

Guidance to subject committees of the Scottish Parliament on post EU scrutiny

Constitution, Europe, External Affairs and Culture Committee September 2023

Introduction

1. The Convener's Group was asked in November 2022 *"to consider how post-EU constitutional issues can be mainstreamed into existing policy and legislative scrutiny"* and asked *"clerks, Legal Services and SPICe to develop a toolkit and guidance which will support Members and the Committees in addressing these issues as appropriate in carrying out regular scrutiny."*
2. At the same meeting, the Convener's Group noted *"that Scottish Parliament officials continue to work with Scottish Government officials in considering the appropriate level and timing of information to be provided to the Parliament in relation to the Ministerial policy to align with EU law."*
3. The aim of this paper is to provide subject committees with guidance on 'post EU scrutiny' in devolved policy areas including the new arrangements agreed with the Scottish Government.
4. 'Post EU scrutiny' is used as an umbrella term for the scrutiny of the Scottish Government's policy commitment to align with EU law where appropriate and new constitutional arrangements which have been introduced following the UK's exit from the EU.
5. As such, this guidance, its annexes and the post EU scrutiny toolkit¹ fulfil both directions from the Convener's Group of November 2022. This guidance, its annexes and the post EU scrutiny toolkit have been developed to assist Committee teams across scrutiny group to support efficient, effective scrutiny of policy issues in the post EU context.
6. The Scottish Government's policy commitment to align with EU law and the post EU constitutional landscape are crucial context for the environment in which policy is developed and legislation made. As such, subject committees will need to understand and navigate such issues during routine scrutiny of policy and legislation within their remit.
7. To assist committees with post EU scrutiny, the Scottish Parliament and the Scottish Government have reached agreement on information which should be provided to the Parliament when it is asked to consider legislative proposals in the areas most affected by post EU arrangements and therefore within the scope of the Scottish Government's commitment to align with EU law where appropriate. The agreement reached with the Scottish Government on the provision of information to aid post EU scrutiny is attached at **Annexe A**.

¹ [Draft toolkit](#)

8. The areas covered by the agreement are devolved matters which were formerly EU competences (with the exception noted in the paragraph below in relation to the UK Internal Market Act 2020). **Annexe B** provides a non-exhaustive list of areas considered to be former EU competences.
9. The agreement also provides that the Scottish Government will provide information on the UK Internal Market Act 2020, in particular market access principle considerations and exclusions to the market access principles, in any primary legislation, Scottish secondary legislation and legislative consent memorandums where the UK Internal Market Act 2020 is a consideration. This includes for legislation in areas which are not former EU competences.
10. **Annexe C** provides a visual aide-mémoire of the agreement reached with the Scottish Government.
11. The remainder of this paper provides high level information on the Scottish Government's policy commitment to align with EU law where appropriate and the constitutional arrangements covered in the agreement. **Annexe D** provides a summary of this, by setting out what information the Scottish Government should provide, what can be expected from it and why having such information is important for scrutiny undertaken by subject committees.
12. Work is ongoing to reach agreement with the Scottish Government on the provision of information in relation to:
 - a. Statutory Instrument notifications as part of the Statutory Instrument Protocol 2 process and approach to UK Government powers in devolved areas
 - b. Review of the written agreement on intergovernmental relations
 - c. Scrutiny of the EU/UK Trade and Co-Operation Agreement;
 - d. Scrutiny of the use of the powers within the Retained EU Law (Revocation and Reform) Act 2023.
 - e. Constitutional arrangements in areas which were not former EU competences (e.g., a process on the provision of information relating to exclusions from the market access principles of the UK Internal Market Act 2020).

Given that Committees will still wish to understand the nature of these arrangements; their influence on policy and legislative development and how they affect stakeholders, **Annexe E** provides a table of the key issues, a note on their importance and some suggestions on how they may be scrutinised.

In addition to this guidance, and as directed by Convener's Group, a scrutiny toolkit has been developed to assist Committee teams across scrutiny group to support efficient, effective scrutiny of policy issues in the post EU context².

The Scottish Government's policy commitment to align with EU law where appropriate

²[Draft toolkit](#)

13. There is no longer a requirement to continue to comply with EU law. Scottish Ministers have indicated that, where appropriate, they would nevertheless like to see Scots Law continue to align with EU law.
14. 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 (the Continuity Act) confers a power on Scottish Ministers to allow them to make regulations with the effect of continuing to keep Scots law aligned with EU law in some areas of devolved policy. This is known as the “**keeping pace**” power. Scottish Ministers may also have existing powers in other Acts which would allow them to align Scots law with EU law. Primary legislation may also be used to introduce legislation with the purpose of keeping Scots law aligned with EU law.
15. The Continuity Act requires Scottish Ministers to lay reports annually (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.
16. The first Statement of Policy by the Scottish Ministers in exercise of the power in Section 1 of the UK Withdrawal from the EU (Continuity) (Scotland) Act 2021 states that:

“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.”³
17. To support scrutiny of the Scottish Government’s alignment commitment, the Constitution, Europe, External Affairs and Culture Committee has commissioned Dr Lisa Whitten to produce an EU law tracker which will also see two reports a year delivered to the Committee. The reports will include a number of case studies which set out instances of potential divergence and/or alignment between EU Law and Scots Law that have taken place during the reporting period⁴. The reports will be published and made available to the relevant subject committees.
18. The first tracker and report will be presented to the Committee and published in September 2023. **Annexe F** provides a breakdown of the information which can be expected from the EU law tracker as well as a note on how the information will aid scrutiny.

The UK Internal Market Act 2020

19. The Scottish Government has committed to provide information on the market access principles of the UK Internal Market Act 2020 (UKIMA) when the

³ [Statement of Policy by Scottish Ministers](#), May 2022

⁴ The tracker will not include all changes to domestic law that have been made by subordinate legislation (either at the Scottish Parliament or the UK Parliament) in areas not covered by the case studies.

Parliament is asked to consider relevant primary legislation, secondary legislation and legislative consent memorandums. In general terms, this is any legislation which affects goods, services and professional qualifications⁵.

20. The Act establishes two market access principles: mutual recognition and non-discrimination. The market access principles are intended to facilitate trade, the provision of services and recognition of professional qualifications across the UK.
21. All devolved policy areas are potentially impacted by the market access principles although some exemptions are provided in the Act. For example, neither of the market access principles currently applies to healthcare services, social services or transport services.
22. The principles do not introduce any new statutory limitations on the competence of the Scottish Parliament or Scottish Ministers. But in practice, regulatory competition may constrain the ability of the devolved authorities to exercise their executive and legislative competences. Specifically, UKIMA may not affect the Scottish Parliament's ability to pass a law but may have an impact on whether that law is effective in relation to goods and services which come from another part of the UK.

Exclusions process for the UK Internal Market Act 2020

23. The market access principles set out in UKIMA apply unless there is an exclusion provided for in the Act.
 - a. Exclusions for goods are listed in [Schedule 1 to the Act](#). Existing regulations (i.e., those in force on 30 December 2020) are excluded if they were already unique to one part of the UK⁶.
 - b. Exclusions for services are listed in [Schedule 2 of the Act](#). Existing regulations (i.e., those in force on 30th December 2020) are excluded from the market access principles for services.
24. Only UK Ministers have the power to create new exclusions/change the exclusions provided for in UKIMA.
25. As such, the UK Government and devolved administrations have agreed a process for considering exclusions to the market access principles of UKIMA.
26. The process requires that if a government wishes to seek an exclusion to the market access principles, it must set out the scope and rationale for this. The proposed exclusion is then considered by the appropriate common framework forum.

⁵ For example, the [Circular Economy \(Scotland\) Bill](#); the LCMs for the [Genetic technology \(Precision Breeding\) Act 2023](#) and [Professional qualifications Act 2023](#).

⁶ UK Internal Market Act 2020 section 4(2)(b) which applies to the mutual recognition principle for goods but not to the other market access principles.

27. If the exemption is agreed, it is for UK Ministers to introduce a draft instrument to the UK Parliament to give effect to the exclusion. The UK Parliament will then consider the draft instrument.
28. The Scottish Parliament will receive an SI notification under Statutory Instrument Protocol 2 (SIP2). This allows the Parliament to scrutinise the decision of Scottish Ministers to consent to the SI being made. However, the scope of the exclusion will already have been agreed between the four UK governments by the time the Scottish Parliament is notified under SIP2.
29. The Scottish Government has committed to provide information on whether an exclusion to the market access principles of UKIMA is thought necessary and if one has been discussed when the Parliament is asked to consider relevant primary legislation, Scottish secondary legislation and legislative consent memorandums. As above, this is any legislation which affects goods, services and professional qualifications⁷. Scottish Parliament and Scottish Government officials continue to work on the level of information to be provided and the timing of that information.

Common frameworks

30. Common frameworks are agreements between the governments of the UK (often all four governments, but this does not have to be the case). They set out how the governments will work together, to discuss and agree an approach to decisions about when they should have the same rules and when they may have different rules in specific policy areas. Frameworks are agreements about how decisions will be made, rather than about what policy decisions will be taken.
31. Each framework sets out the areas of law and policy where it will be used to make decisions. This is known as the 'scope' of a framework.
32. Frameworks were only intended to be used to make decisions in areas previously governed at an EU level (matters now governed by retained EU law or assimilated law after 31 December 2023). However, it's clear that some frameworks will be used to make decisions about policies and laws which were not previously governed at an EU level.
33. The Animal Health and Welfare Framework is an example of this type of framework where matters previously decided at an EU level, as well as those which were not, are within its scope.
34. It is less clear where other frameworks will be used to make decisions. For example, the Ozone-Depleting Substances and Fluorinated Greenhouse Gases Framework, lists specific laws and policy areas where the framework must be used to take decisions, but the groups established by frameworks can also be used as the forums for discussion on much wider issues.

⁷ See footnote 4

35. Given that frameworks are intergovernmental, information from the Scottish Government will be essential to understanding how common frameworks are operating, and how they influence the legislative and policy proposals put forward in framework areas or in areas which interact with frameworks. Scottish Parliament and Scottish Government officials continue to work on the level of information to be provided.

Annexe B

Areas of former EU competence

The Treaty establishing the European Community sets out the areas where the EU has either exclusive or shared competence. For the purposes of this guidance, the policy areas listed below can be considered to be areas of former EU competence.

Areas of Exclusive EU Competence

Article 3 of the Treaty establishing the European Community details the areas of Union exclusive competence as:

- customs union
- competition rules for the functioning of the internal market
- monetary policy, for the member states which have adopted the euro
- conservation of marine biological resources under the common
- fisheries policy
- common commercial policy

Areas of Shared Competence between the EU and Member States

Article 4(2) is on 'shared competence', where the Union and the member states are both able to act.

The main areas of shared competence are as follows:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

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Annexe C

Information to be provided by the Scottish Government to Committees to accompany legislation

The Scottish Parliament and the Scottish Government have reached agreement on the information which should be provided to the Scottish Parliament where legislative proposals are brought forward. This agreement relates principally to areas of former EU competence¹⁰ and where, therefore, there is a question over the impact of the proposal on the Scottish Government's policy commitment to align with EU law where appropriate. The agreement is reflected in the document on the 'EU Alignment Guidance to Committees'.

The table below is intended to aid understanding of what the agreement means in practice. As such, it indicates what information should be provided by the Scottish Government in the case of different legislative proposals in areas of former EU competence¹¹. For ease, it also shows where such information will not be provided. In the case of the UK Internal Market Act 2020 considerations, detail should be provided in every instance given that the market access provisions extend to many devolved policy areas, including those which were not a former EU competence.

What information is provided?	Primary legislation		Secondary legislation		UK primary legislation (which requires legislative consent)		Where will the information be?
	Bill in area of former EU competence	Bill not in area of former EU competence	SSI in area of former EU competence	SSI not in area of former EU competence	LCM in area of former EU competence	LCM not in area of former EU competence	
Detail on which EU legislation is relevant to the proposal and how the legislation will impact on the Scottish Government's commitment to align with EU law	✓	X	✓	X	✓	X	Bill – policy memorandum SSI – policy notes LCM – legislative consent memorandum
Detail on whether and how proposals would result in divergence from EU law	✓	X	✓	X	✓	X	Bill – policy memorandum SSI – policy notes LCM – legislative consent memorandum

¹⁰ In the case of the UK Internal Market Act 2020 considerations, detail should be provided in every instance given that the market access provisions extend to many devolved policy areas, including those which were not a former EU competence.

¹¹ At present the agreement between the Scottish Parliament and the Scottish Government on the provision of information does not extend to UK statutory instrument notifications but this may be expanded in the future and this table will be updated accordingly.

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Whether there are other obligations (e. g. international law) which act as constraints on alignment	✓	X	✓	X	✓	X	Bill – policy memorandum SSI – policy notes LCM – legislative consent memorandum
The impact of the proposal on access to EU markets for people, goods, and services	✓	X	✓	X	✓	X	Bill – policy memorandum SSI – policy notes LCM – legislative consent memorandum
If the UK Internal Market Act 2020 market access principles may impact on the policy objectives of the proposal	✓	✓	✓	✓	✓	✓	Bill – policy memorandum SSI – policy notes LCM – legislative consent memorandum
If an exclusion to the market access principles of the UK internal Market Act is thought necessary and if one has been discussed	✓	✓	✓	✓	✓	✓	Bill – policy memorandum SSI – policy notes LCM – legislative consent memorandum
If a common framework(s) may impact on the policy objectives of the proposal ¹²	✓	X	✓	X	✓	X	Bill – policy memorandum SSI – policy notes LCM – legislative consent memorandum
Whether the Trade and Co-Operation Agreement with the EU may impact on the	✓	X	✓	X	✓	X	Bill – policy memorandum SSI – policy notes

¹² There is ongoing work between the Scottish Parliament and Scottish Government on what information will be provided on common frameworks.

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policy objectives of the proposal							LCM – legislative consent memorandum
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Annexe D

The importance of the information Scottish Government will provide to subject committees for scrutiny

The information will be provided in the situations set out in Annexe C. This information will help subject committees to scrutinise the Scottish Government's commitment to align with EU law where appropriate and to scrutinise the impact of the new constitutional arrangements on policy development and legislation. The Scottish Government is working with its policy teams to embed the agreement to ensure that information appears in relevant Bill documents, SSI policy notes and LCMs.

Information provided by Scottish Government	Constitutional arrangement or policy commitment	Why is this information being provided?	How will it help scrutiny?
Detail on which EU legislation is	Policy commitment	To explain whether	Allows the Parliament to

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Information provided by Scottish Government	Constitutional arrangement or policy commitment	Why is this information being provided?	How will it help scrutiny?
relevant to the proposal and how the legislation will impact on the Scottish Government's commitment to align with EU law		legislative proposals will result in alignment or divergence with EU law, and which EU law is relevant.	view proposals through the lens of the Scottish Government's commitment to align with EU law where appropriate.
Detail on whether and how proposals would result in divergence from EU law	Policy commitment	To explain whether proposals will result in divergence with EU law, including passive divergence (i.e., where inaction results in Scots law being different from EU law).	Allows the Parliament to view proposals through the lens of the Scottish Government's commitment to align with EU law where appropriate.
Whether there are other obligations (e. g. international law) which act as constraints on alignment	Policy commitment	The Scottish Government may be under statutory obligations to follow a course of action, this could include implementing the terms of UK bilateral trade agreement. This may have an effect on whether the Scottish Government is able to pursue its policy of aligning Scots law with EU law where appropriate. This information should explain those	Allows the Parliament to understand any duties on Scottish Ministers which affect their ability to fulfil the policy commitment to align EU law with Scots law where appropriate.

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Information provided by Scottish Government	Constitutional arrangement or policy commitment	Why is this information being provided?	How will it help scrutiny?
		considerations and their impact on the development and shape of the proposal before the Parliament.	
The impact of the proposal on access to EU markets for people, goods, and services	Policy commitment	To trade with the EU, goods manufactured in Scotland and Scottish service providers operating in the EU must comply with EU law for example, in terms of product standards. This information should explain how Scottish Government decisions to align or diverge with EU law might place different requirements on Scottish manufacturers and service providers depending on whether they are trading within the UK or with the EU.	Allows the Parliament to understand how proposed legislation might affect the ability of manufacturers and service providers to trade with and in the EU.
If the UK Internal Market Act 2020 (UKIMA) market access principles may impact on the policy objectives of the proposal	Constitutional arrangement	The market access principles of UKIMA apply in almost all areas of devolved policy in relation to	The market access principles may have an impact on whether legislation passed by the Parliament is

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Information provided by Scottish Government	Constitutional arrangement or policy commitment	Why is this information being provided?	How will it help scrutiny?
		goods and services. This information should explain whether and how the market access principles in UKIMA have influenced the development and shape of the proposal before the Parliament. In particular, it should explain which market access principle(s) is/are relevant and why.	effective in relation to goods and services which come from another part of the UK. Is it crucial that committees are able to consider such factors during their scrutiny. As the deposit return scheme (DRS) has demonstrated, not considering fully the implications of UKIMA on Scottish legislation has real world impact.
If an exclusion to the market access principles of the UK internal Market Act 2020 is thought necessary and if one has been discussed	Constitutional arrangement	The market access principles of UKIMA apply in almost all areas of devolved policy in relation to goods and services but exclusions can be provided for. This information should explain whether the Scottish Government believes an exclusion to the market access principles is	In order for Scottish legislation to be fully effective in relation to goods and services which come from another part of the UK there may need to be an exclusion to the market access principles. Not having an exclusion where one is required for Scottish legislation to be fully effective can have significant

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Information provided by Scottish Government	Constitutional arrangement or policy commitment	Why is this information being provided?	How will it help scrutiny?
		necessary for the legislation to have full effect. The information should also explain whether the Scottish Government is seeking an exclusion to the market access principles and, if so, how advanced any discussions on the relevant exclusion are¹³.	effect as DRS has shown. It is important that committees are able to consider such factors during their scrutiny.
If a common framework(s) may impact on the policy objectives of the proposal	Constitutional arrangement	Common frameworks are agreements between the governments of the UK which set out how the governments will work together, to discuss and agree an approach to decisions about when they should have the same rules and when they may have different rules in specific policy areas (largely those which are devolved but used to be	The Parliament should have all of the relevant information around any proposal it is asked to consider. This includes transparent and clear information on inter-governmental agreements which may have influenced the thinking of Scottish Ministers.

¹³ Work is ongoing between the Scottish Parliament and the Scottish Government to agree a process for the provision of information to the Parliament on the UK Internal Market Act 2020 exclusions process.

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Information provided by Scottish Government	Constitutional arrangement or policy commitment	Why is this information being provided?	How will it help scrutiny?
		governed at EU level). Decisions taken in common frameworks may therefore influence legislative proposals which the Parliament is asked to consider. This information should explain whether a common framework(s) is/are operating in the policy area and, if so, whether and how that has influenced the proposal.	
Whether the Trade and Co-Operation Agreement with the EU may impact on the policy objectives of the proposal	Constitutional arrangement	The Trade and Cooperation Agreement governs the relationship between the EU and the UK. It covers trade arrangements along with measures for law enforcement and judicial cooperation in criminal matters. The Agreement is underpinned by a number of governance	The Scottish Parliament should know when it considers legislation whether any part of that legislation is required to implement an international agreement such as the Trade and Cooperation Agreement.

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Information provided by Scottish Government	Constitutional arrangement or policy commitment	Why is this information being provided?	How will it help scrutiny?
		measures including the creation of a Partnership Council and a number of Specialised Committees to oversee the operation of the Agreement. The Partnership Council can make binding decisions which could include amendments to the terms of the TCA, As the TCA includes provisions affecting areas of devolved competence such as fisheries, the environment and justice, any binding decisions taken by the Partnership Council may require Scottish Parliament legislation to ensure continued compliance with the TCA.	

Annexe E

Statutory Instrument Protocol 2 notifications and constitutional arrangements in areas not covered by the agreement with Scottish Government

Agreement has not yet been reached with the Scottish Government on the provision of information in relation to Statutory Instrument Protocol 2 notifications, and some constitutional arrangements (including where such arrangements operate in areas which are not former EU competences). The table below highlights some of the key issues subject committees may wish to consider as part of their scrutiny.

Key issue	Why is this important?	Why seek information?	Questions which a committee may wish to ask
Retained EU Law or 'assimilated law' (REUL/AL) after 31 December 2023	REUL/AL is domestic law originating from the UK's membership of the EU. It is a snapshot of the EU law which applied in the UK at the end of the transition period on 31 December 2020. REUL/AL may already have been amended since that date. The Retained EU Law	Understanding what is changing in REUL/AL is important for the following reasons: • Accountability of Scottish and UK Ministers for exercise of powers in devolved areas - the powers of both UK and Scottish Ministers are wide and enable legal changes to be made which would normally be enacted by Parliament through a Bill. • Comprehension of domestic statute	What power is being exercised? Which Ministers are exercising the power? Why is the legislation required? What is the effect of the legislation on the Scottish Government's policy commitment to align with EU law where appropriate?

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Key issue	Why is this important?	Why seek information?	Questions which a committee may wish to ask
	(Revocation and Reform) Act 2023 gives Scottish Ministers significant powers to change, revoke and replace REUL/AL by secondary legislation until 23 June 2026. The Act also confers powers on UK Ministers to act in devolved areas. Where UK Ministers exercise these powers there is not a consent requirement.	book in areas of former EU competence. • Insights into how decisions are being made at an intergovernmental level through frameworks for example on future of REUL/AL. • Understanding of how evolution of REUL/AL sits with the Scottish Government's policy of alignment with EU where appropriate.	Is the REUL/AL within a common framework area? If so what discussions have taken place in the framework? Will the proposal have UK Internal Market Act 2020 implications? If so, what are they? Have stakeholders been consulted on the change? What are their views?
Executive powers, particularly those for UK Ministers acting in devolved areas.	Bills often confer delegated powers on Ministers. The wider the powers, the greater the ability for Ministers to make significant updates or changes to the law by	Awareness of executive powers is important for the following reasons: • recognising where significant executive powers affect the balance of powers between legislature and executive • understanding the scrutiny challenge	For Bills/LCMs Is the Committee satisfied that these powers sit with the executive and not the legislature in the long term? Has the DPLRC raised any issues with

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Key issue	Why is this important?	Why seek information?	Questions which a committee may wish to ask
	secondary legislation. An increasing number of UK Bills since EU exit have granted UK Ministers delegated powers to act in devolved areas. Often, the same powers are granted to Scottish and UK Ministers concurrently. This means that either Scottish or UK Ministers can exercise the powers.	of UK Ministers acting in devolved areas • awareness of how the devolution settlement is working	the delegated powers? Are powers given to UK Ministers and/or Scottish Ministers in devolved areas? For SIP 2 notifications If a UK SI is being made - is the Committee satisfied that the power is exercised by UK Ministers? What is the rationale for a UK SI being made rather than an SSI?
Consent provision where UK Ministers wish to act in devolved areas	Where UK Bills give UK Ministers powers to act in devolved areas these are sometimes granted on the basis that UK Ministers must seek the consent of Scottish Ministers or must get the consent of Scottish Ministers. In	Important for the Parliament to: • recognise where powers are being granted to UK Ministers in devolved areas • understand whether there is a consent provision and the nature of it. • be aware of where Scottish Ministers are	For Bills/LCMs Is there a statutory consent provision where UK Ministers are given powers to act in devolved areas? If there is a statutory consent provision, what is the nature of it? E.g., must Scottish

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Key issue	Why is this important?	Why seek information?	Questions which a committee may wish to ask
	some UK Bills there is no consent requirement, meaning that UK Ministers can act in devolved areas without the consent of either the Scottish Ministers or the Scottish Parliament. In some cases, Statutory Instrument Protocol 2 may be engaged.¹⁴	recommending legislative consent is granted for a Bill which confers powers on UK Ministers to act in devolved areas. • monitor where UK Government Ministers are exercising powers in devolved areas with the consent of Scottish Ministers. Statutory Instrument Protocol 2 may be engaged.	Ministers consent or only be consulted? Has the DPLRC Committee raised any issue with consent? If there is no statutory consent provision has there been a political commitment on consent? If there is a consent mechanism or commitment, will Statutory Instrument Protocol 2 be engaged? <i>For SI notifications</i> Does the SI have implications for the Scottish Government's commitment to align with EU law where appropriate? Will the proposal have

¹⁴ [Statutory Instrument Protocol 2](#)

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Key issue	Why is this important?	Why seek information?	Questions which a committee may wish to ask
			UK Internal Market Act 2020 implications? If so, what are they? Is the SI in a common framework area? Have stakeholders been consulted on the change? What are their views?

Annexe F: EU law tracker

Although there is no longer a requirement for Scots law to be compatible with EU law, the Scottish Government has a policy commitment to align Scots law with EU law where appropriate. The [Continuity Act Policy Statement](#) May 2022 states:

“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

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Scotland, maintain Scotland's international reputation, and, by protecting the standards that Scotland enjoys, ease the process of Scotland's return to the EU."

The EU Law tracker has been designed to support the Parliament's scrutiny of the Scottish Government's policy commitment to align with EU law where appropriate. The tracker will be provided along with two reports each year (September and January). The first tracker and report are due to be published in September 2023. The tracker will chart how EU law has developed across a range of policy areas¹⁵. The reports will set out a series of case studies of instances of potential divergence and/or alignment between EU Law and Scots Law that have taken place during the reporting period¹⁶.

Information provided by tracker/report	What level of information will be provided?	Why is this information helpful?	How does the information support scrutiny?
Analysis of whether the law for EU member states (EU law ¹⁷) has changed in policy areas which are devolved to Scotland.	The tracker will provide a detailed breakdown of EU law in devolved areas. Specifically, the tracker will identify: • New EU legislation made during the reporting period • EU law no longer in force during the reporting period	The Scottish Government has agreed to provide information setting out how legislative proposals relate to its EU alignment commitment (see annexe A), but the Parliament will not receive information where EU law changes but there is no corresponding	The tracker provides transparency and will allow Parliamentary Committees, stakeholders including business and the public to track relevant developments in EU law. This information will assist in the scrutiny of the Scottish Government's policy commitment to align with EU law by providing details

¹⁵ Policy areas will include Environmental protection, animal health and welfare, plant health, equality, non-discrimination and human rights, social protection, food standards, chemicals, economy and trade, police and judicial cooperation, public health and transport.

¹⁶ The tracker will not chart domestic law. This means that if domestic law changes but EU law does not, this divergence will not be shown.

¹⁷ The tracker will show whether there have been changes to EU secondary law (which includes directives and regulations) and tertiary law (including delegated acts and implementing acts – both of which are legally binding on member states. EU tertiary law is similar to secondary legislation in the UK/Scotland.

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Information provided by tracker/report	What level of information will be provided?	Why is this information helpful?	How does the information support scrutiny?
	• Updates or changes to EU law during the reporting period	Scottish legislation. The tracker will set out all the EU legislative instruments that were fully or partially within devolved competence before the UK left the EU and show where changes have been made since the UK left the EU	of all changes to EU legislation that have taken place during the reporting period.
Policy case studies which will demonstrate changes in EU law during the reporting period.	The report accompanying the tracker will include a number of policy case studies which will: • Provide an overview and narrative on areas of EU law which have evolved during the reporting period • Give analysis on the relevant EU policy and how it has evolved during the	The policy case studies will provide committees with specific examples in a number of policy areas to demonstrate how EU law has changed during the reporting period The analysis may indicate where alignment has occurred because Scots law has reflected the changes in EU law. The case studies may	The policy case studies will support scrutiny of the Scottish Government's policy commitment to EU alignment by considering specific policy areas in detail. The case studies will provide tangible examples of how EU law has changed during the reporting period and whether similar changes have or have not been made to Scots law. The case studies will therefore give an indication of whether EU law

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Information provided by tracker/report	What level of information will be provided?	Why is this information helpful?	How does the information support scrutiny?
	reporting period • Provide a high-level overview of whether Scots law in the policy area has changed during the reporting period • Provide an indication of whether changes in EU and/or Scots law has led to alignment or divergence	also highlight where passive divergence has occurred (i.e., where Scots law and EU law are different (not aligned) because EU law has changed or is no longer in force and Scots law has not changed/remains in force.	and Scots law are aligned in specific policy areas. Where there may have been divergence the case studies will explain how this has occurred.
Analysis of the European Commission's Work Programme	The report will include a list of the relevant proposals in the European Commission Work Programme covered by the Scottish Government's alignment commitment.	Whilst the tracker and the case studies are retrospective, the analysis of the Commission Work Programme will provide details of planned changes to EU legislation which will take place over the following 12-18 months.	This information will support scrutiny of the Scottish Government's policy commitment to EU alignment by providing a forward look on what changes are likely to occur in particular policy areas over the next year at the EU level. Information about proposed EU legislation will allow Committees to discuss the Scottish

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Information provided by tracker/report	What level of information will be provided?	Why is this information helpful?	How does the information support scrutiny?
			Government's future plans for alignment and to understand how EU policy areas may evolve in the future.
Summary of use by Scottish Ministers of UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 power to 'keep pace' and Scottish primary legislation ¹⁸	The report will include information on how the Scottish Government has used the "keeping pace" power during the reporting period. Section 1(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 confers a power on Scottish Ministers to make secondary legislation with the aim of aligning with EU law –the "keeping pace power". The report will also provide a list of Scottish primary legislation made during the reporting period and highlight which legislation is within areas of	This information will provide committees with an overview of the use of the 'keeping pace power' and a list of Scottish primary legislation which is relevant to the Scottish Government's alignment commitment (i.e., primary legislation used to align Scots law with EU law or primary legislation made at the Scottish Parliament which results in divergence between Scots law and EU law)¹⁹.	This information will support scrutiny of the Scottish Government's policy commitment to EU alignment by demonstrating: • where Scottish Ministers have used the power in section 1(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 • where primary legislation has been passed which affects the Scottish

¹⁸ Scottish Ministers may also use powers contained in other Acts to make subordinate legislation to align Scots law with EU law. Detail should be provided in the Scottish Government's annual report on alignment with EU law. As such, the tracker will not detail this subordinate legislation unless it forms part of one of the policy case studies provided in the report.

¹⁹ The information to be provided by the Scottish Government to accompany legislation (see Annexe A) should include an assessment of whether it will lead to alignment or divergence with EU law.

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Information provided by tracker/report	What level of information will be provided?	Why is this information helpful?	How does the information support scrutiny?
	previous EU competence.		Government's policy commitment to alignment with EU law where appropriate.
Summary of UK primary legislation in devolved areas of former EU competence ²⁰ .	The report will include information on any UK primary legislation made during the reporting period which may affect the Scottish Government's commitment to align with EU law (i.e., primary legislation made at the UK Parliament in devolved areas which are also areas of former EU competence). UK primary legislation which relates to devolved policy areas and is in areas of previous EU competence is likely to have one of two effects: • It may deliver on the Scottish Government's alignment commitment	This information will provide committees with an overview of UK primary legislation which relates to devolved policy areas, and which sits in areas of former EU competence. This information will support committees in understanding where the Scottish Government's alignment commitment is delivered by UK wide legislation (made at the UK Parliament) and where such legislation means the alignment policy is undeliverable.	This information will support scrutiny of the Scottish Government's policy commitment to alignment with EU law by: • highlighting where UK wide legislation affects the Scottish Ministers' decision on alignment • where alignment cannot be pursued as a result of UK wide legislation.

²⁰ UK Ministers may also use powers contained in primary legislation to make subordinate legislation in areas of former EU competence. The tracker will not detail this subordinate legislation (other than under the keeping pace power) unless it forms part of one of the policy case studies provided in the report.

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Information provided by tracker/report	What level of information will be provided?	Why is this information helpful?	How does the information support scrutiny?
	• It may lead to Scots and UK law diverging from the EU thereby preventing delivery of the alignment.		