

Laid before the Scottish Parliament by the Scottish Ministers in accordance with section 7(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

10 May 2022
SG/2022/88

STATEMENT OF POLICY BY THE SCOTTISH MINISTERS IN EXERCISE OF THE POWER IN SECTION 1 OF THE UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

Introduction

In accordance with section 6 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“the Act”), the Scottish Ministers make the following statement explaining their approach, the factors to be taken into account and the process to be followed when considering use of the regulation making power under section 1 of the Act.

This policy statement is laid before the Scottish Parliament for approval under section 7(1). In preparing this policy statement, the Scottish Ministers have had regard to any representations made to them, within the time period set out in section 7(3)(b), about the draft statement (SG/2021/292) which was laid on 29 October 2021. The Scottish Ministers also lay, in compliance with section 7(4), a document describing how they have had regard to these representations.

Background

The UK’s decision to leave the European Union has not changed the EU’s importance to Scotland nor our commitment to it.

For nearly 50 years Scotland was a fully integrated part of the EU; woven into the European economy and benefitting from the high standards of the EU’s social and regulatory protections. Through our membership of the European Single market and Customs Union, Scotland embraced EU membership and in turn contributed to the EU’s success.

The Scottish Government’s European Strategy, *The European Union’s Strategic Agenda for 2020-24: Scotland’s Perspective* published in 2020 and *Steadfastly European: Scotland’s past, present and future*, published in 2021, reaffirmed Scotland’s commitment to work in partnership with the EU to realise our shared values and address global challenges.

Consistent with this commitment, 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 Scotland, maintain Scotland’s international reputation, and, by protecting the standards that Scotland enjoys, ease the process of Scotland’s return to the EU.

Statement of Policy

Approach

Maintaining alignment with EU law and the high standards that Scotland has enjoyed as part of the EU is a priority of the Scottish Ministers. This will be achieved in a range of different ways, legislative and non-legislative. The Scottish Ministers will make use of whichever means is most appropriate for the circumstances of each case. One such means is the power provided in section 1 of the Act which confers on the Scottish Ministers' ability to make subordinate legislation where appropriate in order to keep devolved Scots law aligned with EU law as it develops.

There will however be many instances where the best way to maintain alignment will be by means of primary rather than secondary legislation or indeed by non-legislative means such as a statement of policy or guidance.

Moreover, where secondary legislation is appropriate, it may be possible in some cases to align with EU law using specific domestic powers that cover the subject matter of the EU legislation. Where this is the case, although it is still legally possible to use section 1(1) of the Act to align, the approach will be in line with that previously taken to the use of section 2(2) of the European Communities Act 1972 to implement EU law. Specific domestic powers should be preferred, unless there is good reason for not using these powers.

Where the power in section 1 of the Act will have its place is in circumstances in which secondary legislation is the most appropriate vehicle for maintaining alignment and specific powers are not available, or not appropriate, to give effect to the policy intention of the measure proposed. This recognises that primary legislation will not be appropriate in all cases and alignment could be constrained by the overall limit of legislative time available to the Parliament to align with EU law which would previously have been achieved by using the powers in section 2(2) of the European Communities Act 1972. The power therefore provides essential flexibility so that the most appropriate legislative vehicle can be used depending on specific circumstances.

Factors to be taken into account

Scottish Ministers' default position, for the reasons set out above, will be to align with EU law. There will however be occasions, such as technical provisions only relevant to EU member states, where such alignment would not assist the intended outcome. There will also be occasions where the UK Internal Market Act and the constraints it places on devolved powers raises significant challenges in respect of achieving the desired policy effect.

In coming to a view, Ministers will take account of the full range of interests, whether economic, social, environmental or other. This will be informed by the Business and Regulatory Impact Assessment process, which is being updated to reflect the changed constitutional landscape as a consequence of the UK's departure from the European Union. This will consider the commitment to align, the UK Internal Market Act, as well

as provisions of the UK Trade and Cooperation Agreement (TCA) with the EU and existing international obligations, including those with the World Trade Organisation.

Ministers will also give due regard to the purpose referred to in section 2(1) of the Act, i.e. to contribute towards maintaining and advancing standards in, but not limited to, environmental protection, animal health and welfare, plant health, equality, non-discrimination and human rights, and social protection.

In summary, considerations that Ministers will take into account when considering the use of the power include the following:

1. Legislation

- That specific domestic powers could not achieve the desired outcome or that there is a good reason for not using these powers;
- That primary legislation would not be more appropriate;
- The financial implications, benefits and risks of the proposed legislation.

2. Purpose

- That due regard has been given to the purpose referred to in section 2(1) of the Act - that the regulations contribute towards maintaining and advancing standards in, but not limited to, environmental protection, animal health and welfare, plant health, equality, non-discrimination and human rights, and social protection and;
- that regulations will not breach the limitations on the use of the power proscribed at section 3;

3. Existing Legislative Obligations

- The effect (if any) of the provision on retained EU law;
- equality legislation being the Equality Act 2006, the Equality Act 2010 or any subordinate legislation made under either of those Acts;
- Convention rights within the meaning of section 1 of the Human Rights Act 1998, and other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom;
- employment and health and safety and matters relating to consumer protection and;
- That due regard has been given to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.

4. Consultation

- 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. This approach will be applied in full here. In considering use of the power in section 1(1) of the Act, the

Scottish Government will pro-actively engage with relevant stakeholders. This would include local government as well as relevant organisations, fora or groups, and Ministers remain committed to an ongoing dialogue with parliament on its international and policy priorities. Ministers will ensure that representations are considered as part of the decision making process, along with a range of other available information and evidence.

- This consultation supports, and is integral to, the Business and Regulatory Impact Assessment process. Consultation will also be informed by consideration of the European Commission's annual work programme which details the EU's legislative priorities for the coming year, the six-monthly presidency country's programme and ongoing monitoring of key areas of the EU's business by relevant policy directorates and Scotland House Brussels.
- Ministers will also publish in relevant policy notes and consultation exercises information on how legislation relates to the commitment to align with the EU.

Process

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.

This will take into account, in addition to the factors to be considered detailed above, the Scottish Government's [purpose, achievement of the national outcomes detailed in the national performance framework](#), and the Scottish Government's approach to outcomes based policy making.

Irrespective of Brexit, the Scottish Government continues to engage proactively in the EU and internationally across relevant policy areas, to understand how domestic policy relates to the European and wider international context.

Policy areas work closely with, and are supported by, officials within the Scottish Government's External Affairs, Legal and Brussels directorates. This assists the Scottish Government to understand and influence EU policies that affect Scotland's citizens, organisations and the economy, and maintain and advance the standards Scotland enjoys as a result of the UK's previous membership.

Review

Ministers will keep this statement of policy under review and may publish a revised policy statement from time to time if in their view this is considered necessary and appropriate in maintaining the effective use of the power in section 1(1) of the Act.

Where the Scottish Ministers make a statement under section 9(9) of the Act, they will as soon as reasonably practicable review the policy statement, and either revise and publish the revised policy statement, or lay before the Scottish Parliament a

document explaining why, in their opinion, it is not necessary to revise the policy statement.

Conclusion

The UK's decision to leave has not changed Scotland's commitment to work in partnership with the EU to realise our shared values and work together to address global challenges. Scotland will therefore seek to align with the EU where appropriate and in a manner that seeks to contribute towards maintaining and advancing standards across a range of policy areas. Doing so will also ease the process of Scotland's return to the EU.

This policy statement explains that the Scottish Government will use a range of means to deliver that alignment and sets out the approach it will take in exercising the power in section 1 of the Act.

SCOTTISH MINISTERS