

The Environment, Climate Change and Land Reform Committee
UK Withdrawal from The European Union (Continuity) (Scotland) Bill
Submission from Brexit & Environment¹

Part 1: Alignment with EU Law

On “keeping pace”, we note that Northern Ireland (NI) will be bound to keep pace in areas under protocol; Scotland wants to and in a larger number of areas. Critically, as no goods undermining EU rules would be allowed in the NI market, NI producers will not be undercut by GB producers not keeping pace. In the Scottish case though, in practice mutual recognition and non-discrimination principles in the proposed internal market rules will mean English, Welsh and NI goods will have to be accepted in Scottish shops, irrespective of whether they also ‘keep pace’.

This will make it very unclear for consumers, businesses etc. as some will be asked to keep pace with EU law and not others. As such, and because of the potential economic cost and possibility for Scottish economic actors to be undercut by rUK counterparts not keeping pace, the wording should be ‘have powers’ and not ‘have duty’.

Part 2 Environment: Chapter 1 - Environmental principles

Generally, we welcome the proposals on the principles. We share the view with some groups that the duty should apply even more widely, not just to policy formulation, but we recognise that there are reasons for the limits set. It is worth noting that in the Treaty on the Functioning of the European Union (TFEU), these principles go hand in hand with the objective of high environmental protection; this overarching principle is missing in the Bill. As an illustration, the Continuity Bill, Part 2 Chapter 1 (line 30) says: “those principles are derived from the equivalent principles provided for in Article 30 191(2) of Title XX of the Treaty on the Functioning of the European Union. However, the TFEU states: “Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and 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.”

We find the exclusion of financial plans particularly disappointing, especially at present when the need to build a greener recovery from the current economic crisis has been recognised.

Finally, we feel greater clarity would be welcome on the interaction with other duties on public authorities (e.g. in relation to climate and sustainability under the Climate Change (Scotland) Act 2009 and biodiversity under the Nature Conservation (Scotland) Act 2004.

Part 2 Environment: Chapter 2 - Environmental governance

On the environmental watchdog, we welcome the proposals and the fact that they avoid many of the limitations and constraints found in the English proposals, such as allowing a more direct enforcement power, which is balanced by a right for appeal and more explicit

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powers to intervene in other civil litigation. We particularly welcome the section on collaboration: ESS may...“collaborate with any other environmental governance body in the United Kingdom, including the Office for Environmental Protection, or such other persons as Environmental Standards Scotland considers appropriate” (Continuity Bill, Section 16 (g)).

Moreover, the attempts to establish independence are welcome, although ministerial control over finances and conditions of appointment is not ideal because of the potential for government influence. Tied to this, we note that the exclusion of financial matters may mean that an important driver of environmental performance is without scrutiny.

The parliamentary role at various stages, e.g. improvement plans, is welcome and does help to bolster the powers of ESS.

Currently, there still seems to be an unanswered question over whether the OEP and ESS provisions leave any gaps (when UK Ministers act in devolved areas and Scottish ones in reserved areas) and whether the attempts to prevent ESS becoming just a further route for appeal in individual cases may stymie investigation when one incident points to a potentially serious incident.

We anticipate there may be issues over how the power to raise judicial reviews will work, given the usual three-month time period to do so, which may be consumed by the initial exploration of other routes before reference to ESS and then its investigation and decision-making.

More specifically, we see the Bill as an opportunity not only to address gaps and governance failures linked to UK exit but also pre-existing issues. While the ESS development is welcome, we are concerned it will not address the major issue of Scotland non-compliance with the Aarhus convention and the prohibitive costs for environmental groups to access justice through judicial reviews.²

² See for example, Christman, B. (2020) 21 years of Aarhus – how long the wait for affordable access to environmental justice in Scotland? Available: <https://www.scottishlegal.com/article/dr-ben-christman-21-years-of-aarhus-how-long-the-wait-for-affordable-access-to-environmental-justice-in-scotland>