

Environmental Standards Scotland Written Submission to Inquiry into How is Devolution Changing post-EU

Clare Adamson MSP
Convener
Constitution, Europe, External Affairs and Culture Committee
Scottish Parliament
Edinburgh
EH99 1SP

29 November 2022

Dear Ms Adamson,

1. Environmental Standards Scotland (ESS) welcomes the opportunity to contribute to the Committee's inquiry into how devolution is changing following the UK's exit from the European Union.
2. ESS is a non-ministerial office directly accountable to the Scottish Parliament. Since 1 October 2021, it has been a component of the system of environmental governance in Scotland following the UK's exit from the European Union and the end of oversight of implementation of European Union environmental law by the European Commission and the European Court of Justice. ESS' remit is to:
 - ensure public authorities, including the Scottish Government, public bodies and local authorities, comply with environmental law.
 - monitor and take action to improve the effectiveness of environmental law and its implementation.

3. In this submission, we focus on two of the questions that the Committee has posed:
- how much scope there is for regulatory divergence in areas such as environmental standards, food standards and animal welfare between each of the four parts of the UK? [Paragraphs 4-15].
 - is there sufficient clarity regarding the post-EU exit regulatory environment within Scotland and how it relates to the rest of the UK? [Paragraphs 16-19].

Scope for regulatory divergence

4. There is significant scope for regulatory divergence between Scotland and the other parts of the United Kingdom with regards to environmental standards. However, there are also legislative developments at the UK level that may act to limit divergence and the extent of devolved decision-making.
5. The Scottish Government's Environment Strategy states: "We will seek to maintain or exceed EU environmental standards. We will ensure that international environmental principles continue to sit at the heart of our approach to environmental law and policy." (p.5).¹ This commitment is given statutory support by section 1(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 which gives Scottish Ministers the power to make provision to maintain alignment with European Union legislation. Section 2(1) specifies environmental protection as one of the areas where Scottish Ministers can use this power to maintain and advance standards. Other parts of the United Kingdom may choose to make different decisions. This may result in divergence in environmental standards and regulation.
6. Monitoring and assessing whether Scotland maintains alignment with the European Union in terms of environmental law and standards is a priority for ESS. In the relatively short period of time since the United Kingdom left the European Union, there has been limited scope for divergence either with the European Union or with the rest of the United Kingdom. Over time, the scope for divergence will increase.

¹ [The Environment Strategy for Scotland: Vision and Outcomes \(www.gov.scot\)](https://www.gov.scot/publications/environment-strategy-for-scotland/pages/1-introduction-and-vision-outcomes/)

7. In the short-term, the legislative developments at a UK level that could reduce divergence within the UK and constrain devolved decision-making are the:
- United Kingdom Internal Market Act 2020;
 - Retained EU Law (Revocation and Reform) Bill; and
 - Levelling Up and Regeneration Bill.
8. Both individually and collectively, these pieces of legislation have the potential to constrain Scottish Ministers' ability to make decisions about environmental standards in Scotland. Therefore they could limit the extent of regulatory divergence that takes place within the United Kingdom and limit Scottish Government's capacity to maintain alignment with the European Union.

United Kingdom Internal Market Act 2020

9. The Internal Market Act 2020 introduces principles of mutual recognition and non-discrimination to enable the flow of goods and services across the UK. The Internal Market Act means that these principles apply, by default, to new legislation and regulations, except where divergence has been agreed by the UK Government. The Internal Market Act 2020 could therefore limit Scottish Ministers' ability to enforce new regulations to maintain alignment with European environmental law and standards where they relate to a subject where the UK and/or other devolved administrations have taken a different approach.
10. The UK Government retains the power to negotiate and agree international trade agreements. Trade deals would not prevent Scottish Ministers from applying higher environmental standards in Scotland. However, the market access principles in the Internal Market Act 2020 and the nature of international trade agreements would mean that they could not be applied to imported goods. This could limit Scottish Ministers' scope to increase environmental standards without affecting the competitiveness of

Scottish producers, for example if a trade deal included reduced standards on agricultural products.

Retained EU Law (Revocation and Reform) Bill

11. There has been significant commentary about the content and implications of the UK Government's Retained EU Law (Revocation and Reform) Bill (or REUL Bill). The UK Parliament is currently considering the Bill. It proposes to remove all European law from the UK statute book by the tenth anniversary of the referendum on EU membership (23 June 2026). There are currently estimated to be around 3800 pieces of retained EU law, though the Cabinet Office REUL dashboard has only recognised around 2400 to date. There are approximately 570 assigned to DEFRA though not all of these are directly related to the environment and this excludes some REUL on air quality, water quality and biodiversity. The Bill will 'sunset' the majority of retained EU law by the 31 December 2023, with the remainder either reformed or retained in agreement with devolved administrations. This includes removing the supremacy of EU law, general principles of EU law, such as the precautionary principle, and directly effective EU rights. Any retained legislation will be assimilated into domestic law, with UK and Scottish Ministers given powers to amend, repeal and replace retained EU law and assimilated law more easily.
12. Scottish Ministers have raised objections about the pace and scope of the changes proposed by the Bill and the potential impacts on devolved decision-making.² There may be scope to strengthen environmental law to secure better environmental outcomes but this needs to be done in a careful and considered manner with appropriate scrutiny. The provisions of the Bill may lead to conflicts with Scottish Ministers' ambition and capacity to maintain alignment with European Union environmental legislation and standards. In addition to the potential reduction in devolved decision-making, the Bill gives greater powers to UK Ministers, rather than the UK Parliament, to change the legal and regulatory framework across the UK.

² [Retained EU Law Bill - letter to the UK Government: 8 November 2022](#)

Levelling Up and Regeneration Bill

13. The UK Government's Levelling Up and Regeneration Bill includes proposals to replace Environmental Impact Assessments (EIA) and Strategic Environmental Assessments (SEA) with outcome-focused Environmental Outcome Reports (EOR). The UK Parliament is currently considering the Bill.
14. The Bill states that: 'regulations made by the Secretary of State under EOR regulations may specify outcomes relating to environmental protection in the United Kingdom or a relevant offshore area that are to be "specified environmental outcomes"'. The Bill proposes that the Secretary of State would be able to make EOR regulations which contain provisions within Scottish Ministers' devolved competence, after consultation with them. The Bill also includes other powers which could have implications for Scotland, such as those related to planning data regulations.
15. Scotland refreshed EIA regulations in 2017 and currently applies SEA more broadly than the original requirements set out by the EU Directive. Any reduction in the requirements currently set out by these regulations could have negative implications for the environment and for the capacity for members of the public to be involved in environmental decision making.

Clarity of the post-EU exit regulatory environment

16. The post-EU exit regulatory environment that ESS operates within is clear. However, it is still comparatively new, and therefore relatively untested. As noted above, ESS has now been in existence for fourteen months. ESS can investigate non-compliance with environmental law and the effectiveness of environmental law. ESS can conduct investigations in response to representations received from individuals, communities and organisations or it can undertake investigations on the basis of its own monitoring and analytical work. Details of current and past investigations are available on ESS' website at: <https://www.environmentalstandards.scot/>. ESS has enforcement powers ranging from issuing improvement reports to applying for judicial review.

17. Section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 requires Scottish Ministers to conduct a review of the system of environmental governance as it exists following the United Kingdom's exit from the European Union, including ESS' role within it. The consultation on this review must take place within six months of publication of ESS' Strategic Plan. This should therefore take place during the first half of 2023. This provides an early opportunity to examine the clarity and effectiveness of post-EU exit system of environmental regulation. Scottish Ministers must lay the results of the review and their recommendations in response to it in the Scottish Parliament. ESS looks forward to working with the Scottish Government on the process of the review.
18. There are equivalent new arrangements for oversight and scrutiny of environmental law and standards in other parts of the United Kingdom but these vary in some senses from ESS. The Office for Environmental Protection operates in England and Northern Ireland. Its remit is similar but it also has the responsibility to provide advice to government on proposed changes to environmental legislation. In Wales, there are temporary arrangements in place with the position of the Interim Environmental Protection Assessor for Wales. The Assessor's remit is to provide the public with a means of raising concerns about the functioning of environmental law. The Assessor considers such concerns and can produce advice for Welsh Ministers but does not have any enforcement powers, in contrast to ESS and the Office for Environmental Protection. Welsh Ministers have committed to establishing permanent arrangements.
19. ESS has agreed a memorandum of understanding with the Office for Environmental Protection and the Interim Environmental Protection Assessor for Wales. It sets out how the three organisations will co-operate and work collaboratively on areas of common interest. The three organisations meet on a regular basis.

I hope this information is useful in the Committee's considerations.

Yours sincerely,

Mark Roberts

Chief Executive Officer, Environmental Standards Scotland