

Briefing ahead of ECCLR Evidence Session on EU and the environment Tuesday 30 April 2019

SUMMARY:

LINK welcomes the positive statements by Scottish Government to:

- Maintain or enhance EU environmental protections
- Retain EU environmental principles as paramount to Scotland's environmental credentials and ambitions to achieve the UN SDGs
- Maintain effective, appropriate and proportionate environmental governance in Scotland, in line with commitments made under the Scottish Continuity Bill
- Look for early opportunities to legislate for environmental principles and governance

However, we note that there is ongoing concern regarding:

- The absence of clear solutions for addressing the environmental governance gap
- The absence of a clear timeframe for bringing forward this legislation including the scope of such proposals, as well as interim measures in the event of a No Deal
- Lack of clarity regarding the nature of potential common frameworks and more concrete information regarding Parliamentary scrutiny and stakeholder involvement in their development

We therefore seek:

- Clarity on the Government's preferred approach for addressing the governance gap, specifically with respect to a commitment for a new environmental watchdog
- Clarity regarding the scope and timeframe for legislative proposals on environmental principles and governance
- Reassurances regarding the nature of potential interim measures and opportunities for stakeholder involvement
- A commitment to 'non-regression' in the context of proposals to keep pace with EU laws

INTRODUCTION

Scottish Environment LINK members welcome the Committee's decision to seek further evidence from the Cabinet Secretary for the Environment, Climate Change and Land Reform and the Cabinet Secretary for Government Business and Constitutional Relations at its meeting on 30 April. We understand that discussions will focus on:

- Environmental risks associated with exit, especially in the event of a 'no deal';
- New (or returning) powers/common frameworks; and
- Environmental principles and governance

Our briefing follows a similar structure.

IMPLICATIONS OF A 'NO DEAL' FOR THE ENVIRONMENT

While the risk of a No Deal Brexit is not as imminent, as the Cabinet Secretary notes in her letter to the Committee 'we must retain our planning for all possible outcomes after 31 October 2019'.

Environmental charities across the UK, including Scottish Environment LINK, have highlighted the clear dangers of No Deal scenario for our environment. These include:

1. Absence of a fully functioning statute book if not all statutory instruments are agreed on time
2. Loss of EU governance mechanisms to enforce environmental legislation if no legislative measures are introduced
3. Loss of EU environmental principles if no legislative measures are introduced

In terms of (1), we would like to receive reassurances that existing legislation will be faithfully transposed. As noted in the [Committee papers](#), we understand that the Scottish Government has 'prioritised those areas that would be most heavily impacted, including waste shipment and chemicals regulation'. However, several critically important instruments, such as provisions for the management of non-native species are still forthcoming. We would appreciate reassurances from Scottish Government that those will be put forward in a timely manner.

While more information regarding points (2) and (3) is provided in the third section of this briefing, we would like to highlight two points. First, as highlighted in previous LINK evidence, the Scottish Government has not acknowledged the emergence of potential governance gaps in some areas. For example, in [evidence given on the SSI to domesticate the Habitats Regulations](#), LINK highlighted the fact that the European Commission will no longer scrutinise the various reporting requirements under this legislation. This is an example of a governance gap as the requirement for an independent review would be lost. As noted in the Environment and Climate change roundtable report on [Environmental governance in Scotland after Brexit](#) one aspect of the environmental governance gap will be the absence of capacity and expertise to scrutinise the publication of reports required under EU legislation as well as pressure to improve their quality and delivery. We therefore take the opportunity of highlighting that different aspects of the governance gap are creeping into our legislation already.

Second, we note that the Cabinet Secretary for Government Business and Constitutional Relations has [stated](#) that 'if arrangements are required during a transition period, or under an exit without a withdrawal agreement, we shall design interim arrangements that reflect our policy established through this consultation'. These are welcome commitments, but we note that at the moment the Government does not have an established policy approach. **Given that the consultation on environmental principles and governance runs until 11 May, the Government will have to quickly come to a decision as to its preferred approach in order to be in a position to develop and consult on interim measures and for those to be operational on time for 31 October.** A similar argument can be made in terms of the development of long-term governance measures, as discussed in the third section of this briefing.

We note that already, in June 2018, the roundtable report indicated that 'we foresee that there may be a need for interim measures should a policy decision be taken to establish a new body given the likely lead in time to establishment. An interim position based on an expanded role for existing bodies perhaps supported by an independent supervisory panel would seem the most pragmatic'.

We also note DEFRA's proposals are being actively discussed with stakeholders and in Westminster. It is understood that Defra will be setting up interim measures in the event of a No Deal, which will operate until the Office for Environmental Protection (OEP) is established. According to [reports](#), an eminent environmental lawyer will head the new "shadow body" to oversee the environment protection regime in the event the UK leaves the EU without a withdrawal agreement. The shadow body will "advise, monitor and refer to the OEP any breaches."

We understand that the Scottish Government is not seeking to opt in to this mechanism but at the same time, due to the process outlined above, we have no real clarity as to the ambition of any Scottish interim measures. **Clarity is needed as soon as possible with respect to the Scottish Government's preferred approach to address the environmental governance gap in the short term.**

COMMON FRAMEWORKS

We note the paper submitted by Colin Reid and wish to highlight previous Scottish Environment LINK submissions to this Committee as well as the Finance and Constitution Committee on this issue¹.

As previously stated, Scottish Environment LINK agrees that the current set of inter-governmental relations is sub-optimal. Based on the 'Devolution after Brexit: Managing the environment, agriculture and fisheries' [report](#) by the Institute for Government commissioned, LINK supports that inter-governmental operations will be improved through:

- The creation of a dedicated secretariat
- The agreement and publication of a work-plan
- Greater transparency around the work-plan, activities and meetings
- Stakeholder engagement

We note that the starting point for any of these discussions is that the current devolution settlements must be respected and that any proposals for common frameworks need to be commonly discussed, developed and agreed. This is an absolute requirement for the success of any such joint initiative.

We note that the Cabinet Secretary for Environment, Climate Change and Land Reform notes that 'there are four areas falling within my portfolio that have been proposed by the UK Government for possible legislative frameworks: chemicals, waste and producer responsibility, ozone depleting substances and F-gases, and the EU Emissions Trading Scheme (EU ETS)'.

We would welcome further clarity from the Cabinet Secretary on any joint work in the area of nature protection, given that nature crosses borders and the four UK countries have many shared transboundary challenges to the health and resilience of our natural environment. At the moment, many of the protections afforded to species and habitats in Scotland stem from EU laws, including the designation and management of protected areas and strict systems of species protection. These provisions are shared across the UK. **It would be useful to reflect how a common level of ambition can be set out for the protection of our natural environment, both species and habitats, after a potential EU exit.**

¹ Submission to ECCLR on possible common/shared frameworks and related issues:

http://www.scotlink.org/wp/files/documents/SELINK_ECCLR-response-to-UK-frameworks-Governance-gap_final.pdf;

Submission to FCC on future common frameworks inquiry: <http://www.scotlink.org/wp/files/documents/LINK-Response-to-Inquiry-on-Common-Frameworks.pdf>

Members of Scottish Environment LINK working with other environmental charities across the UK have developed a series of four outcomes which we hope future frameworks will seek to achieve. Those are provided in the Annex to this briefing paper.

We welcome the statement that ‘officials are now ... considering wider stakeholder engagement and consultation’. This has been a long-standing request from LINK members, and we are pleased that now there is a prospect of being more directly engaged in those conversations. **We would appreciate receiving clarity on the timeframe and nature of those engagements as well as the potential for existing proposals for frameworks to be revised on the basis of such engagement.** We believe there is still a lack of clarity regarding the decision-making process for developing these frameworks, beyond the fact that this is at the moment a strictly inter-governmental process which has not received any real public, stakeholder or parliamentary scrutiny or input. We would also look forward to better understanding how the Scottish Parliament can be better engaged in this process.

ENVIRONMENTAL PRINCIPLES AND GOVERNANCE

As mentioned above, despite the fact that a potential EU exit is now postponed to 31 October, time is limited for developing proposals for ensuring the continued application of EU environmental principles as well as setting out interim and long-term proposals for environmental governance in Scotland.

In particular, even with a 2-year transition period, Scotland would need to have in place a new system of environmental governance by 2021. This means that the Scottish Government will have to develop its preferred policy proposals, consult as needed, bring forward legislative proposals, allow enough time for those proposals to be discussed and agreed in Scottish Parliament as well as time for agreed proposals to be implemented and become operational on time for 2021. This is a tight legislative timeframe.

The Scottish Government consultation on ‘Environmental Principles and Governance in Scotland’:

LINK and its members will be submitting detailed views to the Scottish Government consultation. In this respect we note some of our concerns regarding the approach outlined in the consultation.

With respect to the duty on ministers ‘to have regard to’ the four EU environmental principles, we highlight that:

- A duty to ‘have regard’ does not offer parity with the provisions set out in the Treaty of the Functioning of the EU (TFEU) which indicates that union policy on the environment ‘shall be based’ on these principles. The language should be therefore strengthened.
- The duty should be also applicable to other public bodies. There is a precedent for that in other Scottish legislation and it is worth noting that the TFEU provisions with respect to the environmental principles are not limited to specific EU bodies but apply across the board.
- In its recent [inquiry](#) on the Defra draft Environment Bill, the Environmental Audit Committee has called for the Bill to require that “all public bodies to act in accordance with the principles”.
- In its [consultation](#) on the same issues, we understand that the Welsh Government proposes to extend the duties on principles to all public bodies.

We would also seek clarity with respect to the Scottish Government's intention to put forward legislation 'to ensure Scots law continues to align with EU law'. We would appreciate clarity as to the potential processes involved in 'vetting' EU law to ensure it is appropriate in a Scottish context as well as whether the Government would be supportive of inserting provisions within that piece of legislation that Scotland may pursue higher environment standards as well as embedding the principle of non-regression to ensure no environmental damage occurs inadvertently.

With respect to the environmental governance gap, while we note the Government's ambitions, it is concerning that despite the work the roundtable completed in June 2018 and the Committee's support for action to develop solutions², that the consultation does not do so. Instead, the majority of the questions seek confirmation regarding the risks involved.

Given the tight timeframes for bringing forward solutions, we wish to be reassured that the Government will deliberate on and propose a preferred policy approach in a timely manner. We would also appreciate receiving clarity as to the work that the Government has done since June 2018 to deliberate on its preferred policy approach. We would also seek further information as to the potential plans of Government to hold further consultation and what the timeframes and scope of that exercise would be.

It is critical that the Scottish Government confirms:

- **Its intention to bring forward proposals for the creation of an independent watchdog to enforce environmental protections post-Brexit in a way that ensures equivalence with the level of protection enjoyed today as stipulated in the Scottish Continuity Bill.**
- **Whether it will follow the Finance and Constitution Committee's recommendation that any new Scottish agencies or changes to existing agencies' functions are set out in legislation.**
- **Its intention to review provisions around environmental justice in Scotland including the case for environmental courts or tribunals, in line with [its 2016 commitments](#).**

The case for a new environmental watchdog:

As has been highlighted in previous LINK submissions as well as the Roundtable report, there is a need for a new independent and well-resourced watchdog to take forward functions currently undertaken by EU bodies. For example, as the Roundtable report highlights 'there is no current body charged explicitly with seeking to resolve issues of compliance and to pursue remedies in the way the European Commission currently does'.

It goes on to recommend that 'a new body could be created either to report to Parliament directly or to advise a body such as SPSO with an expanded remit. This body would also require powers to require a response or remedies from public sector bodies'. It also adds that this same new body could also take up the formal and informal mechanisms to seek solutions to concerns about the implementation of environmental law, through interaction with Government. With reference to the fact that 'Scots law remedies do not have the same scope as those provided by EU law', it notes that 'if a new public authority is created, evidence of a failure on the part of another public body could be submitted or referred to a court as an option of last resort'.

² In its letter of 21 June 2018, the Committee highlighted that "work is now required to identify what short term measures are necessary to ensure a smooth transition, alongside further work to develop and establish the necessary long term measures": http://www.parliament.scot/S5_Environment/General%20Documents/20180621_Conv_to_CS_re_Roundtable_WEB_pdf.pdf

Given the above, in LINK's view, an adequately empowered and independent watchdog should:

- be able to address/investigate citizens' complaints;
- have powers to require information;
- have powers to require remedies; and
- have powers to refer to Court (which, in turn, would be empowered to impose more stringent remedies).

It is important to highlight that the functions of the watchdog cannot be taken forward by existing bodies because none of them enjoy the level of independence from Government which is required. For example, SEPA and SNH are both NDPBs and effectively report to Scottish Ministers. An effective watchdog also needs investigatory powers (e.g. the ability to require Government/agencies to hand over info, answer questions, etc), powers to make 'rulings' and powers to require remedies or reference to Courts.

It is important to note that the UK Environmental Audit Committee also [reflected](#) on the lack of independence for the proposed OEP as well as its limited functions.

We note and support the need for governance bodies and mechanisms to be accountable to Scottish Parliament, in line with Scotland's devolution settlement. In this respect, we put forward our [concerns](#) regarding the provisions of the Defra draft Environment Bill in the context of the Environmental Audit Committee's inquiry.

This briefing was developed on behalf of the Scottish Environment LINK Brexit Subgroup.

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Annex: Four environmental outcomes that require new intra-UK governance mechanisms after Brexit

1. A co-ordinated transboundary approach to managing shared environmental resources

Environmental processes do not recognise borders, so the UK and devolved governments need to ensure co-operation on a range of transboundary issues, such as managing river catchments, invasive species, cross-boundary protected areas and air pollution.

2. A race to the top, with no backsliding

If environmental policymaking takes place completely independently in each of the four countries, there is a risk of inadvertent confusion, undermining of each other's aims, or, in the worst case, a race to the bottom with deregulation for competitive advantage. To support the integrity of the internal market and prevent unfair regulatory competition, there need to be minimum common standards across the UK. But to ensure each government is constantly striving towards a healthier environment and nature's recovery, there should not be a ceiling to anyone's ambition.

3. International credibility

Although the UK government is the sovereign state that participates in multilateral discussions and is the formal signatory to international agreements, the devolved administrations have full or partial responsibility for delivering on such commitments. To ensure the UK's international promises are credible, mechanisms are needed to translate them into progress on the ground in each country. This includes relevant provisions in the Withdrawal Agreement with the EU (if approved), and any future trade deals.

4. Accountability, transparency and access to justice

Trusted institutions and processes, such as dispute mechanisms, are required to underpin the delivery of all the above. New robust, transparent and well-resourced domestic governance arrangements will need to replace functions currently carried out by EU institutions in securing compliance with common standards across the four nations. People across the UK need to have equivalent access to information, participation in decision-making and access to justice as set out in the Aarhus Convention. These new arrangements will need somehow to be shared or co-ordinated across the UK, while working with the different systems of accountability and respecting the devolution settlements.