

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