

Local Government, Housing and Planning Committee

12th Meeting, 2021 (Session 6)

European Union (Continuity)(Scotland) Act 2021: Draft Policy Statement and Draft Annual Report

Background

1. Following the UK's departure from the EU there is no longer a requirement to continue to comply with EU law. However, Scottish Ministers have indicated that, where appropriate, they would like to see Scots Law continue to align with EU law.
2. Part 1 (section 1(1)) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 confers a power on Scottish Ministers to allow them to make regulations (secondary legislation) with the effect of continuing to keep Scots law aligned with EU law in some areas of devolved policy (the "keeping pace" power).
3. The Act requires Scottish Ministers to lay reports (first in draft form for consultation and then a final version) before Parliament on the intended and actual use of the power. There are two forms of reporting to Parliament, a Policy Statement and an Annual Report.
4. The [draft policy statement](#) and [draft annual report](#) were laid in the Scottish Parliament on 29th October and are attached at Annexe A.
5. The Act allows the Parliament 28 days to scrutinise both the draft documents and after the final versions are laid, a further 28 days.
6. The Constitution, Europe, External Affairs and Culture Committee has considered the documents and took evidence from the Cabinet Secretary for Constitution, External Affairs and Culture on the 18 November 2021.
7. The documents have also been circulated by the Constitution, Europe, External Affairs and Culture (CEEAC) Committee to subject committees on the basis that they may also wish to submit views to the Scottish Government. This was previewed in the CEEAC Committee [correspondence](#) to the Committee in September highlighting subject committees may wish to undertake scrutiny of how keeping pace powers were used within their subject areas, including consideration of the draft policy

statement and annual report. Should the Committee wish to, it can submit its views on both documents by Thursday 26th November.

8. SPICe have published a briefing on the Scottish Government's policy commitment to align with [EU law: Alignment with EU law and the Continuity Act](#) and a blog: [Scrutinising the Scottish Government's commitment to EU alignment – SPICe Spotlight](#).

9. COSLA sent a [written submission](#) to the Constitution, Europe, External Affairs and Culture Committee.

For Decision

10. The Committee is invited to consider whether it wishes to write to the Scottish Government on the draft policy statement and the draft annual report.

11. The Committee may wish to consider the following in writing to the Scottish Government:

- What monitoring of EU law and policy has been carried out by the Scottish Government in the areas covered by the Committee?
- In the policy areas covered by the Committee, whether, during the period of the report (since the UK left the EU), there have been occasions when the Scottish Government considered EU law and decided not to exercise the powers to align or keep pace with EU law.
- During the reporting period, did the Scottish Government ensure continued alignment with EU law in policy areas covered by the Committee using other legislative vehicles?

Clerks/SPICe
Local Government, Housing and Planning Committee

Annexe A

DRAFT 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 draft 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 statement is laid in the Scottish Parliament in draft in accordance with section 7 (3) for a period of 28 days, during which time the Scottish Ministers will have regard to any representations made to them regarding it.

In laying a copy of the final policy statement before the Scottish Parliament for approval under section 7(1), the Scottish Ministers will also lay, in compliance with section 7(4), a document describing how they have had regard to any representations made about this draft statement in accordance with section 7(3)(b) in preparing the final statement.

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 has been 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 has 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 the paper *Steadfastly European: Scotland’s past, present and future* earlier this year 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. Scottish Ministers will make use of whichever means is most appropriate for the circumstances of each case. The power provided in section 1 of the Act aims to maintain the Scottish Ministers' ability to make subordinate legislation where appropriate in order to keep devolved Scots law aligned with EU law as it develops.

It is the intention however that this commitment is implemented primarily through the existing policy development process. There will also be instances where Primary legislation is more appropriate than secondary legislation to maintain alignment. Where secondary legislation is appropriate, in some cases, it may be possible 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 policy is in line with the approach 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.

The power in section 1 of the Act is intended for 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 acts as a backstop, providing 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, or where the constraints under which Scottish Ministers currently operate, in particular as a result of the working of the UK Internal Market Act, mean that they judge that to align in full at this time would not serve Scotland's wider interests.

In coming to that view, Ministers will take account of the full range of interests, whether economic, social, environmental or other. They 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.

1. Legislation

- That specific domestic powers could not achieve the desired outcome or there is a good reason for not using these powers;
- 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.
- 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. In considering use of the Continuity Act power, the Scottish Government will pro-actively engage with relevant stakeholders and local Government, and ensure that representations are considered as part of the decision making process, along with a range of other available information and evidence.

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 International Framework](#), its [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 in international exchanges and learning opportunities 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 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 sets out that the Scottish Government will consider a range of factors to ensure that use of the power to maintain alignment with the EU where appropriate is both effective and efficient.

SCOTTISH MINISTERS
29 October 2021

DRAFT REPORT BY THE SCOTTISH MINISTERS IN EXERCISE OF THE POWER IN SECTION 1(1) OF THE UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021 FOR THE REPORTING PERIOD 29 MARCH 2021 – 31 AUGUST 2021 AND THE INTENDED FUTURE USE OF THE POWER UNDER SECTION 1(1) IN THE UPCOMING REPORTING PERIOD

Introduction

1. In accordance with section 11(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“The Act”), the Scottish Ministers lay the following draft report detailing use of the power under section 1(1) of the Act during the initial reporting period following commencement on 29 March 2021 and 31 August 2021 (“the current reporting period”) and how Ministers intend to use the power in the upcoming reporting period.
2. The report is laid in draft for a period of 28 days during which time the Scottish Ministers will have regard to any representations made to them regarding how they intend to use the power under section 1(1) in the upcoming reporting period.
3. In laying a copy of the final report before the Scottish Parliament under section 10(1), the Scottish Ministers will also lay, in compliance with section 11(5), a document setting out a summary of any representations about the draft report made during the consultation period, and how they have had regard to those representations in preparing the report.
4. This draft report contains details of the matters required under section 10(1):
 - how the power under section 1(1) has been used during the reporting period,
 - how that use of the power under section 1(1) contributes or has contributed towards maintaining and advancing standards,
 - how Ministers intend to use the power under section 1(1) in the upcoming reporting period,
 - how their intended use of the power will contribute towards maintaining and advancing standards, and
 - any use of the power under section 1(1) that has been considered by the Scottish Ministers during the reporting period.

Policy Statement

5. The Scottish Government’s policy statement on use of the power under section 1(1) of the Act sets out the process and factors to be taken into account in considering its use.
6. This aims to provide flexibility by acknowledging that primary legislation may not necessarily be appropriate in maintaining and advancing EU standards in every situation, and that in some cases the factors to be considered may determine that use of the regulation making power is the appropriate method by which to achieve alignment with EU law and ensure the maintenance and advancement of standards.

Draft Report

7. How the power under section 1(1) has been used during the reporting period:

The power has not been used over the reporting period.

8. How that use of the power under section 1(1) contributes or has contributed towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e) of the Act:

Not applicable as the power has not been used over the reporting period.

9. How the Scottish Ministers intend to use the power under section 1(1) in the upcoming reporting period:

Ministers have no current plans to use the power under section 1(1) of the Act, however use of the power may be considered within the upcoming reporting period as necessary.

10. How that will contribute towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e) of the Act:

Not applicable as Ministers have no current plans to use the power during the upcoming reporting period.

11. Any use of the power under section 1(1) that has been considered by the Scottish Ministers during the reporting period:

Ministers have not considered use of the power during the reporting period.

Next Reporting Period

12. Under section 10(2) of the Act the next report will be made following 31 August 2022, detailing the use and considered use of the Act during the next reporting period and any planned use in the subsequent reporting period.

SCOTTISH MINISTERS

29 October 2021