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1<sup>st</sup> May 2024

Dear Clare,

Thank you for your letter of 14 March referring to the Scottish Parliament's EU Law Tracker published 08 March 2024. I am pleased to note that the report confirms 'overall there has not been a significant divergence between Scots Law and EU Law in areas that are in scope of the alignment commitment'. The report makes a valuable contribution to our shared commitment to transparency as the Scottish Government continues to manage the impact of Brexit and protect the high standards Scotland shares with the EU.

Scottish Government Continuity Act annual report: terminology

The Committee sought clarification regarding the reporting criteria used by the Scottish Government in its annual report on the Continuity Act and associated documents. We use the term 'under consideration' where we are actively deliberating our course of action with regard to alignment, have sufficient information for this decision, but have not yet reached a conclusion. The term 'future consideration' is used where we are not yet in a position to complete the decision-making process due to a lack of information from an emerging legislative or policy proposal.

The Committee also requested clarification on the variation of terminology used when noting the Scottish Government's position on EU instruments. As above, we employ the term 'under active consideration' where there is a defined proposal from the EU with sufficient information for officials and Scottish Ministers to undertake their alignment assessment. We use the term 'under development, subject to future consideration' where we require more information before any further assessment or decision-making can be taken. In the interests of clarity, I am happy to explore standardisation of the terminology used in forthcoming annual reports and ask our respective officials to consider this as part of their ongoing work.

### Scottish Government Continuity Act annual report: process

The Committee sought further clarification of the decision-making process in determining the Scottish Government position on alignment. The committee noted an alignment position had been taken in relation to the EU proposal for a revision of the blood, tissues, and cells legislation, even though this proposal is “at a similar stage to other still-draft EU instruments for which the Scottish Government position had not yet been confirmed”.

In some instances, Scottish Ministers consider they have sufficient information to take a decision. For example, in the case of EU proposals for a revision of the blood, tissues and cells legislation, it was deemed sufficient to understand that the development of different rules in the UK and the EU would make it far more difficult to engage in mutual aid or cross border cooperation between the relevant health services.

The Committee requested further information on the Scottish Government threshold in determining the relevance of changes in tertiary EU law and primary UK / Scotland Acts in respect of the alignment policy. Except for specific commencement orders, SSIs are now required to be accompanied by a policy note that considers the alignment policy. This has been required since September 2023. However, there have been instances where this new process has not been adhered to resulting in the alignment consideration not being recorded. We have since taken additional measures to ensure that accompanying documents are prepared for all relevant legislation and include consideration of the alignment commitment.

As detailed in my letter to the committee dated 26 October 2023, this is determined by considering:

- If proposed legislation is within devolved competence;
- If proposed legislation relates to the alignment policy’s purpose of maintaining and advancing high standards;
- If making provision would have a meaningful effect in Scotland now it is outside of the EU in terms of maintaining and advancing those standards.

Regarding the provisions of the cited example, The Plant Health (Fees) (Forestry) (Scotland) (Amendment) Regulations (SSI 2023/377), this legislation concerns bespoke domestic charging measures for plant health activities and is not relevant to the Scottish Government’s policy to maintain alignment with the EU.

### Engagement with trade bodies and businesses

I understand that the Committee has an interest in how businesses across Scotland can keep track of developing EU legislation in order to continue selling into that market. Clearly regulatory compliance post-Brexit has become more challenging for businesses and their representative trade bodies. The Committee asked 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.

The Scottish Government’s statutory statement of policy on the use of the Continuity Act sets out our approach to maintain and advance the high standards we share with the EU and protect against deregulation. The Scottish Government’s guide to policy making requires that engagement with relevant stakeholders is an integral part of the policy development process. This is particularly relevant in matters of regulation. Specific discussions take place in relation to the development of legislation and are reflected in the relevant Business

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and Regulatory Impact Assessment (BRIA) published alongside it. Where changes are undertaken to the regulatory environment in Scotland, legislation and its accompanying supporting documents, including the BRIA and a number of additional relevant impact assessments, are available publicly. Further, the expanded annual report provides a detailed summary of the changes to the regulatory environment within Scotland compared to both the EU and rest of the UK. The work we undertake to monitor and report on legislative developments by the EU is unlikely to be of sufficient detail or direct relevance for targeted business interests.

#### Monitoring passive divergence

I am cognisant that as EU legislative proposals evolve across a range of policy areas post-Brexit there is potential for divergence by default if Scotland does not continue to actively pursue the same policy objectives as the EU in areas of devolved competence.

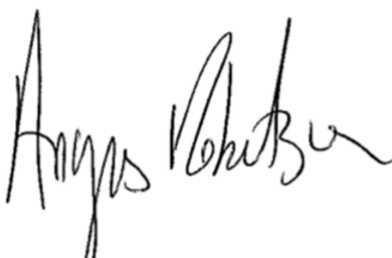
The Committee asked whether the Scottish Government routinely carries out an analysis of the consolidated text versions of relevant instruments to assess the extent of any divergence with EU law arising from tertiary legislation and whether this information can be made publicly available through the annual reporting exercise.

EU law and UK legislation is assessed by Scottish Government policy officials and their legal advisers at various points in the respective legislative development process, in particular at the point the legislation becomes EU or UK law. This includes a proportionate assessment of relevant tertiary legislation which may have a devolved impact. Each assessment is specific to the instrument in question in determining if Scotland is able to make provision to preserve the high standards shared with the EU.

Where there is potential for divergence, the approach is considered by individual policy portfolios in a proportionate manner to its potential impact. Such considerations are part of the normal policy development process. Where tertiary legislation may have a significant impact on devolved interests and potentially alignment with the EU, the conclusions of assessments form part of the formal monitoring arrangements detailed within relevant documents in support of legislation or LCMs proposed to the Scottish Parliament. Annex D of the Scottish Government's annual report of the Continuity Act sets out our analysis of the EU's legislative programme and how it relates to our priorities as set out in the Programme for Government.

I hope you find this response helpful and look forward to further productive engagement between the Scottish Government and the Committee.

Yours sincerely



**ANGUS ROBERTSON**

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