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Gillian Martin MSP
Convener, Environment, Climate Change and Land
Reform Committee
c/o Clerk to the Committee
Room T3.40
The Scottish Parliament
Edinburgh
EH99 1SP

24 October 2019

Dear Gillian

Please see attached paper on preparations within the Environment, Climate Change and Land Reform portfolio for the UK's exit from the EU. This is in response to your letter of 27 September 2019 and in advance of my appearance before the Committee on Tuesday 29 October to give evidence on this subject.

Yours sincerely

Roseanna Cunningham



ENVIRONMENT, CLIMATE CHANGE & LAND REFORM PORTFOLIO - PREPARATIONS FOR THE UK'S EXIT FROM THE EU

Introduction

1. The Scottish Government has a well-established and consistent position; opposing the UK's proposed departure from the EU, in line with the clear majority of votes in Scotland in the 2016 referendum. The UK Government should take immediate steps to remove the possibility of a catastrophic no deal exit. However, while the risk remains, as a responsible Government we are taking appropriate steps to mitigate its potential impacts where possible.
2. The Scottish Government continues to prepare as best it can with the resources and levers available. Given such resources and the limits on devolved competency, it will not be possible to mitigate all the harmful impacts of leaving the EU. Efforts are focused to ensure, that - where able to do so - Scotland, its communities, businesses and citizens are protected.
3. Across the Environment, Climate Change and Land Reform (ECCLR) portfolio, a great deal of work from the Scottish Government, agencies and stakeholders has gone into reducing the potential likelihood and impact of risks. Except where otherwise noted, this letter focuses on preparations for a no deal exit from the EU, which at time of writing could still happen on 31 October. Should an extension be granted, the risk of leaving the EU without a deal will remain, so the information set out here should, subject to events, apply to future exit dates.

Preparations for exiting the EU

The EU exit legislative programme

4. The Scottish Government expects all legislation which is absolutely essential for exit day to be in place in time for 31 October.
5. In total, 46 EU Exit Scottish Statutory Instruments (SSIs) have already been made to address legislative deficiencies arising from EU exit, of which eight have been scrutinised by the Environment, Climate Change and Land Reform (ECCLR) Committee. Almost 160 UK Statutory Instruments (SIs) have been notified so far to the Scottish Parliament, of which 33 notifications - covering 37 SIs - have been considered by the ECCLR Committee. This has involved significant work and the Scottish Government is grateful to the Committee for its cooperation, in some cases to very tight deadlines.
6. All this has been done to prepare for a potential no deal exit. The programme to fix legislative deficiencies identified as being critical for the previous scheduled EU Exit dates of 29 March and 12 April was successfully completed, and the Scottish Government is confident that the programme to fix legislative deficiencies ahead of 31 October will also be completed. If, however, the UK leaves the EU with a deal, in an orderly manner, then all SIs and SSIs considered by Parliament will have to be reviewed in light of the deal. This work cannot be undertaken until we know if there will be a deal and what the terms of such a deal are.
7. In addition, consideration will be given to whether any further parliamentary scrutiny is required where it is proposed that the SIs previously considered by Parliament in the event of a no deal exit, and on a short term basis, may now themselves be considered as the basis for longer term arrangements such as common frameworks.

Planning of Non-Departmental Public Bodies (NDPBs) and agencies

8. We continue to prepare for the impacts of a disorderly exit from the EU. Efforts across the ECCLR portfolio have focused on areas of greatest potential impact - waste shipment, regulation and supply of chemicals, and water.
9. We have used the time afforded by the extension of Article 50 to undertake further risk mitigation work, including testing new regulatory arrangements for REACH with the UK Government and working with the Scottish Environment Protection Agency (SEPA), on preparations to support businesses and local authorities for the impact of no deal. We have reviewed our contingency response arrangements to ensure we share information and can act quickly on emerging environmental issues. This will include working closely with SEPA, Scottish Natural Heritage (SNH) and others who are liaising directly with stakeholders to provide advice and support, both directly and online.
10. The Scottish Government shares the Committee's concerns about any loss of networks, expertise and data. SEPA and SNH in particular are involved in a number of expert and working groups. Until we know the final terms of any UK exit from the EU and the terms of any future relationship, it is not possible to say which information or networks NDPBs and agencies will have access to.

Business Support

11. A no deal exit would lead to a major dislocation to the Scottish economy through a number of factors - disruptions to logistics, supply, trade, investment, migration, and market confidence. The uncertainty relating to this is already impacting business and consumer confidence in Scotland.
12. The UK is not, and cannot be, ready for a 'no deal' exit on October 31. It will not be possible to mitigate all the impacts of leaving the EU without a deal, but we are doing what we can with the funds and policy levers available to us.
13. Responsibility for business support lies within the Finance, Economy and Fair Work portfolio, but the committee may be interested to note that the multi-agency 'Prepare for Brexit'¹ website, hosted by Scottish Enterprise, has had over 100,000 unique visitors and 6000 people completing the business planning tool since 1 November 2018. Businesses can access advice and online self-assessment toolkits, book onto learning events and apply for grants.
14. On 13 March 2019 the First Minister announced £2 million funding across two years to help more businesses in Scotland prepare for EU exit. Brexit Support Grants², administered by Scottish Enterprise, are now available to help small and medium sized businesses manage a wide range of impacts with a grants of up to £4000 each. The grant can be accessed by VAT-registered businesses employing up to 250 staff, and can be used for activities including consultancy support, professional fees, external training, and international market research. Over 2000 application forms have been downloaded, and 87 grant applications have been approved.

1 <https://www.prepareforbrexit.scot/>

2 <https://www.prepareforbrexit.scot/updates/brexit-support-grant>

Risk Management

15. The Scottish Government's no deal plan was published on 8 October 2019³. The ECCLR portfolio's immediate risks are set out below, but we are well aware that many risks in environment and climate change policy are much more long term: we are managing these through the common frameworks, governance and principles work set out later in this paper.
16. Most Scottish waste is dealt with in Scotland. A relatively small proportion is exported (less than 10% in 2017, and that figure stays roughly the same from year to year). It is mainly Refuse Derived Fuel (RDF) and non-ferrous metals, and leaves through ports in Scotland or northern England. Little or no waste is sent through Dover or other ports in the south of England. Arrangements have been made for authorisations permitting the shipment of waste to EU states to continue to have effect for now, and the Scottish Environment Protection Agency can offer assistance on the permitting and notification of trans-frontier shipment of waste. However, customs clearance would be required, and exporters would need to make arrangements with the customs authorities of receiving EU states to enable the export of waste to continue.
17. The legislation needed to support a UK chemicals regulatory regime to replace the EU REACH regime is now in place and we remain in close contact with the UK Government and HSE regarding operational readiness in a no deal scenario.
18. The water industry is well prepared and the sector is confident that a no-deal scenario would not have an impact on water supply. The Scottish Government has been working with water companies, regulators, Defra and Devolved Administrations to prepare for a range of potential EU Exit outcomes. The main vulnerability relates to chemicals which are necessary to treat water to ensure that it is safe to drink. The water industry has assessed its supply chains, supply routes and storage capacities, and carried out necessary preparations. It does not anticipate any significant impacts on usual supply routes.
19. Though the information and intelligence is developing, there is the potential for breakdown of law and order at sea and in port. Responsibility for law and order at sea and in port is a matter for both reserved and devolved agencies. Marine Scotland Compliance is responsible for enforcement of marine and fisheries legislation, but the UK Government has responsibility for safety at sea and enforcement of the UK's borders, and defence against hostile and illegal activity at sea. Marine Scotland Compliance will where possible report and collect evidence of any suspected offences or any emerging or ongoing situations which have an implication for safety at sea, including any hostile activity by or between fisheries vessels. Marine Scotland Compliance will work closely with Police Scotland and the UK Government and its agencies to provide monitoring and support as appropriate. Enforcement of marine and fisheries legislation is devolved, but it is vital that there is close working between the UK Fisheries administrations to ensure a consistent approach, given the mobility of fishing vessels and the shared nature of fish stocks.

³ <https://www.gov.scot/publications/scottish-government-overview-no-deal-preparations/pages/3/>

Governance arrangements following exit from the EU

Common frameworks – intergovernmental relations (applicable regardless of whether the UK leaves with or without a deal)

20. There are established joint UK Government and Devolved Administrations governance arrangements in place to oversee the common frameworks programme and report on progress directly to Joint Ministerial Council (European Negotiations) (JMC(EN)) Ministers. The phased process for common frameworks, outlined in the Cabinet Secretary's letter to the committee on 26 June 2019, has been jointly established by the four administrations through these arrangements. This governance mechanism will continue to oversee and monitor the joint development of frameworks, from initial discussions to define their scope and policy development, through to the agreement and implementation of final framework proposals, and finally into post-implementation. We will continue to work with UK Government and other devolved administrations where frameworks are in Scotland's interests, on the basis of consensus, and with adherence to the principles for common frameworks agreed by JMC(EN) in October 2017.
21. At a meeting of the JMC Plenary on 14 March 2018, Ministers discussed the need to review our inter-governmental structures and agreed "that officials should review and report to Ministers on the existing intergovernmental structures, including the Memorandum of Understanding, to ensure they are fit for purpose in light of the UK's exit from the EU." Both the Welsh Government and Scottish Government agree that current arrangements are not fit for purpose and have been pushing for substantive change. The Quadrilateral Review is ongoing. There is an expectation that officials – through their joint efforts – will present proposals for reform to respective Ministers for consideration by the end of 2019.

Common frameworks – chemicals regulation and pesticides, EU ETS, waste packaging and product regulations

22. There has been an impact on the progress of common frameworks as a result of our officials being required to prioritise work on no deal preparations, but we expect that the work on the chemicals and pesticides framework to shortly move into phase three (review, consultation and further policy development of provisional frameworks).
23. Officials from the UK Government and the Devolved Administrations continue to explore a common framework to replace the EU ETS. Feedback from the joint consultation on the future approach to carbon pricing is informing policy choices that Ministers will discuss and agree between the four administrations before the end of the year, followed by the publication of a joint government response. The Scottish Government continues to press for a UK ETS linked to the EU ETS as previously discussed with the Committee. We continue to oppose any attempt to introduce a UK carbon emissions tax as a long term alternative to the ETS.
24. Work on the common framework on Waste (which would encompass waste packaging and product regulations) is still in at an early stage. Development of the Circular Economy Bill has proceeded in the normal way, and a consultation on proposals for legislation will be published soon.

Maintenance of environmental standards, including through Free Trade Agreements

25. Maintaining high levels of environmental protection is critically important to Scotland. The recent shift in the UK Government's aspirations away from a comprehensive Future Economic Partnership with the EU, and towards a weaker Free Trade Agreement, is regrettable. It is counter to the Scottish Government's objectives and the needs of our

economy, and raises questions about how cooperation on environmental protection between the UK and the EU will be taken forward in respect of matters not directly connected to trade. These matters are long-term risks, and are applicable in both the deal and no deal scenarios.

26. Recent statements suggesting the UK Government's intends to diverge from EU environmental, labour and product standards, are deeply concerning. The Scottish Government has raised these concerns with the UK Government, in light of previous political agreement that governments would not diverge from retained EU law in ways that would cut across future frameworks.

Environmental principles and governance

Continuity Bill

27. The new Continuity Bill will bring back provisions to ensure Scots law may continue to keep pace with EU law, as we believe that the extent to which devolved law aligns itself with the law of the EU should be a decision for this Parliament to take, not the UK Government. The Scottish Government is assessing the timetable on which these powers will be needed, and, given the uncertainty of the scenario in which the UK might leave the EU and the continued possibility of a no-deal exit, this will be subject to continual review. If, in the event of a no-deal Brexit, it becomes necessary to proceed with an accelerated timetable - to ensure that Scotland's devolved laws can continue to align with EU law – the Scottish Government will discuss this with Parliament and the parliamentary authorities.

Environmental governance

28. Scotland already has strong regulatory institutions and environmental regulations in place and these will continue to function following an EU exit. Scottish Ministers have taken steps to ensure that the statute book can continue to operate effectively if the UK crashes out the EU without agreeing a deal.
29. Regardless of the nature of the UK's exit from the EU, the Scottish Government has committed to maintain or exceed environmental standards following EU exit, and will bring forward legislative proposals to ensure the four EU environmental principles continue to sit at the heart of environmental policy and law in Scotland. These are:
- Precautionary principle; where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
 - Polluter Pays principle; the polluter should bear the cost of pollution control and remediation.
 - Prevention principle; preventative action should be taken to avoid environmental damage.
 - Rectification at Source principle; environmental damage should, as a priority, be rectified at source.
30. The UK Environment Bill⁴ was published on 15 October and contained proposals for environmental principles in England, and for governance arrangements covering the UK Government's responsibilities, including the establishment of an Office for Environmental Protection (OEP). We appreciate that the Committee is likely to have more detailed questions about its scope and application at the hearing on 29 October.

4. <https://www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018>

31. We intend that Scottish environmental principles will apply to UK Ministers designing policies in reserved areas covering Scotland, to reflect the fact that provisions on environmental principles set out in the UK Environment Bill extend only to England. The Cabinet Secretary for the Environment, Climate Change and Land Reform has agreed to consider ways in which the four UK administrations can work to provide for coherent sets of principles.
32. The Scottish Government is considering a range of institutional models for a future Scottish governance function, and how it can be carried out constructively, to seek remedy and agreement to environmental improvements. This must ultimately be backed by some form of sanctions, which - while likely to be rarely taken - would provide an incentive for public bodies to correctly apply environmental law and engage with governance where failings are under consideration. While we cannot recreate the enforcement role of the European Court of Justice in a domestic setting, the governance function must have a range of actions it can take that are proportionate and fit with the existing roles of the Scottish Parliament and Courts.
33. There has been regular Ministerial correspondence and discussion at official level throughout the development of the UK Government's environmental governance proposals as set out in its Environment Bill. This discussion has focused on the need to avoid any impact on devolved competence.

The UK Environment Bill and climate change governance

34. The policy statement accompanying the UK Environment Bill indicates that it will include *"powers [to] cover all climate change legislation and hold the government to account on its commitment to reach net zero emissions by 2050,"* and that *"extensive and continued collaboration with the Scottish and Welsh Governments and the Northern Ireland Civil Service has also enabled us to bring forward measures that we expect to see adopted outside of England."* No such collaboration on climate change has taken place and the Scottish Government was not consulted on the addition of climate change provisions to the Bill. Scottish Government officials are investigating with their UK Government colleagues.

Environment Strategy

35. The Environment Strategy forms part of our overall strategic approach on environmental policy, along with future arrangements for environmental principles and governance. We are taking a joined up approach across the strategy, principles and governance arrangements to ensure that they work effectively together as part of a coherent strategic approach to environmental policy as we navigate the challenges arising from leaving the EU.
36. In February, we published an independent analysis report of responses to an Online Discussion held in 2018. It concluded that there is broad support for our proposals for developing the Strategy. It has been necessary to review the timescale for publishing the Strategy to accommodate work on contingency preparations for a no deal Brexit. We will publish our working vision for the Strategy in the coming months.

Replacement funding

37. Scotland is expected to benefit from EU funding by around £5 billion of total funding from the current EU budget round, with an estimated £524 million supporting environmental outcomes.

38. Funding supports a broad range of activity from major programmes of work such as the Scottish Rural Development Programme, Resource Efficient Circular Economy Accelerator Programme, Green Infrastructure Investment Fund and Natural & Culture Heritage Fund, and smaller local projects which make a direct difference to local communities.
39. Officials continue to assess the volume and impact of environmental funding in Scotland, particularly for our public bodies. Without knowing the terms on which the UK will exit, or having a clear picture of replacement funding, planning for the future remains challenging.
40. The UK Government has still to provide clarity on future arrangements for EU funding - proposals on agriculture, fisheries and structural funding are vague and provide no certainty for the future. The UK Government has also committed to replacing EU structural funds with a “shared prosperity fund” (SPF) but the value, scope and operation of the fund are all unclear.
41. There is no sign of the consultation on the SPF that was promised in autumn 2018, and there has been no meaningful engagement with the Devolved Administrations on this matter.
42. In the absence of detailed information about the UK Shared Prosperity Fund from the UK Government, the Scottish Government will soon launch a consultation on the replacement for the European structural funds post EU exit. A steering group led by Professor David Bell of Stirling University will oversee the consultation, and a report on our findings will be published in the new year.