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Designing a System

6. [REDACTED] paper concerns itself predominately with the design elements of a screening/governance process that could be considered to be **downstream** – i.e. at the point on which EU law is published in the OJ and thus beyond the point that we would be able to exert any influence over it and/or have alerted Ministers well in advance of its relative importance. The resource estimates associated with the downstream process look light to us and we should discuss further. Nevertheless, a process like it would be valuable in allowing us to sense check whether we have caught “all in scope” legislation for the purposes evaluating the case for alignment as set out in para 1 (i-v)

7 However our paper here considers the need for an “**upstream process**” to give effect to Ministerial alignment aspirations. It considers the initial steps we’d need to take to implement an early warning or tracking system to sight Ministers on “in scope” legislation for which alignment decisions would require to be taken. It seems unlikely that Ministers would consider it sufficient for the “decision process” on alignment to begin, in all cases, on publication of legislation in the OJ.

8. Much of this upstream process would fall to the Brussels based- Scottish Government desk officers – working as appropriate with policy leads in Scotland – to fulfil. Systems will need to be designed following conversations with the likes of EFTA, UKMIS and other third countries (see paragraph 11) to understand best practice. Whilst numbers can vary considerably annually, one source we consulted suggests that on average the EU adopts 80 directives, 1200 regulations and around 700 decisions per year.

9. Whilst the development of Directives with devolved impacts would be a key focus of tracking work, in reality “in scope” legislation that would require to be tracked will be far broader. That is because in devolved areas (including animal health, justice, agriculture, environment, food safety and fisheries) the EU has tended to do a lot of its legislating using tools other than the Directive. Legislation by Regulation has often been used. Consequently, It will be important to take into account that post-EU exit, the scope of alignment will also be broadened to take into account EU regulations which will no longer have automatic direct effect in Scots law without Scottish legislation. Furthermore, a great deal of important EU legislation which has historically impacted Scotland in devolved policy areas is through tertiary legislation

such as decisions, delegated or implementing acts. By way of example, much of the content of Justice and Home affairs tools and measures relies on Council Framework Decisions. Focusing on directives only would mean missing many developments in the justice and home affairs area. So in reality the scope of tracking work is likely to be broad and focussed on more types of legislative act. It would also require a system of early notification of Ministers in respect of evolving “in scope” EU legislation and early decisions about Ministerial “intent to align”.

Gathering intelligence on and influencing evolving EU law

10. [REDACTED] We can of course seek to influence through Member State contacts and indeed, more realistically, EP contacts going forward, in addition to seeking to use Scottish links through representative groups such as trade bodies, but it would be best to presume that our ability to influence would be extremely limited and should not play a role in driving Ministerial decisions on alignment. We would also need to be clear about what an “influencing” commitment meant in practice, for example, potentially a much more systematic approach to engaging in the pre-legislative process such as Commission consultations, impact assessments, expert working parties etc going forward, as this is likely to have resourcing implications both in Brussels and Scotland.

11. [REDACTED].

12. In taking forward upstream monitoring, the European Commission work programme will be the starting point for understanding Commission legislative ambitions at the start of each business year. Whilst informal MS and indeed EP contacts might be instrumental in helping us to understand the passage of EU legislation through the negotiation process, we should not rule out engagement with EU NGOs including network associations (e.g. Vanguard, ERRIN) to enhance our understanding of the process. We were struck during recent conversations between the European public banking NGOs and SNIB, by how well the former are plugged in to the legislative agenda and have an influence in shaping it. We should also not lose sight of the fact that public sector stakeholders (e.g. SEPA, NatureScot) may also remain in EU wide networks that in turn will have good visibility of the EU legislative agenda.

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Scotland House Brussels
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