

Briefing on legislative developments in the EU and resulting questions

Introduction

1. Section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 gives Scottish Ministers the power to make provision *inter alia* 'corresponding to an EU regulation, EU tertiary legislation¹ or an EU decision' and 'to implement an EU directive'.
2. This power came into force on 1 January 2021 and covers all EU legal acts that 'have effect in EU law after IP completion day', i.e. 31 December 2020.
3. The wording in section 1 could be considered ambiguous: it clearly captures all legal acts that came into force from 1 January 2021 onwards. But does it also include legal acts that came into force before that date, but were never transposed into Scots law during the UK's EU membership or during the transition period that followed? This would notably be the case where EU directives are concerned: these need to be transposed into domestic law by the EU member states during a transposition period, which commences with the entry into force of the directive and typically lasts between several months and two years though it can be shorter or longer.
4. A plain reading of section 1 suggests that it includes all measures that according to EU law are in effect from 1 January 2021 onwards, no matter whether they first came into effect before that date. This would mean that e.g. a directive that entered into force in the course of 2020 and needs to be transposed by the end of 2021 would be covered by the section 1 power. Hence the next section of this briefing addresses both EU directives in force on 1 January 2021, but not yet transposed and legal developments in the EU since 1 January 2021.
5. According to the draft report by the Scottish Ministers required by s. 10 of the Continuity Act, the Scottish Ministers have not used the s. 1 power, have no current intention to use it, nor have they considered using it during the reporting period.
6. The Continuity Act does not place the Scottish Ministers under an obligation to explain their reasoning not to make use of the s. 1 power where this would have been possible. The Act also does not require the Scottish Ministers to disclose whether alternative means of 'keeping pace' – such as the introduction of primary legislation, the use of other legislative bases to adopt secondary legislation, or non-legislative means of keeping pace – have been used. Finally, the Act does

¹ Regrettably, the terminology used in the Continuity Act 2021 – which mirrors that in the EU (Withdrawal) Act 2018 – and the terminology under EU law are not entirely identical. Notably, the term 'EU tertiary legislation' found in the Continuity Act translates into 'delegated acts' and 'implementing acts' in EU diction.

not expressly require the Scottish Ministers to explain how they are monitoring potentially relevant EU law developments.²

Overview of legislative activity at EU level

a. EU legislation in effect on 1 January 2021

7. During the transition period (from 31 January 2020 until 31 December 2020), the UK was still under an obligation to comply with EU law. Consequently, EU regulations and other directly applicable EU law automatically became applicable in the UK (incl. Scotland) and remained in force as 'retained EU law' under the EU (Withdrawal) Act 2018 (so far as instruments have not yet been repealed).
8. The matter is different for EU directives, however. Directives require transposition into domestic law to have effect. Directives therefore go through two stages: a) adoption at EU level; and b) transposition at domestic level, typically several months or years later (depending on the duration of the transposition period).
9. On 1 January 2021 there were thus a number of EU directives in force, which had not yet been transposed into Scots law because their transposition period had not yet expired. With the end of the UK's EU membership the duty to transpose these directives also ended, i.e. the UK or Scotland are no longer under an obligation to transpose.
10. As explained above, the section 1 power captures this situation and thus gives the Scottish Ministers the power to 'keep pace' with EU directives adopted (and in force) before 1 January 2021 if they had not yet been transposed into Scots law.
11. In its policy memorandum on the Continuity Bill,³ the Scottish Government outlines potential examples of how the power could be used and mentions three prospective directives in particular.
 - The recast EU Drinking Water Directive,⁴ which was adopted in December 2020.⁵ The transposition period for this directive will end on 12 January 2023.

² NB that in their draft policy statement, the Scottish Ministers have stated: "In seeking to give effect to the purpose of the power under section 1(1) of the Act, that is maintaining and advancing standards in a range of policy areas, the Scottish Government will gather information to support, assess and consider the case for the regulations proposed. This will include, but not be limited to, close monitoring of activity in the EU institutions".

³ <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/uk-withdrawal-from-the-european-union-continuity-scotland-bill-2020/introduced/policy-memorandum-uk-withdrawal-from-the-european-union-continuity-scotland-bill.pdf>.

⁴ Ibid at para. 40.

⁵ Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast) [2020] OJ L 435/1.

- The Digital Content Directive⁶ adopted as part of a legislative package together with Directive 2019/771 on sale of goods.⁷ Both have been in force since June 2019 and had to be transposed by 1 July 2021 with measures having to be applied from 1 January 2022.
- A directive on restructuring and insolvency, in force since July 2019 with staggered transposition periods ending on 17 July 2021, 17 July 2024, and 17 July 2026 respectively.⁸

12. The Committee might want to enquire whether these directives were considered for a use of the section 1 power and why a decision not to use it was made, in particular given that the policy memorandum hails these directives as examples for a use of the 'keeping pace' power.

13. There are further EU directives whose subject matter overlapped with devolved matters, which were in force on 1 January 2021 with the transposition period still running:

- A directive on the reduction of the impact of certain plastic products on the environment;⁹
- A directive on port reception facilities for the delivery of waste from ships.¹⁰

b. EU legislative activity since January 2021

14. Since January 2021 there has been considerable legislative activity in the EU, mostly at a technical level. According to the European Union's legal database EUR-Lex, as of 2 November 2021 the EU institutions had adopted a total of 1,650 legal acts.¹¹ This includes both new acts as well as acts amending existing EU legislation.

15. In terms of subject matter, EU competence and devolved competence only partially overlap. The main areas of EU legislative activity in 2021 of relevance to this briefing were the environment and climate change as well as animal and human health as well as food safety.

⁶ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

⁷ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

⁸ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18.

⁹ Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L 155/1.

¹⁰ Directive (EU) 2019/883 of the European Parliament and of the Council of 17 April 2019 on port reception facilities for the delivery of waste from ships, amending Directive 2010/65/EU and repealing Directive 2000/59/EC [2019] OJ L 151/116.

¹¹ <https://eur-lex.europa.eu/statistics/2021/legislative-acts-statistics.html> (accessed 2 November 2021).

16. Notably where EU Commission implementing regulations and implementing decisions were concerned (which would qualify as 'EU tertiary legislation' under the Continuity Act, see footnote 1), a large number of these related to two policy areas which are *prima facie* within devolved competence: 'health and food safety' and 'agriculture and regional development'.¹²
17. The most important relevant piece of ordinary EU legislation passed during the reporting period was the so-called 'European Climate Law', an EU Regulation adopted by the EU Council and European Parliament.¹³ It establishes a framework for achieving climate neutrality and is a key legislative measure to implement the 'European Green Deal', which aims to achieve climate neutrality by 2050. The 'European Climate Law' sets a binding target for achieving this and sets a more ambitious target for 2030 compared to what was in place before to reduce greenhouse gas emissions by 55% compared with 1990 levels.
18. The Scottish Ministers apparently did not see a need to use their s. 1 power to keep pace with this development in EU law. This may be because the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 contains a stricter target to achieve carbon neutrality in 2045. However, only a closer analysis of both pieces of legislation would reveal whether Scotland could have benefited from 'keeping pace' with this major piece of EU legislation.
19. Additionally, the European Commission adopted a number of delegated regulations (equivalent to secondary legislation in the UK) in devolved areas, notably the fields of food safety and animal health. These concern *inter alia* hygiene requirements for food of animal origin, requirements for pesticides in infant and follow-on formula as well as food additives to infant and follow-on formula, the labelling and naming of spirits, etc.¹⁴ Again, only closer analysis of

¹² Out of a total of 456 implementing regulations passed in 2021 so far, 176 were concerned with health and food safety and 116 with agriculture and rural development; and out of a total of 258 implementing decisions, 118 were concerned with health and food safety.

¹³ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L 243/1.

¹⁴ Commission Delegated Regulation (EU) 2021/1374 of 12 April 2021 amending Annex III to Regulation (EC) No 853/2004 of the European Parliament and of the Council on specific hygiene requirements for food of animal origin [2021] OJ L 297/1; Commission Delegated Regulation (EU) 2021/1140 of 5 May 2021 amending Delegated Regulation (EU) 2020/687 supplementing Regulation (EU) 2016/429 of the European Parliament and of the Council, as regards rules for the prevention and control of certain listed diseases [2021] OJ L 247/50; Commission Delegated Regulation (EU) 2021/1040 of 16 April 2021 amending Delegated Regulation (EU) 2016/128 as regards the requirements on pesticides in food for special medical purposes developed to satisfy the nutritional requirements of infants and young children [2021] OJ L 225/1; Commission Delegated Regulation (EU) 2021/1041 of 16 April 2021 amending Delegated Regulation (EU) 2016/127 as regards the requirements on pesticides in infant formula and follow-on formula [2021] OJ L 225/4; Commission Delegated Regulation (EU) 2021/807 of 10 March 2021 amending Regulation (EU) No 528/2012 of the European Parliament and of the Council to include potassium sorbate as an active substance in Annex I thereto [2021] OJ L 180/81; Commission Delegated Regulation (EU) 2021/806 of 10 March 2021 amending Regulation (EU) No 528/2012 of the European Parliament and of the Council to include carbon dioxide generated from propane, butane or a mixture of both by combustion as an active substance in Annex I thereto [2021] OJ L 180/78;

this policy field could reveal any potential benefit (or drawback) of using the s. 1 power in relation to these legislative developments.

Possible areas of further scrutiny

20. The preceding analysis suggests that there has been ample legislative activity at EU level in areas that are devolved. There are numerous pieces of EU legislation in relation to which the section 1 power could potentially have been used, but ostensibly was not.
21. The draft report and draft policy statement confirm the potential weaknesses in the scrutiny arrangements in s. 10 of the Continuity Act identified above. Notably where a decision not to use the power in s. 1 of the Act is made, there is a lack of transparency over the reasons why the power was not used in each individual case.
22. Also in light of the Scottish Government's commitment to agree with the Parliament 'an appropriate and proportionate decision-making framework for future alignment with EU law',¹⁵ the Committee might want to explore further how decisions not to keep pace are made, particularly:
 - How do the Scottish Ministers monitor developments at EU level?
 - Does the Scottish Government keep an internal legislative development-tracker?
 - If so, why is this not shared with the Scottish Parliament?
 - If not, might it make sense to ask the Scottish Government to track these developments given
 - a) that the Scottish Government is the only public body realistically capable of doing this;
 - b) that in the absence of systematic tracking, the overall purpose of the Continuity Act (maintaining and advancing standards, see s. 2) might be undermined?
 - Is each and every EU legislative development subjected to a test as to whether it might qualify for the use of the section 1 power?

Commission Delegated Regulation (EU) 2021/716 of 9 February 2021 amending Annex II to Regulation (EU) 2018/848 of the European Parliament and of the Council as regards organic production rules on sprouted seeds and chicory heads, on feed for certain aquaculture animals and on aquaculture parasite treatments [2021] OJ L 151/5; Commission Delegated Regulation (EU) 2021/571 of 20 January 2021 amending the Annex to Regulation (EU) No 609/2013 of the European Parliament and of the Council as regards the list of substances that may be added to infant and follow-on formula, baby food and processed cereal-based food [2021] OJ L 120/1; Commission Delegated Regulation (EU) 2021/1096 of 21 April 2021 amending Regulation (EU) 2019/787 of the European Parliament and of the Council as regards labelling provisions for blends [2021] OJ L 238/1; Commission Delegated Regulation (EU) 2021/1334 of 27 May 2021 amending Regulation (EU) 2019/787 of the European Parliament and of the Council as regards allusions to legal names of spirit drinks or geographical indications for spirit drinks in the description, presentation and labelling of other spirit drinks [2021] OJ L 289/1; Commission Delegated Regulation (EU) 2021/1335 of 27 May 2021 amending Regulation (EU) 2019/787 of the European Parliament and of the Council as regards the labelling of spirit drinks resulting from the combination of a spirit drink with one or more foodstuffs [2021] OJ L 289/4.

¹⁵ Quoted in SPICE Briefing SB21-75, p. 8.

- Have there been any instances where the section 1 power was not used, but another method of 'keeping pace' was employed (e.g. adoption of primary legislation or use of a different power to make secondary legislation?)
- What were the main reasons for not using the section 1 power where this would have been possible? Are entire policy areas not considered, e.g. because keeping pace might not be effectively possible due to the constraints of the UK Internal Market Act?

23. The draft policy statement further states that "*use of the power may be considered within the upcoming reporting period as necessary*". The draft policy statement does not, however, elaborate on the criteria for considering the use of the power 'necessary'.

24. In light of the Scottish Ministers' obligation under s. 6 (1) Continuity Act to 'publish in such manner as they consider appropriate, a statement of their policy (a) on the approach to be taken [and] b) the factors to be taken into account', the Committee might want to query:

- Why does the draft policy statement not elaborate on the precise criteria for assessing the necessity of considering the use of the power during the upcoming reporting period?
- What are the criteria for considering the use of the power 'necessary'?
- What is the justification for restricting the use of the power to 'necessary' cases only given the broad discretion enjoyed by the Scottish Ministers according to section 1 of the Continuity Act?

Dr Christopher McCorkindale

Draft Policy Statement and Draft Annual Report: Constitutional Issues

There are at least four constitutional issues that arise from the draft annual report and policy statement, to which the committee might give further consideration.

1. Between the “default” position, to align with EU law in devolved areas, and the stated preference to do so via specific domestic powers or primary legislation, is a significant transparency and accountability gap that invites further clarification. That is, whether non-use of the keeping pace power during the reporting period, and the absence (currently) of any intended use of the power during the upcoming reporting period, signals a decision (or a series of decisions in specific devolved policy areas) not to align with EU law (and, in which case, what explains the departure from the default position), whether there has been a decision to align with EU law (or a series of decisions to align in specific areas) using specific domestic powers or primary legislation (and if so, via which legislative vehicles, chosen on what principled bases) or whether there have been no (and are currently no foreseen) developments in EU law that engage the question of domestic alignment. The draft policy statement might therefore do more than it does in the bullet-pointed list of factors to be taken into account (at p 3) to explain the approach taken, the factors taken into account (both practical and principled) and the process to be followed when deciding whether or not to align with EU law, and if so whether or not to make use of keeping pace power. Whilst the Scottish Ministers are not required to report on instances where a decision is taken not to align with EU law or where alignment has been achieved via other means, a greater level of detail in the policy statement about how these decisions are reached will assist the Scottish Parliament and the Committee to examine the extent, and the use (or non-use), of the keeping pace power in context.
2. The draft policy statement *does* contemplate (hypothetical) recourse to the keeping pace power where there is no available, or appropriate, specific domestic power and where alignment via primary legislation would be constrained by a lack of available legislative time (p 2). In such circumstances, we are told, recourse to the keeping pace power would be in keeping with recourse, pre-EU withdrawal, to the regulation-making power in section 2(2) of the European Communities Act 1972 (ECA) (p 2). However, there are two important contextual differences between section 2(2) of the ECA and section 1(1) of the Continuity Act. First, alignment with EU law was previously a legal *requirement* on the part of the Scottish Ministers, and so recourse to section 2(2) ECA carried its own justification. This is no longer the case. Alignment is now a policy *choice* on the part of the Scottish Ministers, which requires more by way of justification. Second, and following from this,

whereas section 2(2) of the ECA conferred a broad discretion upon Scottish Ministers to implement EU obligations in devolved areas, these were obligations into which the UK, by virtue of its membership of the EU, was able to input directly at the policy development and drafting stages. By contrast, recourse to the keeping pace power affords a broad discretion to the Scottish Ministers to implement, among other things, entirely new policy objectives at the EU level and into which neither the UK nor Scotland have had direct input (most obviously through the implementation of directives (Continuity Act section 1(a)(iii))). As such, the draft policy statement might usefully distinguish between uses of the keeping pace power that are of a technical nature and uses of the power that make more fundamental changes at the level of policy. This should include how that distinction between technical and policy measures might be drawn and what are the implications for parliamentary input and scrutiny, in particular where the keeping pace power engages questions of policy that are subject to no direct input at the development and drafting stages and that are subject to relatively weak procedural safeguards at the implementation stage.

3. According to the draft policy statement, when making a decision whether *or not* to align with EU law (for example, because alignment might run contrary to the intended domestic policy outcome or because of additional constraints, such as the operation of the UK internal market) ministers will have “due regard” to the purposes set out in section 2(1) of the Continuity Act (p 3). A statutory duty to have “due regard” to the purposes or possible effects of legislation is an onerous one. More than a mere “general” regard, judicial authority in the context of the public sector equality duty (PSED) (the so-called *Brown* and *Bracking* principles) tells us that:

1. The purposes referred to are integral to the statutory scheme;
2. The decision maker must be aware of the “due regard” duty;
3. The duty must be exercised before, and at the time that, the policy is executed;
4. The duty must be exercised in substance, with rigour and with an open mind;
5. Having “due regard” means taking a “conscious” approach to the relevant purposes;
6. The duty is non-delegable;
7. The duty is continuing;
8. It will be good practice to keep records demonstrating consideration of the duty – warts and all.¹⁶

¹⁶ *R (Brown v Secretary of State for Work and Pensions* [2008] EWHC 3158; *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. This approach was met with approval by the Supreme Court in *Hotak v London Borough*

The draft policy statement might therefore be more clear in setting out both the Scottish Ministers' "proper and conscientious"¹⁷ approach (to be taken) to the "due regard" duty and also the approach (to be) taken by the Scottish Government with regard to the keeping of records that relate to the exercise of that duty. This will be particularly helpful where, having had "due regard" to the purposes set out in section 2(1), a decision is taken not to align with EU law.

4. There are at least three important aspects of the decision-making context that have still to take to shape. One such aspect relates to parliamentary *input*. During the passage of the Continuity Bill the Cabinet Secretary committed to "working with the Parliament to agree an appropriate and proportionate decision-making framework" that would "provide for an appropriate level of consultation at the earliest stages of policy development".¹⁸ Given the scope of the keeping pace power to implement new policy decisions made at the EU level, into which the UK and Scotland has had no direct input, there are good reasons of constitutional principle (transparency, democratic legitimacy and responsiveness, accountability) why the establishment of a robust framework, focused on early policy engagement with the Scottish Parliament, should be a priority during the current reporting period. The second and third such aspects relate to parliamentary *scrutiny*. On the one hand, the draft policy statement could do more to outline the process by which the Scottish Government tracks developments in EU law and, in so doing, selects those areas in which alignment is appropriate. On the other hand, the continuing and private nature of inter-governmental negotiations about Common Frameworks, and about how those Common Frameworks will interact with market access principles contained in the Internal Market Act 2020 and with the terms of existing or future UK trade agreements, obscures the true extent of the freedom Scottish Ministers will in fact have to align with EU law where there UK diverges from EU law and regulatory standards. Any policy statement made under the Continuity Act should therefore be reviewed and revised urgently as and when both the formal processes for tracking and sifting EU law and the interactions between the keeping pace power, Common Frameworks, the Internal Market Act and current or future UK trade agreements become clear.

of Southwark [2015] UKSC 30. See generally, C Harlow and R Rawlings, *Law and Administration* (4th) (2022) p 789.

¹⁷ *Hotek* at para 75.

¹⁸ Scottish Parliament Finance and Constitution Committee. (2020, November 25). Official Report 30th Meeting 2020, Session 5, available at <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=12968>.

Annexe C

Professor Michael Keating

The Keeping Pace Power/ Dynamic Alignment

1. There are two distinct rationales for maintaining dynamic alignment with EU law and regulations:
 - a. To keep Scotland, as far as possible, within the *acquis communautaire*, with a view to facilitating EU entry as an independent state, or perhaps some other arrangement bringing Scotland closer to the EU Internal Market.
 - b. Because the Scottish Government prefers the EU approach to a given policy issue.
2. The Scottish Government Statement of Policy suggests that its approach is the former; alignment with the EU will be the default option. So the task could be a large one, requiring tracking of EU law in all devolved fields. It could also mean Scotland become a policy-taker, given the lack of Scottish input to EU law.
3. Alignment of regulations may not ensure uniformity if they are applied differently. EU law is subject to interpretation by the Court of Justice of the European Union (CJEU), whose rulings will not apply in Scotland. Interpretations by the CJEU and Scottish courts might therefore vary.
4. The exercise of the keeping pace power will be affected by how much divergence there is between the UK and the EU. The closer the UK cleaves to European norms, the less problem there will be for Scotland in maintaining alignment.
5. The Trade and Cooperation Agreement (TCA) does not require the UK to maintain regulatory alignment with the EU but there are incentives to do so. There is a non-regression provision so that, if UK regulations are lowered, the EU is permitted to suspend part of the agreement or take retaliatory action. There is also provision for revising the Agreement should either side fail to keep up with new regulatory standards.
6. At one time, Brexit was promoted on the ground that the UK could deregulate widely and this threat was used in the Brexit negotiations. The current UK Government has abandoned the radical deregulatory approach but we do not know the extent to which the UK does intend to diverge from EU standards.
7. It may seek 'equivalence' decisions from the EU in order to retain access for its products; this appears to be its preferred approach in financial services. This would allow it to remain close to EU norms while preserving the formalities of sovereignty. Equivalence is widely used in the Swiss agreements with the EU but there is likely to be less scope for this within the TCA, partly because the EU is not satisfied with the Swiss arrangement.
8. Free trade agreements with third countries may also have regulatory implications, most likely in the form of relaxed regulations in agriculture and food safety. At one time, it was feared that this might lead to the UK Government superseding devolved regulations in order to guarantee access to the whole UK market. Fears have already been expressed about the effects of the Australia and New Zealand trade agreements. There are various mechanisms allowing the UK Government to over-ride devolved regulations, including powers under the EU Withdrawal Act (not used so far), primary

legislation, or requiring devolved ministers to put legislation before their legislatures. These are unlikely to be used now that devolved regulations can be circumvented through the UK Internal Market Act.

9. The UK Internal Market Act does not affect the competence of the Scottish Parliament to align with EU law. It does, however, introduce the principles of non-discrimination and mutual recognition. These means that goods eligible to be sold in any part of the United Kingdom can be marketed in any other part, even if they do not meet the regulatory requirements of that part. It is not clear how the Internal Market Act will work out, as much of it depends on litigation by individuals.
10. The ability of Scotland to diverge from UK-wide regulations in order to align with Europe is also directly affected by the Frameworks programme. There is now provision for adding areas covered by frameworks to the list of exemptions to the Internal Market Act. Frameworks will govern the extent of common regulations and the agreed scope for divergence (so potentially allowing Scotland to follow EU regulations). This is another area of uncertainty as there is no common format for frameworks and they have taken more or less constraining forms. No frameworks have been imposed so far and, if they are all to be subject to unanimous agreement by the UK and the devolved governments, their scope may be limited by a Scottish decision to align with Europe. The Scottish Government may thus be faced, in individual sectors, with the decision of whether to align with the EU or with the rest of the UK.
11. The approach taken in the development of frameworks has been to keep the main discussions at the technical level, depoliticising the process and so facilitating agreement on details. This echoes the way the EU deals with associated countries. It may, in the long run, be the way the TCA works out, although so far some issues arising from that, including fisheries and the Irish Protocol, have had a high political profile. Similarly, issues in the framework agreements within the UK could become politicised. As long as they remain at the technical level, there is a better prospect of agreement but at the cost of consistency, clarity, transparency and accountability.
12. The outcome of all this will affect the extent to which Scotland can remain aligned with EU standards, especially in view of the UK Internal Market Act. The resulting complexities could create uncertainty for businesses. It will also create difficulties for the Scottish Parliament in keeping track of developments across these arenas.

Professor Katy Hayward

Protocol on Ireland/Northern Ireland and the particular experience of dynamic alignment Northern Ireland

1. This briefing comes in light of the particular experience in Northern Ireland, which has been put in the position of compelled continuity with a portion of the *acquis communautaire* by the Protocol on Ireland/Northern Ireland ratified through the Withdrawal Agreement Act, 2020.
 - a. It is worth outlining first what this means in practice in order to be able to advise on what the Committee might want to be aware of with respect to the Continuity Act.
 - b. There are three major concerns for Northern Ireland in relation to dynamic alignment that are of pertinence to the keeping pace ambition: monitoring, scrutiny, impact assessment, and managing divergence.
 - c. I include questions the Committee might wish to ask the Scottish Government, given that the answers are not clear from the Policy Memorandum or Policy Statement

2. What is meant by 'keeping pace'?
 - a. Article 13(3) of the Protocol states 'unless otherwise provided, where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced.' This is known as 'dynamic alignment'.
 - b. Northern Ireland is dynamically aligned to EU law in relation to Individual Rights, Trade in Goods, VAT and Excise, the Single Electricity Market, and State Aid. The vast majority of these are in relation to trade in goods.
 - c. The portion of the EU *acquis* that applies to NI is listed in the Annexes to the Protocol in the form of EU directives, decisions and regulations.
 - d. Question: **what portion of the EU *acquis* will be kept pace with?**
 - e. The aspiration to keep pace with EU laws in the field of food safety and environmental protection, for example, will be particularly technical and have considerable knock-on consequences for the Scottish economy (see below).

3. What dynamic alignment means in practice
 - a. In the case of the Protocol, dynamic alignment means that if the EU acts are repealed, replaced or expire, then NI legislation needs to reflect this. The Continuity Act, therefore, is a highly significant piece of legislation that effectively means a continued dynamism that is particularly difficult to scrutinise and manage outwith membership of the EU institutions.
 - b. At the time the Withdrawal Agreement was signed, 338 acts were listed. This was increased to 344 (8 additions, 2 deletions) by the Joint Committee in December 2020. Such additions/exclusions can only come with the agreement of its co-chairs.

- c. By July 2021, the EU acts Northern Ireland is to remain aligned with stood at 313. This was due to the expiry of a few (e.g. restrictions on goods from Chernobyl) and the repeal of around 50 acts, mostly in the area of animal health.
 - d. Many of these were replaced in the form of more broad pieces of legislation, such as the EU act (Regulation (EU) 2017/625) known as the 'Official Controls Regulation'.
 - e. Question: **is it just new EU acts that the Scottish government wishes to keep pace with, or amendments, updates, replacements to existing EU legislation?**
4. The complicating factor of implementing legislation
- a. Because EU directives, regulations and decisions do not always provide detail for the procedures, processes or requirements that may be necessary for implementation, such details are instead set out in EU implementing legislation.
 - b. There can be around a thousand such pieces of legislation issued per year. These are highly technical. Northern Ireland needs to be aware of this legislation in order to be able to discern what applies to it post-Brexit.
 - c. Determining which measures apply to Northern Ireland, and which do not, is an enormously complex and time-consuming task. The Joint Consultative Working Group on the Protocol (JCWG) has been established under the Protocol for this purpose, namely to notify the UK government as to what measures could be relevant to Northern Ireland under the Protocol. This can entail notice of up to 50 measures per week.
 - d. Outwith the JCWG, there is no comprehensive and or publicly-accessible register of this implementing legislation.
 - e. **How will the Scottish Government keep abreast of the relevant implementing legislation for those EU acts it chooses to align with?**
5. The greatest concern for Northern Ireland under the Protocol in the longer term when it comes to trade in goods in particular is the question of how divergence will be managed.
- a. Most of the acquis that Northern Ireland has to align with falls under the category of trade in goods (some 260 acts).
 - b. EU legislation in this area is very technical and is intended to facilitate movement of goods within the EU. The flipside of this is that it adds new barriers to the entry of goods that do not meet these criteria.
 - c. Northern Ireland is experiencing this at the moment for goods coming from GB to NI. As Westminster legislation for England and as UK FTAs allows goods that diverge from EU rules (e.g. in hormone treatment, GMOs, Maximum Residue Levels in human or animal feed), there will be new barriers to the movement of goods into NI.

- d. This will not be the case for Scotland given the controversial UK Internal Market Act. However, there will be a reverse consequence – one that is similar to those faced by NI businesses seeking to continue to export goods into GB.
 - e. This is particularly true for the agri-food sector (farming and food processing), which is very highly regulated. There is a grave concern that they will be priced out of the GB market if they have to follow higher EU standards (e.g. restrictions on fertiliser use) at the same time as the GB market is increasingly filled with products that are cheaper to produce because they are free from such restrictions.
 - f. This will be an issue that will grow in significance over time for Scottish producers.
 - g. Question: **will impact assessments be done on such legislation that is likely to have an effect on food quality and the price of food?**
6. The Continuity Act obviously takes a long view in terms of the purpose of the Act, but it should be made clear that the more its closest market diverges from the EU, the more difficulty there will be for Scotland.
- a. A lot of the impact of continuity with EU rules whilst Scotland's largest market remains that of GB will be felt down the line in terms of technical details.
 - b. For example, one of the most difficult and consequence-filled aspects of trade in goods is the matter of labelling. The EU's rules on labelling are very strict. Requiring specific labels for goods for the Scottish market compared to those for England and Wales will mean increase in costs (in some cases up to 30%) and also disruption for some wholesale brand name products that are made elsewhere in GB and distributed across it.
 - c. Similarly, if the EU increases the standards for the production of organic products, e.g. in eggs, and Scotland chooses to align, those products may well be priced out of the GB market at the same time as not enjoying free movement into the EU.
 - d. **What are the criteria for the decision to align with EU rules, and how will an assessment of the longer term consequences for Scotland's trade with its nearest market play into this?**
7. Another problem comes in relation to the difficulty arising from the fact that Scotland is not an EU member-state at the moment.
- a. The decision to align with EU laws without having been able to shape them or and without being able to make a case for particular consideration when it comes to their implementation will bring practical difficulties.
 - b. For example, even under the Protocol, and with the Withdrawal Agreement institutions in place, there are gaps with respect to information that NI needs from the EU directly that can have direct implications for the application of EU law here.

- c. Take, for example, the common framework on Fluorinated Greenhouse Gases and Ozone-depleting Substances (evidence to NI Committee on Agriculture, Environment and Rural Affairs, 26 Nov 2020): “Northern Ireland's regulators no longer have any direct access to the EU's systems that offer the information about quota and how much it has. It would be very important for Northern Ireland regulators to have access to that, because they cannot carry out proper inspections without knowing what quota particular companies hold.”
 - d. The ‘democratic deficit’ question is one that may well be increasingly asked as a consequence of the Continuity Act. This may come both with respect to the lack of Scottish involvement in shaping or making the EU legislation to begin with, and with regards to the use of secondary legislation to implement it in Scotland.
8. In summary, I would read the Policy Statement from the Scottish Government as being inadequate in five regards.
- a. The first is the persistent ambiguity as to whether it wishes to keep pace with all EU law, or just a portion, and whether this will include replaced and amended laws, and the necessary implementing legislation. There is a lack of specificity about the grounds on which such a decision will be made.
 - b. Related to this is the lack of clarity about when it would be appropriate to use primary legislation or secondary legislation and, in the case of the latter, the affirmative procedure and the negative procedure.
 - c. The third concern is the lack of appreciation for the difficulty of monitoring the legislation evolution from the EU.
 - d. The fourth is the lack of consideration for the practical consequences of alignment for Scottish producers (specifically those exporting to England and Wales) given the context of intended divergence from EU laws in areas that are highly regulated and subject to detailed legislation in the EU, specifically food safety, and plant and animal health.
 - e. The fifth concern is about the democratic deficit, which is not just a problem in terms of principle but also in practice, given the difficulties in direct communication between Scotland and the relevant EU institutions (including agencies, regulating authorities, committees, etc.)