

Scottish Environment

LINK response to Call for Evidence - EU Environmental and Animal Welfare Principles

Scottish Environment LINK¹ members welcome the opportunity to provide evidence to the Committee's inquiry on EU environmental and animal welfare principles and to highlight the importance of those principles for the development and enforcement of environmental policies in Scotland, and indeed across the UK.

LINK members strongly support and welcome the fact that Scottish Parliament has already unanimously supported amendments to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (hereafter referred to as the 'Continuity Bill') that retain these principles and introduces commitments to consult on the future of these principles in domestic law in Scotland. Scotland alone has put those commitments into law, while Welsh and UK governments have made similar commitments outside the scope of their respective Bills. We urge Scottish Government and Parliament to maintain their ambitious approach that safeguards against the watering down of environmental protections and seek similar commitments across the UK.

The absence of equivalent provisions in the UK Withdrawal Bill highlights the importance of ensuring that Scotland is in a position to continue to pursue an ambitious approach irrespective of the future of the Continuity Bill and Clause 11 of the UK Withdrawal Bill. This is why we also welcome the commitments made by the Minister for UK Negotiations on Scotland's Place in Europe Michael Russell to consult with other parties on how to protect the unique elements of the Continuity Bill and consider whether this might require further legislation².

This briefing sets out to respond to the following questions set by the Committee but is largely based on previous submissions to Scottish Parliament Committees³.

1. How important are the EU principles of: the precautionary principle; preventive action; environmental damage should as a priority be rectified at source; the polluter should pay; and animal sentience.

LINK members have been consistently vocal about the need for overarching EU environmental principles as well as the recognition that animals are sentient beings to be retained in domestic law. EU environmental principles are enshrined in Article 191(2) of the Treaty of the Functioning of the EU (TFEU) while provisions about animal sentience were introduced in 2009 by the Lisbon Treaty and are now included in Article 13 of the TFEU. Equally important is the need to mainstream environmental policy and drive towards sustainable development identified as objectives in developing Union policy (Article 3 on sustainable development and Article 11 on the integration principle).

Today, in Scotland, as a result of the UK's membership of the EU, environmental principles, such as the precautionary principle and the polluter pays principle, can be applied by courts, businesses and government in their decision-making. They form an essential component of environmental law, which necessarily must be able to look ahead to the long-term and be flexible in its application. As they are key to the interpretation of EU law, they should therefore be key to the interpretation of all retained EU law whether it is defined in the Continuity Bill as EU derived domestic legislation or devolved direct EU legislation as it becomes domestic law.

¹ Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 35 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

² Official Report, 21 March: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11434&i=103885>

³ [Scottish Environment LINK submission on common frameworks](#); [Scottish Environment LINK submission on UK Withdrawal Bill Legislative Consent Memorandum](#).

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Environmental principles need to be a part of domestic law on day one of the UK's exit from the EU and the public should be able to rely on them, the courts apply them, and public bodies follow them, at the very least in respect to all retained EU law.

Environmental charities and NGOs have been calling for such provisions to apply across the UK and for these principles to receive legislative underpinning in primary legislation. Given the importance of ensuring no watering down of environmental protections in any part of the UK while also ensuring that the UK is in a position to tackle global and domestic environmental challenges, it will be important for all countries of the UK to provide legislative underpinning to these principles in a way that is consistent with devolution.

What is more, the environmental principles are not unique to EU law – they are principles of environmental law in general, and are also found in a number of international environmental treaties to which the UK is a signatory. This includes the Convention on Biological Diversity, the Convention on Climate Change and the Convention on the Law of the Sea. Currently, Scotland gives effect to these obligations to the international community through the UK's EU membership, and in particular the appearance of these principles within the TFEU.

2. How and where have these principles had an impact on environmental and animal welfare policy in Scotland?

Scotland has made good use of these principles while also reaping the benefits of how these principles have been applied at the EU level. For example, at the EU level, the precautionary principle has been applied to:

- **Ban neonicotinoid pesticides until further scientific information emerged on their environmental impacts:** the European Food Safety Authority (EFSA) issued preliminary conclusions on the impacts of this class of pesticides in 2003. As a result, the European Commission introduced controls on use of the substances. Recently, EFSA updated its conclusions confirming that “most uses of neonicotinoid pesticides represent a risk to wild bees and honeybees”⁴.
- **Introduce restrictions to the use of phthalates, plasticiser chemicals used in flexible PVC, until health and environmental impacts were confirmed:** in 2005 the use of phthalates was restricted in toys until further scientific uncertainties were addressed. In 2014, the restrictions were confirmed on the basis of revised risk assessments⁵. There were found to be harmful to human health and considered substances of very high concern under the EU's REACH Regulation.

In Scotland, the Scottish Government has made very good use of the environmental principles in policies, legislation and in courts:

- **The Scottish Government GM crops decision utilised the precautionary principle:** Scotland [opted out of the use of genetically modified \(GM\) crops in 2015](#) on the basis of the precautionary principle. The Scottish Government stated that it was concerned that there was insufficient evidence that GM crops would not damage Scotland's food and drink sector. Cabinet Secretary Richard Lochhead stated: “I strongly support the continued application of the precautionary principle in relation to GM crops and intend to take full advantage of the flexibility allowed under these new EU rules to ban GM crops from being grown in Scotland”.
- **The Scottish Government decision to impose and extend a moratorium on fracking was also in line with the precautionary principle:** in 2015, Energy Minister Fergus Ewing announced a moratorium on fracking and stated that the approach adopted “underlines the Scottish Government policy of taking a precautionary, robust and evidence-based approach to this technology”⁶.

⁴ EFSA press release: <https://www.efsa.europa.eu/en/press/news/180228>

⁵ EC Communication: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52005PC0143>; EC website: http://ec.europa.eu/growth/sectors/chemicals/reach/restrictions_en

⁶ Scottish Government press release: <https://news.gov.scot/news/moratorium-on-underground-coal-gasification>

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- **The Scottish Government commitment to introduce a deposit return scheme is based on the application of the polluter pays principle in waste policy:** emanating from article 15 of the EU's Packaging and Packaging Waste Directive which suggests that members states may adopt measures to reduce the amount of packaging and packaging waste in line with inter alia the polluter pays principles. The introduction of a deposit return system embodies this as it places a responsibility on the producer to address aspects of a product's end of life stage.
- **Scottish policy for the regulation of non-native species embodies a preventive action approach:** the principle of "preventive action" is the basis of invasive non-native species (INNS) legislation (Wildlife and Countryside Act as amended by the Wildlife and Natural Environment (Scotland) Act). This principle supports that "prevention is better than cure" and so effort should be put into biosecurity etc to prevent INNS arriving as this is less costly, in long run, than the elimination of INNS after they have arrived/ are established. This approach is reflected in the Scottish Government [Code of Practice on Non-Native Species](#).
- **The Court of Session applied the polluter pays principle in 2013 in an open cast coal ruling:** in a [landmark ruling for environmental protection in December 2013](#), the Inner House of the Court of Session ruled that liquidators of Scottish Coal could not 'disclaim' i.e. unilaterally abandon environmental licences, specifically CAR licences issued by SEPA under The Water Environment (Controlled Activities) Regulations 2005 and 2011.
 - This forced liquidators to continue to maintain the sites, preventing further environmental damage and preventing further costs from falling to Local Authorities or Scottish Government. A key part of the reasoning behind this decision lay in looking to the underlying purposes of the CAR regime, stated as being "to secure environmental advantages for society through the achievement of EU environmental objectives".
 - The court ruled that the "polluter pays" principle as set out in the Treaty on the functioning of the EU ("TFEU"), provided a sound reason for prohibiting unilateral termination, because "the principle required that the costs of pollution should be internalised, through pricing mechanisms, so that they became costs of any operations causing environmental degradation."
 - This case illustrates how the Scottish court was able to refer directly to the "polluter pays principle" as it exists in the TFEU – without the principle existing in a specific piece of EU or EU-derived legislation.

3. Views on the appropriateness of retaining/adopting/enshrining these EU principles in law or alternative principles/approaches that could be adopted.

As indicated earlier in this submission, LINK members support retaining EU principles in primary law in Scotland, as well as across the UK. Consistency in this respect across the UK will provide an important basis for maintaining existing common standards upon which countries can further build. In looking at future environmental policies in Scotland, LINK members welcome the opportunity to look at further principles that could underpin our domestic law in addition to internationally recognised principles enshrined in EU law. We would expect such deliberations to be part of the discussions that will take place in the context of the forthcoming consultation which the Scottish Government has committed to.

4. Views on if and how environmental principles could and should be enshrined in law in Scotland and enforced.

EU law and policies have integrated these principles in a variety of ways: Treaties allow for those principles to be considered in the wider context of EU law while provisions in specific legislation allow for more prescriptive approaches. While some of the principles will be transferred into domestic law by virtue of being referenced in specific pieces of EU legislation, it is important to note the unique function of having those principles referenced in the Treaties which ensures that all EU environmental policy must be based on those principles. This allows for addressing gaps in legislation and formulating approaches for future legislation. For example, it has been acknowledged by the European Commission that the way in which the Environmental Liability Directive defines

the scope of the polluter pays principle means that “regrettably ... the directive only covers damage to biodiversity, water and land, and not to air or human health”⁷. The overarching role of the Treaties can help bridge that gap but also ensure that future legislation is fit for purpose.

EU environmental and animal welfare principles need to be enshrined in primary law. What is more this should go hand in hand with deliberations about how to ensure that legislation can be implemented and enforced effectively. Laws are only effective when they have strong institutions and mechanisms to support and implement them in practice. As has been previously discussed, to maintain the same level of environmental standards in Scotland, following the UK’s exit from the EU, it will be important to address the governance gap created by the loss of the functions currently performed by EU bodies.

To ensure that retained EU law has the same practical impact and to extend this certainty to any future law, domestic governance mechanisms are needed to take on the functions of existing EU bodies. This may require the creation of a new body or new bodies to ensure the governance gap is addressed. Similarly, existing bodies may need to have some functions expanded or strengthened to compensate for functions currently performed by EU bodies. Any such body or institution must have (i) adequate resources, (ii) be independent of government, (iii) have relevant expertise and (iv) have sufficient legal powers to enforce the law and hold the various governments to account.

5. Examples of where key environmental principles have been enshrined in domestic legislation elsewhere.

There are several examples from across the globe on the use of the environmental principles enshrined in EU Treaties in a court setting. However, many countries have also sought to provide legislative underpinning to most if not all of these principles in domestic law. For example, France amended its constitution in 2005 to include a Charter for the Environment. The Charter for the Environment contains a formulation of the precautionary principle (article 5)⁸; it also requires that “public policies shall promote sustainable development” and to “contribute to the making good of any damage caused to the environment”.

In Wales, the Well-being of Future Generations (Wales) Act 2015 enshrines the principles of Sustainable Development and creates a sustainable development/wellbeing duty. The Environment (Wales) Act 2016 enshrines the principle of sustainable management of natural resources & the preventative principle (‘take action to prevent significant damage to ecosystems’). This addresses some of the EU principles but as elaborated by our colleagues in Wales Environment Link in their briefing on the Legislation Derived from the EU (Wales) Bill “Welsh Acts elaborate on sustainable development/sustainable management whereas the EU treaty environmental principles (polluter pays, prevention, precautionary principle, rectification at source and integration) cover broader areas. Not all of these principles are addressed explicitly in Welsh law, so the environmental principles will play a complementary, rather than conflicting, role”.

As such, there is a precedent for setting such principles in primary law. What is key is that all of these principles are given legislative underpinning as it is only in this way they can be upheld in the manner that they are now which has led to positive environmental outcomes.

This LINK Parliamentary Briefing was prepared on behalf of LINK’s Brexit Subgroup.

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⁷ <https://euobserver.com/environment/137573>

⁸ Charter for the Environment: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/charter-for-the-environment.103658.html>

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