



The Scottish Parliament  
Pàrlamaid na h-Alba

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14 March 2024

Dear Angus,

### **Second EU Law Tracker Report**

The CEEAC Committee considered the [second report](#) from Dr Lisa Whitten of the [EU Law Tracker](#) at our meeting last week. The Committee agreed to write to you to highlight the key issues raised in Dr Whitten's report and to seek a response. The report has also been shared with relevant subject committees.

### **Reporting**

Since the first report of the EU Law Tracker, as you will be aware, the Scottish Government and Scottish Parliament reached an agreement on the level of information to be provided when introducing legislation which either impacts on the policy commitment to align with EU law or is affected by certain specified constitutional arrangements. In relation to EU alignment, relevant Policy Memorandums, Policy Notes, or LCMs should include details of which EU legislation is relevant to the legislative proposals and, where relevant, how the legislation will impact on the Scottish Government's commitment to align with EU law, and details of whether and how proposals would result in divergence from EU law.

Additionally, Ministers agreed to provide additional annual reporting from October 2023 to sit alongside the existing Continuity Act reporting process to provide information including how alignment has been considered in respect of legislation made in the Scottish Parliament over the reporting year; an assessment of EU legislation made over the reporting year that may be relevant to the commitment to align; and where Scotland's policy priorities in respect of the EU lie in the coming year.

In our [response of 27 November 2023](#) to the most recent Annual Report, the Committee welcomed the significantly extended levels of reporting on the policy to align, though proposed suggestions for improvements to reporting moving forward.

The second report of the EU Law Tracker incorporates analysis of all relevant information published by the Scottish Government on its alignment policy, including that provided according to the new approach which has been fully implemented since September 2023.

The report acknowledges that “the Scottish Government’s new approach to reporting on the implementation of its alignment policy is a very welcome development and one that bolsters transparency and aids legislative clarity”. Dr Whitten also highlights, however, that “in some instances the articulation of the Scottish Government position in relation actual or potential alignment with specific EU instruments or proposals is vague and leaves room for ambiguity”.

#### Information provided in the Continuity Act Annual Report

The report highlights that “the new reporting approach of the Scottish Government provides greater insight into the position taken as regards specific EU instruments as well as EU proposals for new acts”.

However, Dr Whitten also notes that the information provided in the Annual Report on the Continuity Act, in some cases, “lacks clarity and/or specificity particularly as regards the criteria and associated procedures for determining whether or not EU instruments/proposals that are currently ‘under consideration’ by the Scottish Government may or may not end up being those with which Scotland opts to remain aligned”.

The Committee therefore seeks further clarification with regards to the criteria and associated processes for determining whether or not to align with EU instruments/proposals which are ‘under consideration’.

Dr Whitten’s report also highlights that there is a “noticeable variation” in terminology regarding the Scottish Government’s position on different EU instruments. Some, for example, are deemed ‘under active consideration’ while for others it is stated that the ‘proposal under development, subject to future consideration’. The Committee seeks clarification on the difference in activity or analysis between these two categories.

The report further highlights that the Scottish Government has taken a position on alignment in relation to the EU proposal for a revision of the blood, tissues, and cells legislation, however, that this proposal is “at a similar stage to other still-draft EU instruments for which the Scottish Government position is stated in more ambiguous terms (e.g., ‘proposal is under development, subject to future consideration’).” The

Committee would welcome clarification of the decision-making process in relation to determining the Scottish Government position on alignment.

### Information provided alongside legislative proposals

With regards to the information provided on alignment alongside legislative proposals, the report highlights that, of the 73 relevant SSIs made during the reporting period, the accompanying policy notes for 19 SSIs did not contain information on the keeping pace policy. Dr Whitten outlines that, most of these 19 SSIs are “unambiguously unrelated” to the alignment policy, but that for some, the situation is “less clear”.

Moreover, there are a small number of examples where a Policy Note does contain a statement regarding EU alignment consideration in which the Scottish Government proposes the instrument to be ‘not relevant’ but where a case could nonetheless be made that the given instrument makes provisions which (directly or indirectly) are related to or impact upon the degree of alignment between Scottish law and EU law.

The Plant Health (Fees) (Forestry) (Scotland) (Amendment) Regulations (SSI 2023/377) is provided as an example of an SSI for which the policy note states its provisions are ‘not relevant’ to the alignment policy but for which a case could be made regarding its relevance. Dr Whitten notes that “whether or not, therefore, this SSI does or does not relate to the EU alignment commitment depends somewhat on what threshold is being used to determine relevance or lack thereof”.

The Committee therefore seeks further information on the Scottish Government threshold for determining the relevance of any given legislative provision to the alignment policy.

### **Monitoring**

The Committee has maintained an interest in the process by which the Scottish Government monitors developments in EU law within scope of the alignment commitment, including the scope of this monitoring.

Annexe C of the Continuity Act Annual Report provides a non-exhaustive list of EU legislation potentially within devolved competence or having a devolved impact which was in progress at the start of “formalised monitoring” in July 2023. Dr Whitten said that this annexe “can usefully be considered as a snapshot of the Scottish Government’s analysis of the situation at the time of the publication of that Annual Report”.

Annexe D also sets out the Scottish Government’s high-level commentary on the European Commission Work Programme and notes that the Scottish Government “will

continue monitoring the Commission’s proposals as they develop further and consider alignment where possible and meaningful”.

In recent evidence to the Committee, the Agricultural Industries Confederation reported that “there has been no formal policy or mechanism established by the UK Government to monitor or track the emerging and increasing divergence” between the EU and UK and as a result “trade bodies and businesses have been left to undertake this work themselves”. NFU Scotland agreed that the “monitoring of divergence is absolutely critical”.

The Committee asks what discussions the Scottish Government has had with trade bodies and businesses about how the Scottish Government monitors developments in EU law, divergence between the UK and EU law, and divergence between Scotland and the rest of the UK in areas previously within EU competence. In particular, what discussions it has had regarding the extent to which this information can be made publicly available so that businesses, the public and other stakeholders are cognisant of the regulatory environment within Scotland compared to both the EU and the rest of the UK.

#### Impact of changes in tertiary EU law and primary UK/Scotland acts on the alignment commitment

The Committee communicated our view in our [letter of 24 November 2022](#) that there needs to be much more clarity with regards to the interaction of the commitment to align with the *acquis* especially with regards to tertiary EU implementing legislation. Your [response of 28 June 2022](#) noted that “all EU legislation (tertiary or otherwise) has potential relevance to the commitment to align and is considered in the same way as regulations and directives for relevance to Scotland.”

In our [letter of 14 September 2023](#), the Committee invited you to reflect on the findings of Dr Whitten’s first report in the Continuity Act Annual Report, including on the possible impact of changes in tertiary EU law and primary UK Acts highlighted in the report on the alignment commitment.

Dr Whitten in her second report suggests that the CEEAC Committee may again wish to invite Scottish Government Ministers to respond to the possible impacts of the changes in tertiary EU law—reflected in consolidated text versions of relevant instruments—and in primary UK Acts on the alignment commitment.

The Committee asks whether the Scottish Government routinely carries out an analysis of the consolidated text versions of relevant instruments to assess the extent of any divergence with EU law arising from tertiary legislation and whether this information can be made publicly available through the annual reporting exercise. Likewise, whether a similar analysis is carried out in relation to primary UK Acts.

## Programme for Government

Lastly, the Committee seeks clarification on whether the Scottish Government has carried out any analysis on the likely impact of the EU's legislative programme on the Scottish Government's legislative programme within the context of the alignment commitment.

Yours sincerely,

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

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