

Inquiry into the transposition of EU Directives

Written evidence from Scottish Environment LINK to Europe and External Relations Committee

Scottish Environment LINK (LINK) welcomes the opportunity to submit evidence to this important inquiry.

Summary

1. LINK has concerns that the inquiry to date has not adequately considered the overall purposes and benefits of EU legislation to Scotland, particularly to its environment and people, and that there is scope for the inquiry to consider wider aspects of the implementation cycle than purely transposition.
2. LINK recommends avoiding use of the term 'gold plating' as it misleadingly suggests that anything above 'minimum transposition' is always negative (which is rarely the case – as demonstrated by a recent review for the UK Government).
3. LINK believes that transpositions should be fit for purpose, reflect agreed national policy priorities and seek to be consistent with existing legislation wherever possible (see LINK's response to Consultation on the Environmental Liability Directive for an example of where a forthcoming Directive needs to dovetail with existing domestic legislation).
4. In general, LINK feels Scottish Government consultation procedures, during the period after Directives have been published and their passage through Parliament, are effective and transparent (although more explanation could be provided on why advice from stakeholders is sometimes not acted on without justification).
5. LINK feels that transposition of some Directives have been left until the 'last minute' (e.g. Environmental Liability) which may not provide stakeholders with enough time to engage adequately.
6. Input into the transposition process by stakeholders (and Parliament) is much more effective and transparent when primary legislation is used as the implementing legislation.
7. In LINK's experience, there is plenty of scope for 'differential transposition'. We urge the Scottish Government and Parliament to tailor transpositions to the needs of Scotland's people and Scotland's environment (which is very different physically and ecologically to most other parts of the UK) without unduly undermining the effectiveness of the legislation at delivering the required outcomes.
8. LINK experience is that the Parliament has been effective in scrutinising Directives during their transposition where this has been by primary legislation. However, it has been far less effective in engaging EU structures during 'upstream' policy development or when transposition is by secondary legislation.
9. LINK recommends that Government and Parliament should work together closely to set up a transparent, stakeholder-accessible process which enables direct and effective engagement with EU Directives from 'upstream' development through to on the ground implementation in Scotland.

General principles

10. LINK notes with interest the key recommendations of the previous enquiry into the scrutiny of EU legislation, as well as the recent UK review of the implementation of EU legislation (the “Davidson Review”)ⁱ. However, we feel strongly that the Reporters Reportⁱⁱ did not provide a much needed overview of the **purpose** and the **benefits** arising from the transposition and implementation of EU Directives. Without this valuable context, the report reads as if there is a ‘problem needing to be fixed’, rather than a balanced account of the both the pros and cons of EU transpositions.
11. LINK therefore recommends that during the course of the current enquiry the Committee attempts not only to scrutinize the processes behind transpositions but also the range of benefits EU Directives bring to Scotland’s environment, economy and people. LINK suggests some key benefits might include:
 - a consistent and **level legislative playing field** with other EU Member States;
 - better **protection and enhancement of the environment – this should be seen as a “public good,”** a form of **environmental capital**, which should be managed in the public interest and protected from over-exploitation by private or other public interests; and
 - the benefit of European expertise and a **wider knowledge base** on a range of issues.
12. In addition, LINK believes that any assessment of this kind should consider the complete implementation cycle in relation to EU Directives. Transposition is, often, only the first stage of implementation – to deliver the intended benefits (to the environment, the economy and society) such laws need to be well implemented which often requires appropriate decision making under the transposed legislation and/or adequate funding. Without these, either the benefits will not accrue or they may be unfairly distributed.
13. LINK also suggests that the negative connotations associated with the term ‘gold plating’ are unhelpful and misleading in the context of this current enquiry. Ministers and Parliament should be at liberty to transpose EU Directives in a way which is **fit for purpose** without being accused of ‘gold plating’. In some cases this might mean minimum transposition. In other cases this may mean going beyond minimum transposition to ensure the Directive is transposed in a way which is consistent with existing legislation, or to deliver a national policy agenda. Going beyond minimum transposition in this sense is not ‘gold plating’; it is merely a way of properly enacting the policies of Scottish Ministers and Parliament. We also note the Davidson Review’s conclusion that: *“inappropriate over-implementation may not be as big a problem in the UK – in absolute terms and relative to other EU countries – as is alleged by some commentators”*ⁱⁱⁱ and Lord Davidson’s comment that: *“additions made during the transposition of European legislation provide benefits to business such as greater legal clarity and the streamlining of existing domestic legislation”*^{iv}.

How effective and transparent are the Scottish Government’s transposition procedures?

14. In LINK’s experience, transposition procedures have generally been well structured and transparent. However, we do have some concerns that technical information, or other comments, submitted to formal consultations is often received but often not acted on. Clearly, it is the Government’s prerogative as to how to respond to comments submitted but, we believe, the consultation process would be enhanced if it was more transparent and reasons for shelving key suggestions were clearly spelt out.
15. Our experience with various transpositions in recent years has led us to the conclusion that these are most effective and transparent when they are transposed by primary legislation. Two examples of effective transposition of environmental Directives are:
 - Water Framework Directive (2000/60/EC) which was transposed by the Water Environment and Water Services (Scotland) Act 2002. The fact that this was transposed in Scotland through primary legislation as opposed to a statutory instrument (as it was in England and Wales) allowed both

Parliament and wider stakeholders to more fully engage throughout the process of transposition and subsequent implementation. This is a useful example of where the Scottish Parliament added considerable value (beyond what might be achieved through Westminster) to the process of transposition; a process which resulted in a respected piece of legislation more tailored to Scottish needs.

- The 'Strategic Environmental Assessment Directive (2001/42/EC) which was transposed by the Environmental Assessment (Scotland) Act 2005. The Directive was first transposed into Scots law through the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (Scottish Statutory Instrument No. 258) but the Act repealed the Regulations and widened the scope of SEA to include strategies as well as plans and programmes. Again, the primary legislation route enabled stakeholders such as LINK member bodies contribute their experience and expertise throughout the passage of the legislation through Parliament.
16. It should be noted that, in both these recent and successful transpositions, the Government and/or Parliament concluded that the result for Scotland would be enhanced by (what some would call) 'gold-plating'. Thus, both the WEWS Act and the EA Act include provisions (wetlands and flooding, and strategies, respectively) not required by the original Directive. However, these provisions were included as a result of Government policy and/or Parliamentary scrutiny as they were felt to be appropriate responses to the public policy needs in Scotland.
17. Two examples where transposition of environmental Directives has been less successful include:
- The Habitats Directive (92/43/EEC) which was originally transposed by the Conservation (Natural Habitats, &c.) Regulations 1994, as well as reliance on the existing Wildlife and Countryside Act 1981 (now amended, in Scotland, by the Nature Conservation (Scotland) Act 2004). In October 2005, the European Court of Justice ruled that the UK had failed to adequately transpose certain aspects of Directive into domestic legislation (Case C-6/04); this case has also been accompanied by a series of other ECJ decisions or Commissions inquiries into the implementation (or not) of both the Birds and Habitats Directives. The 2005 case found that many of the obligations had been delivered through policies and guidance without specific legislative transposition and by means of general legal duties. Although this predates devolution of powers to the Scottish Parliament, it demonstrates the need for coherent and proactive transposition to avoid gaps and inconsistencies and crucially, to provide greater legal certainty. These cases also highlight the need for implementation beyond transposition in the decisions of Ministers, relevant agencies, Local Government, etc and for appropriate funding to be in place to support this implementation.
 - Action Programme for Nitrate Vulnerable Zones (Scotland) Regulations 2003 and other measures to implement the 1991 Nitrates Directive (91/676/EEC). Successive Governments have adopted a 'slow' and 'minimalist' approach to the implementation of this Directive. This has resulted in the European Commission taking action to require it to be more fully applied – most recently by considering to hold up approval of the SRDP until such measure are taken. This is another example of incomplete implementation – it is the decisions of Ministers beyond transposition (e.g. designations of NVZs and funding arrangements) that secure – or not – the effective implementation of the Directive. More timely, robust and adequately funded implementation would have provided farmers with greater clarity, more time and better support to achieve the outcomes necessary.

How effective is the Scottish Government in working closely with the other devolved administrations and the UK Government during the transposition process?

18. LINK is not in a position to answer this question in detail.

Is there adequate and timely consultation with stakeholders whose interests on which a new directive will directly impact?

19. LINK feels there is often adequate consultation, particularly where Directives are transposed through primary legislation. This is in large part due to the willingness and openness of the Scottish Parliament to engage with a range of stakeholders.
20. On the issue of timeliness, LINK would suggest that the record of the Parliament in engaging with the early development of EU Directives ('upstream engagement') could be improved and welcomes the fact this is a recommendation within the Committee's 2nd Report, 2007. A good example of upstream engagement was the event on the EU Maritime Green Paper on 4 December 2006, organized by the Europe and External Relations Committee and held in the Scottish Parliament's main chamber. The consultation provided a forum for relevant stakeholders to discuss the proposed policy and its implications for Scotland (the Maritime Green Paper could become a key driver for EU-wide marine spatial planning underpinned by a future Directive). Over 80 delegates from organisations across Scotland attended, representing industry, academia, the public sector, MSPs, MEPs and LINK. It would be useful if the Parliament could run these events for other 'on the horizon' Directives, perhaps at the start of a longer term stakeholder relationship throughout the development, transposition and implementation of Directives^v. This would also help forge better links with Scotland and the European Commission and enable stakeholders to more easily input into upstream development.
21. There is also a tendency to leave some Directives to the 'last minute'. This was one major problem with the Nitrates Directive (see above) and a current example is the Environmental Liability Directive (consulted on in Scotland 2007) which is now late in being transposed. A copy of the LINK response to the Government consultation on this Directive is attached as an Annex to this evidence. This indicates that one of our key concerns is that the transposition 'meshes' with existing domestic law – and applies the liability principles to biodiversity interests of national, as well as international, importance (e.g. to SSSIs as well as SPAs and SACs). We await the Scottish Government's response but note that the cross-Party House of Commons EFRA Committee has, while also criticising a minimal approach and fear of 'gold plating', recommended this approach in England and Wales^{vi}.

Are there effective mechanisms to ensure the accountability of the regulators within the transposition process?

22. LINK has limited comment to make on this question but we would reiterate the need for clarity and certainty about the roles of all those involved in the regulation process^{vii}:

- those originating regulation;
- those who must enforce or otherwise achieve compliance;
- the regulated parties;
- those charged with adjudicating on appeals; and
- those reviewing and evaluating.

In supporting greater clarity, LINK would also observe, in passing, that such regulators need greater support. Too often, regulators are unfairly criticised for regulating according to the EU and/or domestic law they are responsible for implementing. Moreover, often such regulation (which is often seen as 'negative') would be less controversial if accompanied by the other aspects of effective implementation, such as funding measures (which would often be seen as a 'positive').

To what extent does the transposition process allow for "differential implementation" and the tailoring of Scottish solutions to Scottish problems?

23. In our experience, 'differential implementation' has been achieved for key environmental Directives including the Water Framework Directive and the Strategic Environmental Assessment Directive, both of which could be said to have been 'tailored' to Scottish needs. In future, we would like to see Scotland taking more of a lead on transpositions which relate to areas of devolved competence. In supporting

such 'differential implementation', it must be stressed, however, that this must not result in less effective implementation – simply implementation in a manner most appropriate to Scottish needs. The end results (outcomes) must remain those required by the relevant Directive.

How effective is the role of the Scottish Parliament within the transposition process?

24. Our experience to date suggests that although the Scottish Parliament effectively scrutinises Directives as they are transposed by primary legislation (see above), it has not been proactive enough in engaging with EU structures during the all important Directive development phase. There are exceptions to this, for example the EU Maritime Green Paper (see above). In addition, we believe that the Scottish Parliament could be more effective at scrutinising transposition if and when this is done by secondary legislation.

Are there examples of good practice of effective, collaborative and transparent transposition within other EU legislative regions?

25. LINK notes that the Reporter's Report (paras 28-29) refers specifically to the Danish example as a "widely respected" and "comprehensive and rigorous" model of good practice which involves key stakeholders throughout the process. LINK supports the Danish model and would ask the Committee to look into adopting a similar model in Scotland.

ⁱ http://bre.berr.gov.uk/regulation/reviewing_regulation/davidson_review/index.asp

ⁱⁱ Reporter's Report on the Inquiry into the Transposition and Implementation of EU Directives in Scotland. (SP Paper 783).

ⁱⁱⁱ http://bre.berr.gov.uk/regulation/documents/davidson_review/davidson_review.pdf - page 4.

^{iv} <http://bre.berr.gov.uk/regulation/news/2006/061128.asp>

^v Denmark uses a system of 35 EC 'Special Committees' (whose members include key stakeholders) which scrutinise EC proposals from the 'upstream' proposal stage through to transposition (see Reporters Report).

^{vi} http://www.parliament.uk/parliamentary_committees/environment_food_and_rural_affairs/efra_pn51_070712.cfm

^{vii} See http://www.betterregulation.ie/upload/Regulating_Better_html/accountability.html