Environment, Climate Change and Land Reform Committee
EU Environmental and Animal Welfare Principles
Written submission from Institute for European Environmental Policy

We are grateful for the Committee’s call for evidence, and would like to offer the following comments in respect of the questions it poses.

1. How important are the EU principles of: (i) Precautionary principle

The precautionary principle was introduced into the European treaties under the Maastricht Treaty of 1992, as part of a broader integration of environmental principles (including, for example, the redefinition of a basic aim of the EU as "sustainable and non-inflationary growth respecting the environment"). The treaty simply states that Union policy on the environment “shall be based on the precautionary principle”, without further defining it (although it can be inferred that the principle is the same as that set out in the 1992 Rio Declaration “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”)

The principle has been an important guide to legislative and other action at EU level, and to its interpretation. Although there are a number of conflicting interpretations of the precautionary principle, and although it is sometimes invoked rhetorically to support a position of blanket opposition to activity or products regarded as posing risks, the Commission has developed, and the European Council has endorsed, a relatively detailed approach to its implementation. This is set out in the 2000 Commission communication, which outlines a graduated approach to situations where full information is lacking, including the potential for adopting temporary measures, the need for an assessment of costs and benefits of action, and the need in particular for action to improve scientific understanding and resolve uncertainty.

The principle has given backing for regulatory action against risky products or practices in cases where there is no clear proof of harm, but where there are substantial concerns about the risks posed. The European Court of Justice noted in a judgement on the Commission ban on exports of beef from the UK during the BSE crisis that “Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.” This judgement has been referred to a number of times subsequently. The precautionary principle is now embedded in environmental law, and also (and arguably to a greater extent) in European food and consumer protection law.

The principle is effectively a constitutional one; it is part of the framework for law-making and decision-making set out in the EU’s governing documents. There is therefore no obvious equivalent mechanism in UK law, unless a written constitution

1 Written into the UN Framework Convention on Climate Change (article 3.3) as “Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing [ ] measures”
2 Com (2000) 1: Communication from the Commission on the Precautionary Principle
is adopted. While legislation requiring future application of the precautionary principle would have real value, and provide greater of certainty about the government’s approach, it would be capable of being overturned at a later date, or simply disapproved in individual legislative decisions where the precautionary principle was regarded as inconvenient. The UK is a signatory to international agreements, like the UN Framework Convention on Climate Change, which refer to the principle, these have a much less direct impact on decision-making in signatory states.

The EU’s approach has been regarded as being more precautionary than that adopted by key trading partners, particularly the US (although in practice there are a few areas where US decisions have been more precautionary – for example, in vehicle emissions legislation). It can be expected that US negotiators and private interests will press, in any trade negotiations with the UK following the UK’s departure from the EU, for decisions to be based on “sound science” – often used as a shorthand for an approach where activities are assumed not to pose risks unless there is carefully documented evidence of the risks. The US Chamber of Commerce, for example, has this summary of its strategy on the precautionary principle:

- “Support a science-based approach to risk management, where risk is assessed based on scientifically sound and technically rigorous standards.
- Oppose the domestic and international adoption of the precautionary principle as a basis for regulatory decision making.”

There is thus potential for any approach to regulatory alignment agreed as part of a US/UK trade deal to create constraints on the future application of precautionary approaches, and potential for democratic decisions based on a precautionary approach to be overturned through the enforcement mechanisms that are agreed as part of a trade deal.

The detailed arrangements for ensuring that the interests of devolved governments are taken into account in future trade negotiations are unclear. However, introducing a clear statement of a precautionary approach into Scottish legislation could have several benefits, including:

- The potential to set out in detail what is meant by a precautionary approach, along the lines of the Commission’s 2000 communication, in order to provide greater clarity for the private sector, for civil society organisations, and for researchers;
- The potential to clarify the legal position in Scotland in advance of any future trade negotiations, thereby creating a greater presumption that the Scottish legislative approach would need to be catered for in any trade deal signed.

(ii), (iii), (iv) Preventive action; environmental damage should as a priority be rectified at source; and the polluter should pay

The principles of preventive action, of rectifying damage at source, and the polluter pays principle, all predate the precautionary principle, having been adopted as part
of the new Environment title included in the 1987 Single European Act. This requires
that:

“Action by the Community relating to the environment shall be based on the
principles that preventive action should be taken, that environmental damage should
as a priority be rectified at source, and that the polluter should pay.”

These principles are, though, closely aligned to the precautionary principle, and are
aimed at ensuring that environmental action is both effective, and aligns economic
incentives. Emphasising the need for preventive action reduces the scope for
producer or other interests to argue that harm should be tackled only after it had
been proven to occur; focusing on reducing damage at the source of that damage
has led to a move away from a reliance on end-of-pipe controls (although these
continue to be an important backstop), in favour of designing production systems
more sustainably. The polluter pays principle aims to ensure that external
environmental costs (i.e. those which impact on the community or the environment at
large rather than the producer or purchaser in a given transaction) are internalised in
the producer’s business decisions; this has led, for example, to policies based on
extended producer responsibility, so that products are better designed to avoid
waste.

All of these principles are valuable, and are now to a large extent embedded in
legislation, practice and in case law. Writing them into Scottish law faces similar
challenges to those we mentioned with respect to the precautionary principle, since
these are essentially constitutional principles. Giving them backing in legislation is
therefore not an equivalently strong commitment. However, they could all prove
valuable in scenarios where the Scottish Government and Parliament needed to
ensure that appropriate democratic decisions to impose regulation to protect the
environment are not put at risk as a result of arbitration arrangements introduced into
new UK trade arrangements outside the EU. In particular, imposing costs on
producers, and ensuring that pollution is tackled at source, could be useful in
ensuring that Scottish producers do not face unfair competition from production in
economies which do not regulate global pollutants (in particular, greenhouse gas
emissions).

(v) Animal sentience

The principle of animal sentience is the most recent relevant principle to be written
into the Treaties, and dates from the 2007 Treaty of Lisbon, which introduced the
following text into the Treaty on the Functioning of the European Union:

“In formulating and implementing the Union's agriculture, fisheries, transport, internal
market, research and technological development and space policies, the Union and
the Member States shall, since animals are sentient beings, pay full regard to the
welfare requirements of animals, while respecting the legislative or administrative
provisions and customs of the Member States relating in particular to religious rites,
cultural traditions and regional heritage.”

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3 Single European Act, article 25, introducing new Title VII to the EEC Treaty, including new Article 130r.2
4 Provided that any measures abide by the General Agreement on Tariffs and Trade, which imposes general
obligations to avoid discrimination against imports.
IEEP is less focused on animal welfare issues than on environmental issues; and we have not carried out any work on this principle. It does not appear to have yet given rise to much case law; and the terms of the principle are sufficiently vague (what does “full regard” require, for example?) that some clarification of their impact is needed. Introducing similar principles into Scottish law would create an opportunity to write them in clearer terms. It should be noted that the UK Government has committed in the Westminster Parliament to “ensure that any necessary changes required to UK law are made in a rigorous and comprehensive way to ensure animal sentience is recognised after we leave the EU”\(^5\).

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

It is difficult to point to specific instances where the relevant principles have had an impact in Scotland which differs from the broader impact of EU legislation. However, areas where the precautionary principle has had an impact on EU legislation and practice include the rules on chemicals, and on the authorisation of pesticides or GMOs. The polluter pays principle has had an impact on laws on packaging and other waste streams, and on industrial emissions generally. The principle of tackling pollution at source lies behind the fact that EU legislation both sets broad standards for environmental objectives to be achieved (in terms of river quality, or air quality), but also lays down specific requirements on polluters (eg through the nitrates and urban waste water treatment directives, and the industrial emissions directive). All of these areas of legislation have had significant impacts on improved protection of the Scottish environment.

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

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

We have identified above some of the arguments around enshrining the principles in Scottish law, noting that it is a weaker approach than the constitutional nature of the principles in EU law. Approaches falling short of legislation, for example, a statement of intent from the Government or from regulators, would (while they could have some value) be even less enforceable.

In addition to the international trade arguments mentioned above there may also be issues with respect to the future single market in the UK. The UK government may seek to introduce mechanisms to ensure that measures adopted by devolved governments, or by the UK government in respect of England, do not create barriers to the free circulation of goods within the UK. Scottish legislation on the principles could therefore have some value in providing clarity on the Scottish Parliament’s understanding of its scope for action; for example, in providing backing for the introduction of extended producer responsibility measures in respect of new waste streams. And while decisions on these issues are a matter for each part of the UK, through their own democratic processes, there would be significant benefit to similar

\(^5\) Animal Welfare: Written statement - HCWS267, 23 November 2017
approaches being adopted across the UK. Early action in Scotland could help to drive an ambitious approach to the principles in other parts of the UK.

One issue which will need to be carefully considered is the extent to which current policies are in fact consistent with the principles the Committee is considering, and what the implications could be for the design of new policies following the UK’s departure from the EU. Arguably, for example, a strict application of the polluter pays principle would preclude the provision of support to sectors such as agriculture purely to enable or encourage compliance with the baseline of environmental legislation.

Finally, IEEP and other commentators have pointed out that there is a significant potential governance gap arising as a result of the UK’s departure from the EU, with the monitoring and enforcement roles of the European Commission and the European Court no longer available. Scotland will face choices on how to address that governance gap in future, and could potentially establish new structures, or reinforce existing ones, in order to ensure that the public is able to hold government to account in its implementation of environmental objectives. One role for such a body could be to advise the Parliament and the wider public on the degree to which key environmental principles are respected in the development of future legislation and policy, and on how to interpret the principles.

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

Space does not allow for a detailed description of examples where environmental principles have been written into domestic legislation, although we can refer the committee to earlier IEEP work on institutions designed to protect the interests of future generations. Specific examples to mention briefly here are the “Well-being of Future Generations (Wales) Act 2015”, which attempts to set out a detailed description of the principles of sustainable development, and the French “Code de l’environnement”, which sets out in legislation broadly the same principles as the EU Treaties (precaution, prevention, polluter pays, and treatment at source), with the addition of a principle of public participation.

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7 Code de l’environnement, Article L110-1