration of the European Commission's annual work programme which details the EU's legislative priorities for the coming year, the six-monthly presidency country's programme and ongoing monitoring of key areas of the EU's business by relevant policy directorates and Scotland House Brussels.
- Ministers will also publish in relevant policy notes and consultation exercises information on how legislation relates to the commitment to align with the EU.

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 [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 proactively in the EU and internationally 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's commitment to work in partnership with the EU to realise our shared values and work together to 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 explains that the Scottish Government will use a range of means to deliver that alignment and sets out the approach it will take in exercising the power in section 1 of the Act.

SCOTTISH MINISTERS

Laid before the Scottish Parliament by the Scottish Ministers in accordance with Sections 7(4) and 11(5) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

10 May 2022
SG/2022/89

DOCUMENT DESCRIBING HOW THE SCOTTISH MINISTERS HAVE HAD REGARD TO REPRESENTATIONS ON THE DRAFT STATEMENT OF POLICY AND DRAFT ANNUAL REPORT ON THE SCOTTISH MINISTERS EXERCISE OF THE POWER IN SECTION 1 OF THE UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

Introduction

In laying a copy of the policy statement before the Scottish Parliament for approval under section 7(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“the Continuity Act”), the Scottish Ministers also lay, in compliance with sections 7(4) and 11(5), this document. This describes how they have had regard to representations made about the draft statement, SG/2021/292 and draft annual report, SG/2021/291 laid on 29 October 2021 in preparing the revised statement and finalised report.

This document fulfils the Scottish Ministers obligations in relation to the policy statement under section 7(4) and in the report under section 11(5).

Representations Received

The Scottish Government received two submissions in respect of the draft policy statement. These were from the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (CEEAC) in respect of their scrutiny of the draft policy statement and the Continuity Act, and the Rural Affairs, Islands and Natural Environment (RAINE) Committee. These submissions can be found on the [Scottish parliament’s website](#).

The responses received focused on how the Scottish Government intends to engage with parliament in considering scrutiny of both use of the Continuity Act power and the Scottish Government’s policy to maintain alignment with the European Union. Comments also focused on consultation, and how the Scottish Government would engage with wider stakeholders regarding use of the Continuity Act power and the wider policy of alignment.

1. Working with Parliament

Both representations focused on the need for the Scottish Government and parliament to work together to clarify how parliament should proportionately scrutinise the Scottish Government’s policy of aligning with the EU.

Response

Scottish Government officials have been engaging with officials of the CEEAC committee over the last year. This engagement assisted the Scottish Government in developing implementation of the Continuity Act leading to laying of the draft policy statement and draft report on 29 October 2021.

Since this date officials have considered further how to assist the parliament in its scrutiny role, and how the Scottish Government can provide information on its use of the Continuity Act and wider policy of alignment. This has assist production of the amended policy statement and finalised annual report now laid. Officials will continue to engage with parliament in a structured manner to better support both organisations to understand the challenges that the post-EU exit landscape presents for Scotland.

This process has informed changes made to the policy statement which are reflected below.

2. Provision of Information

In their respective submissions, both committees noted that consideration should be given to information provided by the Scottish Government to assist scrutiny, both in terms of decision making and implementation of decisions.

The RAINE committee recommended that the Scottish Government provide clarification on what areas of the committee's remit will maintain alignment with the EU, and that accompanying legislative documentation and SG consultation documents provide detail of how the proposed measures relate to the Scottish Government's commitment to align with the EU.

Response

The published policy statement notes that the Scottish Government will provide information annually on the EU's legislative priorities. The Scottish Government intends that this take the form of a response to the annual European Commission work plan, which sets out the legislation planned for the coming year. This will also reflect the priorities of the current EU presidency country which rotates through the EU membership every 6 months, and how its priorities might be relevant for the Scottish Government's approach to the EU.

This will provide the Scottish Government with an annual opportunity to set out that legislation which is expected to be materially relevant in maintaining Scotland's alignment with the EU. The information provided by the Scottish Government will set out specifically, as far as is possible at the work plan stage, the EU legislation which Scotland intends to align.

This process will assist subject matter committees in identifying areas where they may wish to scrutinise the Scottish Government's planned approach, including but not limited to use of the Continuity Act, which will also be supported by the

information provided in the annual report on planned use of the power in section 1(1) of the Continuity Act for the coming reporting period.

The Scottish Government also proposes providing an annual interim update on its approach, also reflecting the priorities of the current biannual EU presidency country. The Scottish Government will continue working with the Scottish Parliament over specifics of these publications continuing its commitment to work with parliament to support consideration of its scrutiny role.

The policy statement has been updated to note that where relevant policy notes are provided for legislation the Scottish Government will include references to consideration of EU alignment. The Scottish Government will also seek to include such information within relevant formal consultations.

3. Monitoring Developments within the EU

Both committees asked for clarity on how the Scottish Government will monitor developments in EU policy and law, including relevant implementing legislation, to inform its decisions about whether to maintain alignment.

The CEEAC committee also noted that consideration should be given to a website providing colour coded information to make clear what decisions the Scottish Government is taking to align.

Response

In addition to consideration and provision of information on the annual European Commission work plan and the priorities of the rotating presidency countries, the Scottish Government sets out the approach to monitoring developments in EU policy and law in the process section of the policy statement. Critical to this is the European component of the Scottish Governments international work, including the support offered to policy directorates by Scottish Government Legal Directorate and the Scottish Government Brussels Directorate in understanding the policy positions and developments within the EU institutions.

A comprehensive website of proposed EU legislation and the Scottish Government's intention to align would require significant resource both to sift the legislation produced and update the website. Much of the EU's legislation will not be relevant to Scotland, in that it will be specific to the single market, specific member states, or areas of policy that are not devolved.

The Scottish Government therefore considers that an approach to provide information focused on Scotland's priorities as detailed in this document and the revised policy statement provides a more proportionate level of information to support our existing approach to consultation and support scrutiny of the commitment to align.

4. Assessment of Regulatory Divergence

The CEEAC committee asked that the policy statement is amended to include details of how regulatory divergence between the UK and the EU will impact on the commitment to align, UK wide frameworks, the UK's Trade and Cooperation Agreement with the EU and UK Internal Market Act 2020. Evidence from the Law Society of Scotland also noted to the committee that there could also be more clarity as to how the UK Internal Market Act is considered a constraint on Scottish Ministers.

Response

The policy statement has been updated to note that the Business and Regulatory Impact Assessment (BRIA) process is being updated to reflect the changed constitutional landscape. The updated BRIA will detail the need to consider and also assess any relevant impacts of the proposed measure on the Scottish Government's commitment to maintain alignment with the EU and the UK Internal Market Act. This builds on recent updates to the BRIA in respect of Scotland's obligations under World Trade Organisation rules.

In terms of the impact of UK Internal Market Act, a constraint could exist in realising the full effect of devolved policy resulting from a decision to align with EU law. The market access principles of the Act mean that Scottish regulations may be dis-applied for goods or services coming from other parts of the UK with differing regulations to Scotland. So, while we may take the decision to align with EU law in relation to a specific policy, in practice, should that decision result in policy which diverges from other parts of the UK, the UK Internal Market Act could mean the effect (or outcome) of such a decision is dependent on whether and in what way the Act is engaged.

5. Consultation

Representations requested specific detail on those who would be engaged in consultation regarding the Scottish Government's use of the Continuity Act, and if this included the wider policy of EU alignment. This queried if relevant stakeholders' included civic society organisations, and the Scottish parliament itself, and the approaches taken to such consultation, ensuring that this is accessible and transparent.

The RAINE committee also recommend that consideration be given to updating the draft annual report to provide details of all public consultations, which include consideration of whether or not to align carried out during the reporting period.

Response

The Scottish Government's approach to consultation is detailed within the policy statement. 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. The Scottish Government considers that those affected by Ministers policy decisions would include where relevant, but not

limited to, local government, the Scottish Parliament, civic organisations and other relevant fora. This approach will be applied in relation to each subject matter where alignment is an issue, just as it would to any where it is not.

In terms of reporting on the details of formal consultations, the required content of the annual report is set out at section 10(1) of the Continuity Act. In the light of the additional steps we shall be taking in response to the Committees' comments (see below) we do not consider it would be proportionate to include details of all relevant public consultations.

The Scottish Government considers however that the information it has committed to provide on its approach to alignment will inform both parliament and the wider public with an understanding of its approach to using the Continuity Act power and also the policy of maintaining alignment with the EU. This includes the inclusion of information on EU alignment within consultations where this is a relevant factor, and detail of the commitment to align within legislative accompanying documents where these are provided and consideration of the policy within the Business and Regulatory Impact Assessment (BRIA) process.

The Scottish Government considers that this provides greater transparency and a proportionate level of information to support our existing approach to consultation and support scrutiny of the commitment to align.

6. Memorandum of Understanding

The CEEAC committee noted that consideration should be given by officials to a Memorandum of Understanding between the Scottish Government and parliament in developing proposals to facilitate effective scrutiny of the commitment to align.

Response

Scottish Government officials are committed to continuing their work with their parliamentary counterparts to consider the approach to scrutiny, to facilitate and build on the approach detailed in the revised policy statement and this document.

This work is ongoing, and will consider in the future the necessary and effective constitution of this engagement for both Ministers and Parliament's consideration as the approach detailed here is embedded in practice.

7. Status of the Continuity Act Power

The RAINE committee commented that it was not clear as to Ministers consideration of the Continuity Act power "as a backstop rather than an essential power."

Response

The Scottish Government is clear that alignment will be achieved through a variety of means. Those may be through secondary legislation, primary legislation or via non-legislative means.

Where secondary legislation is appropriate then the Scottish Government's preference is to use subject-specific powers. However, there will be times when these are not available, and in this context section 1(1) is an essential power for implementing the policy of alignment.

8. Report on Use of the Continuity Act Power

The CEEAC committee stated that it was not clear why the report on the use of the Continuity Act power and planned use in the next period did not highlight the Scottish Government's consideration of its use in respect of Changes to Building Energy Standards and implementation of the EU recast Drinking Water Directive.

Response

Section 10(1)(c) sets out that the Scottish Government must report on 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. Scottish Ministers determined that an appropriate length for this period would be the next reporting period.

Changes to Building Energy Standards and implementation of the recast Drinking Water Directive were not planned to be made within the next reporting period, but at a later stage.

SCOTTISH GOVERNMENT

Laid before the Scottish Parliament by the Scottish Ministers in accordance with Section 10(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

10 May 2022
SG/2022/90

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 10(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“The Act”), the Scottish Ministers lay the following 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. In laying a copy of this report before the Scottish Parliament under section 10(1), the Scottish Ministers also lay, in compliance with section 11(5), a document setting out a summary of any representations about the draft report SG/2021/291 laid on 29 October 2021 made during the consultation period, and how they have had regard to those representations in preparing this report.

3. This 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.

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