

UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

EXPLANATORY NOTES

OVERVIEW AND BACKGROUND

Part 1 – Alignment With Eu Law

Sections 8 to 11 – Explanatory statements for, and reporting on, regulations under section 1(1)

56. Sections 8 and 9 require all instruments made, or laid in draft, under section 1(1) to be accompanied by written explanatory statements, setting out certain matters relating to the making of the instrument:
- An explanation of the instrument and why Scottish Ministers consider there are good reasons for making it, for example to ensure the highest possible food safety standards are maintained, the pre-IP completion day law which is relevant to it, and its effect on retained EU law;
 - An explanation of the effect (if any) which the instrument has on Convention rights and other international human rights;
 - Whether it modifies any provision of equality legislation and if so, what its effect is;
 - That the Scottish Ministers have had regard to their duties under equality legislation;
 - The instrument's effect on rights and duties relating to employment and health and safety, and matters relating to consumer protection (in so far as it would be within devolved competence for an instrument to have an effect on those matters);
 - Whether Scottish Ministers have consulted with local authorities, and others, and if so, the details of that consultation;
 - The likely financial implications of the provision (except where the regulations are subject to negative procedure).
 - An explanation of why, in the Scottish Ministers' opinion, there are good reasons for laying the instrument or draft at that time, or, as the case may be, for using the power in that way, if the instrument or draft:
 - is laid before a policy statement is published under section 6(1);
 - is laid during the period between a revised policy statement being laid for approval and it being published; or
 - contains provision that involves using the power under section 1(1) in a way that is not in accordance with the policy statement published under section 6.

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57. Section 8(4) requires the Scottish Ministers, if they fail to make such a statement, to set out the reasons why.
58. Section 8(5) requires the Scottish Ministers to arrange for the publication of these statements.
59. **Section 8(6)** provides that the Scottish Ministers do not have to comply separately with the requirement to make an explanatory statement if they have previously done so for an equivalent instrument (for example, where a draft has been withdrawn and re-laid with minor modifications).
60. Paragraph 16 of schedule 8 of the EUWA imposes a similar requirement for certain statements to be made (on or after IP completion day) in relation to Scottish statutory instruments (SSIs) which amend or revoke subordinate legislation made under section 2(2) of the ECA. The requirement applies to SSIs or draft instruments to be laid before the Scottish Parliament and it applies whether the SSI is made under powers conferred before, on or after IP completion day but it does not apply to powers under the EUWA itself. The duty falls on the Scottish Ministers or other authority making the instrument. In the event that the Scottish Ministers are required to make an explanatory statement under both section 9 of this Act and under paragraph 16 of schedule 8 of the EUWA, it would be possible for the Scottish Ministers to make a single statement.
61. Section 10(1) requires Scottish Ministers to prepare and lay before the Scottish Parliament a report explaining how the section 1(1) power has been used during the reporting period, and how Scottish Ministers intend to use it over such period of time as they may determine, as well as how those past and future uses contribute, have contributed, or are expected to contribute, to achieving the purpose set out in section 2. It also requires Ministers to set out in that report any use of the power which has been considered during the reporting period.
62. The first reporting period is defined by section 10(2)(a) as the period from the day on which the section 1(1) power comes into force until 31 August 2021. Subsequent reporting periods are defined by section 10(2)(b) as each subsequent period of one year. Section 10(2)(c) defines the final reporting period as the period beginning with the day after the end of the last period of one year until the expiry of the section 1(1) power.
63. Section 10(3) makes clear that in relation to the report on the final reporting period, Scottish Ministers are not required to set out how they intend to use the power as per section 10(1)(c), nor how future uses of the power will contribute to the purpose as per section 10(1)(d).
64. Section 11 sets out the procedure which Scottish Ministers must follow before laying the report required by section 10(1). That procedure has two stages.
65. In the first stage, subsection (1) requires that the report must first be laid in draft (as soon as practicable, and no later than two months after the end of the reporting period, as required by subsection (3)), and that in preparing the final report Scottish Ministers must have regard to any representations made to them about the draft during a consultation period (subsection (2) clarifies that this process only relates to the forward-looking aspects of the report, i.e. the aspect where Scottish Ministers explain how they intend to use the power under section 1(1) in the future).
66. That consultation period is defined by subsections (7) and (8) as 28 days from the day on which the draft report is laid, not counting any periods when the Scottish Parliament is dissolved or in recess for more than four days.
67. In the second stage, i.e. the laying of the final report before the Scottish Parliament as required by section 11, subsection (4) provides that this may not be done before the end of the consultation period.

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68. Subsection (5) requires that when the report is laid before the Scottish Parliament, a document must also be laid which summarises the representations received on the draft and how regard has been had to these in preparation of the final report.
69. Subsection (6) provides that should representations have been made proposing that primary legislation should instead be used in relation to any particular intended uses of the power, that document must cover those representations separately.
70. Should Scottish Ministers deem it necessary to bring forward regulations either before a report is laid, or which were not foreseen in the most recent report, it is expected that the reasons for doing so will be addressed as part of the explanatory statements required by sections 8 and 9.