

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

28 June 2023
SG/2023/138

DOCUMENT SUMMARISING CONSIDERATION OF THE REPRESENTATIONS MADE ON THE 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 LAID IN DRAFT IN PARLIAMENT ON 27 OCTOBER 2022

Introduction

1. The Scottish Ministers lay, in compliance with section 11(5) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“the Continuity Act”), this document describing the representations made about the draft annual report laid on 27 October 2022 and how they had regard to them in preparing the finalised report.
2. This document fulfils the Scottish Ministers’ obligations in relation to the report under section 11(5). This document also aims to provide a detailed response to the points raised to Ministers regarding the Scottish Government’s EU alignment policy commitment. This goes beyond responding to the comments on the draft provisions in the draft report under section 10(1)(c) on the intended use of the power under section 1(1), as would be required by the Continuity Act.
3. This document should be read in conjunction with the Scottish Government’s finalised annual report laid in parliament on this date and the Cabinet Secretary for External Affairs and Constitution’s covering letter to the Convener of the Constitution, Europe, External Affairs and Culture (CEEAC) Committee.

Representations Received

4. The Scottish Government received a single representation from the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (CEEACC). This letter covered a range of issues in respect of their scrutiny of the Continuity Act draft report in relation to the intended future use of the section 1(1) power, which was the subject of the draft under section 10(1)(c) and section 11(2), and of the alignment policy generally. This submission can be found on the [Scottish Parliament’s website](#).
5. The letter received broadly focused on the scope of the commitment to align, timing, stakeholder engagement and transparency of decision making. The response also asked specific questions regarding the entries made within the draft annual report.
6. Sections 11(1)(b), 11(2) and 10(1)(c) set out the requirement for Scottish Ministers to have regard when preparing the final report to representations made on the draft report in relation to uses of the section 1(1) power to align with EU law

beyond the current reporting period, for a period of time that Ministers may determine.

7. Within this scope, the submission made by the CEEAC committee included representations regarding previous consultation on the planned use of the power in respect of implementation of certain requirements of Directive (EU) 2020/2184 (the “Recast Drinking Water Directive”) on the quality of water intended for human consumption.

Commitment to align with EU Law

Comments from the CEEAC Committee

“As set out in the Statement of Policy, the Scottish Ministers’ “default position” is to align with EU law and this “will be achieved in a range of different ways” including primary and secondary legislation and non-legislative means such as a statement of policy or guidance. Scottish Government officials also told us that there “are other ways, such as policy announcements and agreements with other organisations in order to deliver services” and those “would lead to alignment in a wider sense.””

Scottish Government Response

8. The Scottish Government policy statement approved by Parliament states that “*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*” and that Ministers default is to align with EU law; critically, it also acknowledges this will not always be possible.

9. The statement sets out a range of reasons why alignment will not always be possible, including, for example, some measures are only applicable to EU member states, and in some cases alignment will not assist the intended outcome or devolved decisions to align may be undermined by the effect of the UK Internal Market Act. The policy statement clarifies these extenuating circumstances further: “*In coming to a view, [on whether to align] Ministers will take account of the full range of interests, whether economic, social, environmental or other*”.

10. The Scottish Government reaffirms its commitment to aligning with EU law wherever such alignment is possible within the devolved settlement, where it is meaningful and where it will protect and advance standards and the wellbeing of the people of Scotland. In this regard Ministers priority is the protection of retained EU law from the UK Government’s deregulatory agenda.

11. This commitment includes tertiary EU legislation as well as Directives and Regulations. For the purposes of absolute clarity, there will be certain discretionary circumstances where alignment with EU law is not pursued for the reasons set out above.

Scope and Transparency

Comments from the CEEAC Committee

“It is not clear from the draft Annual Report or the Statement of Policy whether, in deciding whether or not to use the ‘keeping pace’ power, the Scottish Government routinely monitors all EU legislative developments that may fall within the scope of the Continuity Act.”

“The Committee notes that retained EU law only preserves alignment with EU law as it stood at the end of December 2020. As EU law continues to evolve from January 2021 onwards, there may be increasing passive legislative divergence from EU secondary and tertiary legislation unless the Scottish Government brings forward legislation to align.”

“The Committee recognises that some passive divergence will be inevitable given not all new legislation at an EU level will have an impact on Scotland as part of a non-Member State. However, it is clear that much of the new secondary and tertiary legislation will be relevant to the Scottish Government’s commitment to align with EU law. “

“The Committee’s view is that there needs to be much more clarity with regards to the interaction of the commitment to align with the *acquis* especially with regards to tertiary EU implementing legislation. Given the Scottish Government’s emphasis on retaining EU law, the Committee invites the Cabinet Secretary to clarify whether this also includes a commitment to align with implementing legislation which impacts on Scotland.”

Scottish Government Response

12. Scottish Ministers agree that passive divergence with the EU is an inevitable consequence of Scotland being removed from the EU. Further, Scottish Ministers are no longer under a legal duty to transpose EU law following the UK’s departure¹. EU law is no longer developed with consideration of its application to the UK, nor does the UK or Scotland have a role in forming that legislation. The Scottish Government’s ability to influence that development is therefore very limited as part of a third country. In addition, the UK Government no longer provides Scotland with detailed information as to the EU’s legislative plans.

13. Scottish Ministers however remain committed to aligning with EU laws and standards where we can, subject to the clarifications set out in paragraph 10. Scottish Government policy of maintaining EU alignment, including via the powers provided by the EU Continuity Act 2021, ensures Scottish Ministers can protect the

¹ Since the UK’s departure from the EU, the legal basis for application of EU law in the UK and the power to transpose EU law provided by the [European Communities Act 1972](#) no longer applies. In Scotland the Continuity Act aims to ensure we can align but does not replicate the legal obligation basis for transposition that EU membership created. The Continuity Act provides a discretionary power for use where Ministers assess its requirement and where such use will maintain and advance standards.

world-class standards that Scotland shares with the EU. Ministers will prioritise alignment where this will enhance the wellbeing of the people of Scotland by maintaining and advancing standards using the most relevant legislative powers.

14. Policy portfolios within the Scottish Government, supported by the work of Scotland House Brussels, monitor relevant policy developments in the EU and seek opportunities to engage with EU and member state counterparts to identify relevant legislation for consideration of alignment. However, partly in response to the above concerns raised by the Committee, and as described in Mr Robertson's letter to the Committee on 27 April 2023, the Scottish Government intends to take a more centralised approach in identifying relevant policy matters that will enable improved reporting to Parliament.

15. In this respect, the work by Dr Whitten referenced by the committee is useful in considering the progress of EU law over the period from the UK's departure. Alongside the Official Journal of the European Union, the work of policy areas and Scotland House Brussels and the annual Commission Work Programme, such research is useful to the Scottish Government in identifying potential areas for alignment.

16. The Scottish Government agrees that all EU legislation (tertiary or otherwise) has potential relevance to the commitment to align and is considered in the same way as regulations and directives for relevance to Scotland.

17. Scottish Ministers are keen to respond positively to the Parliament's request for greater transparency. Accordingly, the Cabinet Secretary wrote to the Constitution, Europe, External Affairs and Culture Committee on 27 April committing that policy notes and memoranda will reflect whether the legislation in question is relevant or not to the policy of EU alignment, and if so provide further detail.

18. As set out in the letter, Ministers will increase the information provided to Parliament and the public to understand how the commitment is being applied. Ministers propose bringing forward additional annual reporting from October 2023 to sit alongside the existing Continuity Act reporting process, including:

- **how alignment has been considered in respect of legislation made in the Scottish Parliament over the reporting year;**
- **an assessment of EU legislation made over the reporting year that may be relevant to the commitment to align;**
- **where Scotland's policy priorities in respect of the EU lie in the coming year; and**
- **reporting of the impact of the UK Government's Retained EU Law Bill on Scotland and our ability to align with the EU to protect high standards.**

19. In addition, the Cabinet Secretary wrote to the Committee on 23 June to highlight publication of a letter and paper provided to the EU Ambassador on Scotland's policy priorities for the EU over the coming year in response to the Commission's Work Programme. Ministers propose undertaking this task annually as part of an expanded reporting process.

20. The Scottish Government would welcome the Committee's views on these proposals for increased reporting, acknowledging that with the next annual report draft due in October 2023, such additional reporting will not initially cover a whole year. We would also welcome continued engagement between officials in developing the details of such an approach.

Energy Performance of Building Directive

Comments from CEEAC Committee

“The Committee notes that scrutiny of Directive 2018/844/EU demonstrates the challenge in scrutinising the commitment to align with EU law given that it is not clear from the Annual Report—

- Whether this Directive has been transposed into UK and Scots Law in relation to devolved areas given that the transposition deadline fell within the Transition Period prior to the UK leaving the EU;
- Why consideration has been given during the reporting period to make regulations to keep pace with certain measures within the Directive when the transposition deadline was 10 March 2020.”

Scottish Government Response

21. Implementation of Directive 2010/31/EU on the Energy Performance of Buildings (EPBD) was reported at a UK level with elements sitting within devolved responsibility and transposed by each UK Administration. Directive (EU) 2018/844, published on 20 May 2018 set out amendments to both the Energy Performance of Buildings Directive (2010/31/EU) and the Energy Efficiency Directive (2012/27/EU).

22. From Spring 2019, a UK transposition board met several times to discuss and report on progress of the required amendments. The Directive was only partially transposed by the UK as of 10 March 2020 – see table below for Scotland specific elements. All four of the main UK Administrations had similar positions and timetables for progressing the transposition of the Directive. This was mostly due to required changes being implemented through national building regulations, where review timetables were set to deliver domestic policy objectives in support of respective Climate Change agendas. For Scotland, this was mostly to be covered by a scheduled review of energy standards within building regulations for 2021.

23. Sections 8(2) and 8(5) were addressed via legislation on [24 November 2022](#), amended on [3 March 2023](#) and implemented in full from 5 June 2023.

Article	Transposition position, March 2020		June 2023 Update
	Partial	Pending	Status
Article 8(1) - Technical building systems (self-regulating devices)	X		Achieved 12/22
Article 8(2) - Electromobility (new/renovated non-residential buildings)		X	Achieved 2023
Article 8(5) - Electromobility (new/renovated non-residential buildings)		X	Achieved 2023
Article 8(3) - Electromobility (existing non-residential buildings)		X	Not Transposing
Article 14(4) – Inspection of heating systems, building automation & control systems		X	Achieved 12/22
Article 15(4) - Inspection of air-conditioning, building automation & control systems		X	Achieved 12/22
Annex I - Common general framework; calculation of energy performance of buildings		X	Partially achieved

24. The ‘partial transposition’ reference for Annex I refers to the decision not to use ‘primary energy’ as the main reporting metric when setting performance targets for new buildings but to use ‘delivered energy’ instead as this is more representative of the performance of the building and not the energy system supplying it.

Non-Legislative Alignment

Comment from CEEAC Committee

“The Committee is unclear about the purpose and status of any policy commitments for regulatory alignment by way of non-legislative means and what the practical effects of this would be in terms of aligning with EU regulatory standards as they evolve and would welcome further clarification”

Scottish Government Response

25. In response to the Committee’s concerns, Scottish Ministers intend to provide information on the practical effects of where policy commitments have been met by non-legislative means. This information would be included in the extended annual reporting set out above.

26. Not all EU policy commitments or legislation will require legislation in Scotland to allow the outcomes we share with the EU to be realised. For example, regulations provide a legislative method of aligning with relevant EU law, however Scottish Government guidance may support policy outcomes without the need for legislation.

27. The Scottish Government's paper shared with the Committee on 23 June 2023 set out our priorities for the EU including a number of areas in which the Scottish Government's policy approach seeks to align with the EU without the use of legislation.

SCOTTISH MINISTERS

28 June 2023