



The Scottish Parliament
Pàrlamaid na h-Alba

Angus Robertson MSP, Cabinet
Secretary for the Constitution,
External Affairs and Culture (by e-
mail)

The Scottish Parliament
EDINBURGH
EH99 1SP

CEEAC.committee@parliament.scot

24 November 2022

Dear Cabinet Secretary,

**The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021
Annual Report**

1. Further to your appearance before the Committee on 17 November 2021, the Constitution, Europe, External Affairs and Culture Committee comments below on the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.
2. The Committee welcomes the information provided in the Annual Report in relation to the decisions related to the use of the ‘keeping pace’ power. The Committee requests further information with regards to the following—
 - Scope;
 - Timing;
 - Stakeholder Engagement;
 - Transparency of Decision-Making.

Scope

3. 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.
4. 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.¹ 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.”

5. Section 1A (1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 states that the purpose of the ‘keeping pace’ power is “among other things, to contribute towards maintaining and advancing standards in relation to the following matters—
 - Environmental Protection
 - Animal Health and Welfare
 - Plant Health
 - Equality, Non-Discrimination, and Human Rights
 - Social Protection.”²
6. At the same time, the power can also be exercised in relation to any areas of EU law that were previously within the scope of devolved government in Scotland and/or any new EU laws that would, if the UK had remained an EU Member State, be within devolved competence.
7. The Committee asked SPICe to commission research to provide a baseline of the potential scope of the commitment to align with EU law. The Committee thanks Dr Lisa Claire Whitten for carrying out this work and for her excellent report. Dr Whitten points out that to comprehensively map the policy scope of the Scottish Government’s commitment to align with EU law, it is necessary to include any EU law instruments that were, either fully or partially, within devolved competence in Scotland prior to the UK’s withdrawal from the EU. A summary is provided in Table 1.

¹ [eu-alignment.pdf \(parliament.scot\)](#)

² [bill-as-passed-uk-withdrawal-from-the-european-union-continuity-scotland-bill.pdf \(parliament.scot\)](#)

Table 1: Summary of the Potential Legislative Scope of the ‘Keeping Pace’ Power in EU Law Terms.

Policy Area	EU Instruments*	Competence	
		Mixed	Devolved
Environmental Protection	42	24	18
Animal Health and Welfare	46	10	36
Plant Health	17	3	14
Equality, Non-Discrimination, and Human Rights	7	1	6
Social Protection	4	4	0
Food Standards	30	27	3
Chemicals	7	4	3
Economy & Trade	6	5	1
Police & Judicial Cooperation	57	27	30
Public Health	15	3	12
Transport	12	7	5
		115	128
Total	243*		

*As of 31st December 2020

Source: Lisa Claire Whitten

8. Table 1 shows that at least 243 instruments of EU law are potentially in the scope of the Scottish Government’s alignment commitment. In addition to the five areas listed in section 2(1) of the 2021 Act for which Scottish Ministers are to have ‘due regard’ when exercising the ‘keeping pace’ power, EU law instruments concerning food standards, chemicals, environment and trade, police and judicial cooperation, public health and transport also feature.
9. Those 243 legal instruments are now incorporated into the UK and Scottish statute book as Retained EU Law (REUL) but as Dr Whitten highlights “they did so in a ‘frozen’ form from the perspective of EU legislative procedure.” As such, REUL only achieves alignment up to the end of December 2020. This means that any EU legislative developments that have happened since then would not have taken effect in their (Scottish) retained EU law ‘frozen’ version.
10. The Committee notes that it is important to recognise that EU law (the EU *acquis*) evolves continuously over time primarily through secondary legislation (regulations, directives, and decisions) and tertiary legislation (implementing acts and delegated acts). Therefore, REUL in its frozen form at the end of December 2020 will diverge from EU law as it develops unless additional legislation is passed within the UK and devolved legislatures.
11. Dr Whitten’s research shows that in the period between January 2021 and October 2022, 32 acts of EU Law fully or partially within the competence of the Scottish Government have ceased to have legal force in the EU. However, given all of these 32 were repealed and replaced as a result of provisions in other acts of EU law that were adopted before the end of December 2020, “the divergence impact for Scotland of changes arising from this type of change has, so far, been minimal.” Dr Whitten points out that the “primary reason for the limited divergence effect to

date is due to the tendency for new EU secondary law instruments to include (often generous) periods for transition from older to newer act(s). “

12. Dr Whitten’s research also shows that during the first 6 months of 2022 the EU passed 599 implementing/tertiary EU law acts within the competence of the Scottish Government. She points out that while “amendments made via EU implementing legislation are often very technical and have limited substantive policy impact, sometimes changes are significant for specific sectors and/or stakeholders subject to or affected by the relevant legislation.”
13. A key scrutiny challenge for the Committee and the Parliament as highlighted by Dr Whitten is understanding the different types of EU legislation and the way they interact. In particular, the extent to which REUL may or not evolve in line with the *acquis* now that there is no legal requirement for this to happen. The Committee provides an example of the extent of this challenge based on the EU Energy Performance and Buildings Directive (Directive 2018/844/EU (amending Directive 2010/31/EU) at **Annexe A**.
14. Dr Whitten suggests that the frequent use of tertiary legislation by the EU as a mechanism for the evolution of the *acquis*, “raises questions about the degree of alignment with EU law that the Scottish Government wishes to pursue, and its justification for doing so.” In her view “if the intention is for Scotland to remain fully and dynamically aligned with areas of EU law within its competence, then changes in tertiary EU implementing legislation ought to apply to retained EU law versions of the relevant secondary EU law instrument in Scotland.” However, if the “intention is for Scotland to stay aligned only in certain areas of EU law within its competence, and to do so on a case-by-case basis, then changes in tertiary EU implementing legislation need not necessarily apply.”
15. The Committee explored the scope of the Scottish Government’s commitment to align with EU law with the Cabinet Secretary and his officials. The Cabinet Secretary told us that the Scottish Government “are not following a blanket alignment policy” and this is because “many measures do not impact on Scotland in any way whatsoever.” He stated previously that “many of the 2000 or so EU measures introduced annually will not be of any relevance to Scotland, in that they will be specific to the single market, specific member states, or address areas of policy that are not devolved.”³
16. The Scottish Government’s Statement of Policy also recognises that 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.”⁴
17. The Committee asked the Cabinet Secretary whether the Scottish Government’s alignment policy includes a commitment where appropriate to align with changes to the *acquis* through tertiary legislation. He responded that he wants “to make sure

³[01062022-sg-response-to-committee-letter-on-revised-alignment-policy-statement.pdf \(parliament.scot\)](#)

⁴ [eu-alignment.pdf \(parliament.scot\)](#)

that we have an understanding across the full range of European Union proposals to ensure that there is no passive drift.”

- 18. 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.**
- 19. 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.**
- 20. 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.**
- 21. 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.**
- 22. The Committee would welcome clarification of these issues.**
- 23. 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.**

Timing

- 24. The Committee notes that the EU Energy Performance and Buildings Directive (Directive 2018/844/EU) was adopted while the UK was still an EU member state and that the transposition period ended on 10 March 2020, before the end of the Implementation Period (when the UK was required to continue to observe EU law). The Committee notes therefore that all elements of the Directive should have been transposed during the Implementation Period and that the later decision on**

whether to align with the Directive has taken over two years to reach and consideration about alignment wasn't included in the 2021 Annual Report.

25. Linked to this timing, it is not clear what Scottish Ministers policy is on the speed of alignment, i.e., how quickly alignment is delivered following the EU legislation entering into force. EU member states are given a considerable amount of time for transposition (typically 1-2 years, often more) of Directives whilst Regulations usually come into force more quickly because transposition generally isn't required. It is not clear whether the commitment to align with EU law includes a commitment to do so before the end of the transposition period provided to Member States.

26. The Committee recommends the need for much more clarity regarding the timing of consideration and decision-making with regards to the use of the keeping pace power.

27. The Committee recommends that the draft annual report is revised to include much more detail in relation to the timing of the consideration and decision not to align with Directive 2018/844/EU.

Stakeholder Engagement

28. The Annual Report states that consideration "was given to using the power under section 1(1) to make regulations to keep pace with certain measures of the EU Energy Performance and Buildings Directive (Directive 2018/844/EU (amending Directive 2010/31/EU))." The Committee has previously noted the Scottish Government consultation on *Scottish Building Regulations – Proposed Changes to Energy Standards and associated topics*⁵ which included consideration of keeping pace with Directive 2018/884/EU.

29. The Annual Report also states that the Scottish Government "intends to make provision in late 2022 using the power under section 1(1), in conjunction with other domestic powers, to amend the Public Water Supplies (Scotland) Regulations 2014 ("2014 regulations")." This is intended to "implement certain requirements of Directive (EU) 2020/2184 ("Recast Drinking Water Directive") on the quality of water intended for human consumption.

30. The Statement of Policy by the Scottish Ministers states that in "considering use of the power in section 1(1) of the Act, the Scottish Government will pro-actively engage with relevant stakeholders" and "Ministers will ensure that representations are considered as part of the decision making process, along with a range of other available information and evidence."⁶

31. The Cabinet Secretary confirmed in a letter to the Committee dated 1 June 2022 that the Scottish Government "will honour its existing published commitments to collaborative policy development, and will engage proportionately with relevant stakeholders in considering decisions to align."

⁵ [Scottish Building Regulations – Proposed Changes to Energy Standards and associated topics \(www.gov.scot\)](http://www.gov.scot)

⁶ [eu-alignment.pdf \(parliament.scot\)](http://parliament.scot)

- 32. The Committee notes that there is no reference in the Annual Report to stakeholder engagement by the Scottish Government in considering using the keeping pace power in relation to either the EU Energy Performance and Buildings Directive or the Recast Drinking Water Directive.**
- 33. The Committee invites the Cabinet Secretary to provide details of the outcome of the stakeholder engagement on the consideration of the use of the power in relation to both Directives.**

Transparency of Decision-Making

34. Given the draft Annual Report indicates that only two uses of the 'keeping pace' power have been considered and only one taken forward, it is not clear what process Scottish Ministers employ when monitoring new EU legislation for possible alignment and how decisions about alignment are then taken.
35. It is also not clear how Scottish Ministers make decisions about which legislative approach to take to achieve alignment. In addition, the reporting requirements linked to the Continuity Act mean the Committee do not get information on other ways in which the Scottish Government may have met its policy commitment to continued alignment with EU law.
36. Dr Whitten points out that while there have been changes in EU legislation that are potentially within the scope of the 'keeping pace' commitment, these have not been mentioned or accounted for in the Annual Report. As a result, it is not possible for the Committee, or the Parliament to make an assessment about the extent to which Scots Law continues to align with EU law post EU-exit.
37. In our letter to the Cabinet Secretary dated 26 May 2022, we restated our view that there is a need for more transparency around the decision-making process regarding EU alignment. We highlighted that transparency is important not just for the Parliament, but for stakeholders who also need to be clear on where there is alignment and where there is proposed divergence.
38. You confirmed in your response that the Scottish Government "will provide information on Ministers' intentions regarding EU alignment in respect of not only the Continuity Act power but also other legislative means" and that this "will provide a level of transparency beyond that required by the Act alone."
39. The Committee welcomes this commitment to provide information on Ministers' *intentions* with regards to the Commission's work programme and the EU Presidency. The Committee also notes the Cabinet Secretary's commitment to reflect on how the Scottish Government "can ensure that if there are major proposals that may have relevance to Scotland and we have decided for whatever reason that legislation is not required to be aligned, that can be shared."
- 40. The Committee's view is that the current approach to reporting on the commitment to align with EU law is unsustainable. Dr Whitten's research fully demonstrates the scope and complexity of the Scottish Government's commitment to align and this is not reflected in the minimal information**

provided in the Annual Report. While the commitment to provide further information on the Scottish Ministers' *intentions* to align is welcome there is also an urgent need for a reporting mechanism which provides detailed information on *actual* legislative and non-legislative alignment including the effect of this in comparison with the *acquis*.

41. The Committee reiterates our view in our letter to you dated 26 May 2022 that we do not have sufficient transparency with regards to the Scottish Ministers' decision-making process on EU alignment especially where decisions are taken not to align and the reasons for that.

Yours Sincerely

A handwritten signature in black ink that reads "Clare Adamson". The signature is written in a cursive, flowing style.

Clare Adamson MSP, Convener of the Constitution, Europe, External Affairs and Culture Committee

EU Energy Performance and Buildings Directive (Directive 2018/844/EU (amending Directive 2010/31/EU)).

Directive 2018/844/EU entered into force on 30 May 2018⁷, while the UK was still an EU member state. It amended EU Directive 2010/31 requiring member states to transpose new obligations in relation to the energy performance of buildings into national law, recognising the crucial role of the building sector in meeting environmental goals. The deadline for member state transposition was 10 March 2020, i.e. after the UK had left the EU, but during the transposition period.

The UK Government published a consultation document in May 2020 which states that “EU obligations require that the Directive should be transposed into domestic legislation as the transposition deadline falls within the Transition Period.”⁸

The Scottish Government published a consultation document on *Scottish Building Regulations – Proposed Changes to Energy Standards and associated topic*.⁹

The document states that the review includes elements which transpose 2018 amendments to the Directive. It also states that from 2006 until the end of 2020, Directive 2010/31/EU committed the UK, as a Member State, to review the energy performance requirements for buildings at intervals not exceeding 5 years. The Directive also required the setting of minimum energy performance requirements for new buildings and new building work and the application of a calculation methodology for the former. Transposition of much of the Directive was devolved in Scotland.

In the Committee’s report on the draft Statement of Policy in November 2021 we noted that that the consultation document stated that “we plan to introduce requirements in the car parks of certain non-residential buildings where no construction work is planned through powers available in the UK Withdrawal from the EU (Continuity) (Scotland) Act 2021.”

The Committee recommended that further clarity is required particularly in relation to why the Scottish Government consultation document noted above sets out plans to use the keeping pace power while the draft annual report states the power has not been used and there are no plans for its intended use.

The Scottish Government responded that changes to Building Energy Standards were not planned be made within the next reporting period, but at a later stage.

The Annual Report states that consideration was given to using the power under section 1(1) to make regulations to keep pace with Directive 2018/844/EU (amending

⁷ [Directive \(EU\) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency \(Text with EEA relevance\) \(legislation.gov.uk\)](#)

⁸ [Energy Performance of Buildings - consultation \(publishing.service.gov.uk\)](#)

⁹ [Scottish Building Regulations – Proposed Changes to Energy Standards and associated topics \(www.gov.scot\)](#)

Directive 2010/31/EU) and that the Scottish Government however assessed a number of factors that did not support implementation of this measure at this time.