



Law Society  
of Scotland



# Consultation Response

## Environmental Principles and Governance in Scotland

May 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law sub-committee welcomes the opportunity to consider and respond to Scottish Government's consultation on *Environmental Principles and Governance in Scotland*<sup>1</sup>. We have the following comments to put forward for consideration.

## General comments

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We note the proposals previously set out by Scottish Government in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill as well as the principles set out in section 16(2) of the EU Withdrawal Act 2018 and the Draft Environment (Governance and Principles) Bill published by the UK Government in December 2018. It is important that the wider context within which environmental principles sit is considered – for example, Scotland's National Performance Framework and other 'restrictions' in environmental matters such as climate change.

We consider that strong collaboration between the UK Government and devolved administrations is of considerable importance. This is particularly significant given the transboundary effects of environmental impacts. Consistency in the manner in which principles are applied will be of benefit in ensuring that international environmental obligations are met and avoiding 'environmental regulatory tourism'. The extent to which consistency will be sought across the jurisdictions is a political matter and we have no comment to make on this.

The Cabinet Office published in late 2017 a list of 111 points where EU law intersects with devolved matters. This has been supplemented by the publication of the *UK Government's Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern*

<sup>1</sup> <https://consult.gov.scot/environment-forestry/environmental-principles-and-governance/>

*Ireland* on 9 March 2018. 24 of the policy areas in question were identified as being subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part. The Cabinet Office published in April 2019 a *Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland*. This revised analysis has reduced the number of policy areas where legislation common frameworks may be required to 21. In order to add further information to the debate, we offer a survey of those policy areas relevant to environmental matters (annexed to this paper) which includes details of the EU law concerned and the implementing legislation for Scotland and, where appropriate, for the UK (occasionally on a GB basis) and for England and Wales.

We also note that the Scottish Government has consented to regulations on a variety of environmental matters which have been, or are due to be, laid in Parliament in preparation for the UK's EU exit<sup>2</sup>. To date, these regulations cover: ionising radiation; emissions trading; health and safety in connection with genetically modified organisms, control of major accident hazards; water environment and environmental policy; persistent organic pollutants; control of mercury; animal health; nuclear reactors; fluorinated greenhouse gasses and ozone-depleting substances; waste management; Nagoya Protocol; air quality carbon capture and storage; marine environment; import and trade of animals and animal products; registration, evaluation, authorisation and restriction of chemicals (REACH); genetically modified organisms; and animals and food.

We note and welcome the work undertaken by the Roundtable on Environment and Climate Change. The report of the Roundtable<sup>3</sup> considers a variety of options for environmental governance following the UK's withdrawal from the EU. There appears to have been limited development of the proposals since the Roundtable's report. However, we recognise that the extent to which there is freedom to devise new structures may be constrained by the terms of any future agreements with EU or others. For example, we note the specific environmental requirements set out in Article 3 of Annex 4 of the *Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, as endorsed by leaders at special meetings of the European Council on 25 November 2018 and on 11 April 2019.

<sup>2</sup> Further information about the Scottish Parliament's consideration of these instruments can be found here: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/109366.aspx>

<sup>3</sup> <http://www.gov.scot/Resource/0053/00536067.pdf>

## Consultation questions

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### Section 1: Environmental principles

#### **Question 1: Do you agree with the introduction of a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers?**

We support the introduction of a duty in relation to the four EU environmental principles and note that there are a variety of forms of duty which may be imposed.

The principles are currently integral to Scots environmental law as they are relevant to the interpretation of any law that implements EU environmental law. The four principles are enshrined in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU). These principles will continue to have relevance following the UK's withdrawal from the EU due to the incorporation of EU law into domestic law. We consider it important that an approach is taken which safeguards these but also ensures that there remains a degree of consistency of approach among the UK jurisdictions. The extent to which consistency will be sought is a political matter and we have no comment to make on this.

As we refer to in our answer to question 3, we also suggest consideration be given to the possibility of changes to the four principles by the EU at some time after the UK's withdrawal from the EU.

There are different approaches which could be taken to compliance with the principles.

1. A general duty on Scottish Ministers to “have regard to” environmental principles could help to ensure that environmental concerns are taken into account when policies are made and when action is planned. There is a well-established practice of requiring public authorities to ‘have regard’ to various factors. This approach would mean that the principles would not be a controlling factor but simply that they cannot be wholly ignored as irrelevant considerations. An example of this type of approach from another sphere is found in the Land Reform (Scotland) Act 2016, section 56(14)<sup>4</sup> which refers to the International Covenant on Economic, Social and Cultural Rights. This incorporates consideration of high level values which generally are not justiciable or referred to in legislation.

We consider, however, that there is the potential for Scottish Ministers to ‘have regard to’ the principles but choose to attach little or no weight to them. This could result in little practical weight being attached to the principles when action is taken. It is likely to be difficult to challenge a decision of a Minister, for example by judicial review, to attach little or no weight to the principles unless it can be demonstrated that the principles have been given no consideration.

<sup>4</sup> At time of writing, this section of the Act is not yet in force.

We note that it is not suggested that Scottish Ministers are to explain how principles have been taken into account and/or to publicise reasons for failure to implement the principles. Such measures would go some way to providing further scrutiny and accountability of policy makers in their fulfilment of the duty. We recognise that some may still feel that that would still allow for little weight to be given to the principles in particular cases.

2. An alternative form of wording which would likely strengthen environmental protection could be to require Ministers to ‘act in accordance with’ the principles. We recognise, however, that that may be considered to be too restrictive and limit the flexibility sought for the application of the principles. Such a duty has the potential to give rise to challenge.
3. Other terminology is used in reference to other extant duties, for example:
  - a. The biodiversity duty found in section 1 of the Nature Conservation (Scotland) Act 2004 refers to a duty “to further the conservation of biodiversity so far as is consistent with the proper exercise of [their] functions”. A recent Scottish Parliament inquiry suggested that this duty may not be effective<sup>5</sup>.
  - b. The duty on planning authorities to act “with the objective of contributing to the achievement of sustainable development” in relation to development planning (Town and Country Planning (Scotland) Act 1997, section 3E).
  - c. The duty on Scottish Ministers, SEPA and “the responsible authorities” to act “in the way best calculated to contribute to the achievement of sustainable development” (Water Environment and Water Services (Scotland) Act 2003, section 2).
  - d. Duties on a public body under section 44(1) of the Climate Change (Scotland) Act 2009 to act:  
“(a) in the way best calculated to contribute to the delivery of the targets set in or under Part 1 of this Act;  
(b) in the way best calculated to help deliver any programme laid before the Scottish Parliament under section 53....”
  - e. Duties on a public body under section 44(1) of the Climate Change (Scotland) Act 2009 to act “(c) in a way that it considers is most sustainable.”
  - f. The requirement on the Scottish Ministers to give Scottish Water directions “requiring it to promote water conservation and water-use efficiency” (Water Industry (Scotland) Act 2002, section 56).

<sup>5</sup> Public Audit and Post-legislative Scrutiny Committee 2nd Report, 2018, *Post-legislative Scrutiny: Biodiversity and Biodiversity Reporting Duties* (SP Paper 369).

This may present an opportunity to rationalise the existing environmental duties on Scottish Ministers and other public bodies.

4. A further option would be to introduce an overall objective of achieving a high level of environmental protection. This could take the form of a stronger duty (for example, to contribute to, pursue, or promote) in relation to environmental protection generally with 'weaker' duties in relation to specific principles, either by 'having regard to' or similar terminology. This could help to strengthen the focus on environmental protection and allow for the Scottish Ministers to be challenged in the event that the duty was not respected, while maintaining a modest duty to uphold the particular environmental principles. We note the recommendation of the House of Commons' Environmental Audit Committee<sup>6</sup> in relation to the inclusion of such a duty in the draft Environment (Principles and Governance) Bill and discussion about such a duty by the House of Commons' Environment, Food and Rural Affairs Committee<sup>7</sup>, also in relation to the draft UK Bill.

### Application of duty

Whatever the mechanism finally decided upon, it is important that it allows transparency of decision making in accordance with the principles.

It is important that the law is as clear and precise as possible. Scottish Ministers, and if appropriate, public bodies, need to be able to guide their behaviour by a clear understanding of the standards of conduct expected by the law. It flows from this therefore that any incorporation of environmental principles into the law must have sufficient clarity as to the role and effect of the principles so that Scottish Ministers, and if appropriate, public bodies, remain clear as to the conduct required to adhere to the law.

The courts must be clear as to how they are to take account of and enforce the principles where they have been enacted in the law, so they should be provided with clear guidance as to how the principles are to be treated. We comment further in relation to such guidance in our answer to question 4. The guidance should make clear how any discretionary nature of the principles is to be applied and how they are to be balanced with other factors that influence a decision. In addition, we note that there requires to be clarity as to how or whether the principles are to be taken into account by the court when considering the implementation of legislation, for example, in judicial review. Since this would involve instructing the court how to act, we consider that such guidance requires to be in the form of statutory guidance or be embedded in legislation rather than being a matter of policy only, which by its nature does not impose a legal obligation.

<sup>6</sup> House of Commons Environmental Audit Committee, Eighteenth Report of Session 2017–19, *Scrutiny of the Draft Environment (Principles and Governance) Bill* (HC 1951), at paragraph 11.

<sup>7</sup> House of Commons Environment, Food and Rural Affairs Committee, Fourteenth Report of Session 2017–19, *Pre-legislative Scrutiny of the Draft Environment (Principles and Governance) Bill* (HC 1893), at paragraphs 14 and 15.

We note that under section 6(2) of the European Union (Withdrawal) Act 2018, courts can “have regard to” future case-law of the Court of Justice of the European Union (CJEU) but are not bound by it. There may be merit in guidance on this.

When considering any particular course of action, it is likely that there will be a number of matters to be regarded by the decision maker, including domestic policy and principles. While we recognise the need for appropriate checks and balances, in particular reflecting the need to balance environmental principles against other principles and priorities, it is important that the environmental principles will be given meaningful attention when relevant policies are made, developed or revised.

It is of central importance to the rule of law that legislation is clear and has specification. We note that it is not currently proposed that the principles will be enshrined in so called ‘black letter’ law. If this approach were to be taken, we would be concerned that sufficient specification would not be achieved. We consider that there are potential drawbacks of putting the principles themselves into black-letter law. A ‘principle’ may be incapable of being legally enforced due to lack of certainty as to how it applies in a particular situation and how it interacts with more specific provisions of substantive law. Directly enacting principles in legislation is generally not an effective way of law-making unless their subsidiary role is made clear and there is no instance of principles being relied upon in place of sufficiently precise legal rules being developed. It can be difficult for courts and other authorities to apply or enforce equitably principles that are directly enacted in the law due to the discretionary nature of the process.

If the principles were to be enshrined in so called ‘black letter’ law, it would be essential that this was done as part of a wider process that ensured that all the other relevant principles were also considered. Any principles of environmental protection need to be carefully balanced against counter-balancing principles, including those that protect the interest of persons operating in the environment, such as the EU principle of proportionality. The protection of the principles of EU environmental law is best achieved within the context of the overall approach to how EU law and the principles applying under it will be preserved in Scots law. To pick out specific principles and give them special status which goes beyond that currently applying, runs the risk of unintentionally giving the principles a greater status than other relevant principles. This may fail to allow the striking of an appropriate balance between environmental protection and economic development, as envisaged by the basic regulatory principle in the Regulatory Reform (Scotland) Act 2014 of contributing to achieving sustainable economic growth.

## **Question 2: Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?**

We believe that the duty should extend to Scottish Ministers and to public bodies, including local authorities.

We consider that there are three points at which a duty could be imposed:



- application to the formation of policy,
- application to the formation of proposals for legislation, and
- the implementation of legislation itself.

The consultation proposes that duties apply to Scottish Ministers, and perhaps to public authorities, in respect of the first of these two matters. We note that the remit of the European Commission to date has focussed on the first two of these matters.

It would be an option to impose a duty to ‘have regard to’ (or such other duty) the principles in the implementation of legislation. We consider that such a duty has the potential to become overly burdensome. This would apply to all decisions made by a local authority, for example including decisions taken on planning applications and other regulatory permissions, which is likely to involve considerable efforts. It is not clear how Scottish Ministers and public bodies would record that they had ‘had regard to’ (or such other duty) the principles in implementing legislation and how this would be demonstrated. We suggest therefore that any duty should remain at a high level.

We also note that it is important to clarify what is meant by “policy”. We consider that this refers only to the development of policy when in Government. There would be merit in the definition of policy including documents such as strategies and programmes to prevent the scope of the duty being artificially limited by the labelling of a document.

### **Question 3: Do you agree that a new duty should be focused on the four EU environmental principles? If not, which other principles should be included and why?**

We agree that there is merit in a new duty being focused on the four EU environmental principles – precautionary principle, polluter pays principle, prevention principle, and rectification at source principle. The extent to which consistency will be sought between the principles in Scotland and the EU principles is a political matter.

The four EU environmental principles identified in the consultation paper have played a major role in shaping environmental law to date. As referred to above, the principles are currently set out in Article 191(2) of the TFEU. These principles represent continuity with those currently found in EU law and policy, and as implemented in the UK. The idea of “polluter pays” is simply a variation of the fundamental legal principle of taking responsibility for harm caused.

It is important to recognise that the precise application of these principles can be controversial, especially the precautionary principle where there will often be argument over the correct balance between the gains of development and the environmental risk.

As noted above, it is essential that all the other relevant principles are also considered when policies are made. This will include EU principles which become retained EU law as at the date of the UK’s withdrawal



from the EU. There may be merit in the integration principle<sup>8</sup> being included. This would appear to be consistent with the desire to link this duty with Scottish Government's objectives and wider structures.

In addition, we suggest that consideration be given as to the approach which may be taken if there are changes to the EU principles after the UK's withdrawal from the EU. If there was a change to the principles at EU level, it would be appropriate for the Scottish Parliament to have a role in considering whether to make changes to the principles adopted in Scotland.

We note the rights set out in the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention 1998) which are referred to in the UK Government's draft Bill. These rights are conferred on UK citizens and citizens within all states that have ratified the Convention. We support the approach taken by the Scottish Government not to include these as principles. We consider it important that these continue to be recognised as rights rather than principles as this may have the effect of devaluing them.

**Question 4: Do you agree there should be an associated requirement for a policy statement which would guide the interpretation and application of a duty, were one to be created?**

There should be guidance on the interpretation and application of a duty, should one be created. In order to give the guidance legal status, we consider that such guidance should take the form of statutory guidance or be embedded in legislation rather than in the form of a policy statement.

It is of central importance to the rule of law that the law is clear and has specification and therefore we support the introduction of guidance in relation to the interpretation and application of a duty. Uncertainty in relation to environmental principles may make it difficult for individuals and organisations to guide their conduct according to the necessary standards and to plan for the future.

It is important that the process by which the guidance is formulated is transparent and accountable with scope for public participation and for Parliamentary approval. The production of guidance provides a focus for consultation and debate over the interpretation of the principles and how they should be applied. This will help to clarify that these are matters for consideration by the legislature. We would welcome consultation on any such statement.

The principles are well established in EU law and are generally consistently applied. It is important that there remains consistency in their application as this will help to provide certainty and clarity of decision making for individuals and businesses. Any guidance should set out the key context of the principles being taken into account, in particular, clear expectations as to the role and interpretation of the principles. There

<sup>8</sup> Article 11, TFEU

must be clear guidance available as to the significance and weight to be attached to the environmental principles as compared to other legal principles and direction on the interaction of the principles with substantive legal rules. The extent to which the courts are entitled to have regard to the principles (or such other duty) must be made clear. As referred above, this should be in the form of statutory guidance or legislation to ensure that the courts are obliged to follow its terms.

European case law has had an extensive influence on the interpretation of the principles to date and it is important that this continues to be reflected.

Under the European Union (Withdrawal) Act 2018<sup>9</sup>, courts can have regard to future case-law of the Court of Justice of the European Union (CJEU) but are not bound by it. We suggest, therefore, that it should remain open to the court to choose whether, and to what extent, to have regard to case law from the CJEU. As referred to above, we consider it to be a political decision as to the extent to which consistency will be sought with the EU following the UK's withdrawal.

## Section 2: Environmental governance arrangements

### **Question 5: What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?**

Currently EU Member States, based on their own monitoring, submit information and data to the European Commission which analyses national reports. The Commission's findings are presented in different ways for example, implementation reports to the European Parliament and Council, and indicators, scoreboards and other publications. The Commission's monitoring and reporting role allows for assessment of compliance by Member States with EU requirements.

We consider a significant loss will be in relation to loss of data, and in particular, the comparability of data and trends, both in terms of location and time. The impact of this loss is likely to be for the future rather than an immediate loss. Without collaboration between the UK Government and devolved administrations, there is a potential for a lack of comparability of data and trends within the UK.

### **Question 6: What key issues would you wish a review of reporting and monitoring requirements to cover?**

We consider it important that future arrangements remain consistent with monitoring procedures and methods across the UK jurisdictions and the EU in order to ensure comparability over time and between

<sup>9</sup> Section 6(2)

places. We suggest that there be specific authorisation for the sharing of data with bodies which serve equivalent functions in other jurisdictions.

We note the possibility of entering bilateral agreements with particular jurisdictions in relation to such requirements. This may be of particular value with jurisdictions which face similar environmental challenges.

### **Question 7: Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?**

Yes. We consider that there will be missing environmental governance mechanisms as a result of leaving the EU, including the loss of governance functions of the European Commission (EC), the Court of Justice of the European Union (CJEU) and the European Environment Agency (EEA). The CJEU has the power to make sure that Governments meet their legal commitments. While it can sometimes be challenging to galvanise action by the European bodies, the supranational oversight will be lost. We recognise that at the end of 2018, there were 16 environmental infringements cases being considered by the CJEU in respect of the United Kingdom and four Article 260 (previously 228) Cases<sup>10</sup>. While these may be considered to be fairly limited in number, the supranational oversight of the European bodies is likely to cause some loss.

It is important in terms of enforcement that clear and strong environmental targets are maintained.

The absence of the EU is likely to impact on specific environmental matters where there are requirements on UK and Scottish Governments, for example, provisions relating to the preparation, review and reporting on noise action plans.

We also note that the EC's 'soft' role in mediation and arbitration will be lost by the UK's withdrawal from the EU. The EC has played a strong role in respect of these matters which has relied upon expertise, both technical (which is likely to be capable of being replicated) and in terms of knowing what other Member States are thinking and doing, and how they may react, and also upon their supranational role and the power which the EC can bring to bear on a Member State which does not respond positively to a 'soft' approach. This latter element will be lost by virtue of there no longer being a supranational body, and it is therefore of considerable importance that any body which takes on a scrutiny role has powers to hold the

<sup>10</sup> "An Article 260 case is opened when a Member State fails to comply with a judgment of the Court (CJEU) that found a failure to fulfil an obligation under the EU law by that Member State. If the judgment is not finally complied with, the Commission would bring such a case again before the Court, which may impose fines on that Member State", see European Commission Legal Enforcement Statistics, <http://ec.europa.eu/environment/legal/law/statistics.htm>

Also see Barry J. Rodger, 'The application of EU law by the Scottish courts : an analysis of case law trends over 40 years' (2017) 2 Jur Rev 59 which highlights that between 1973 and 2015, there were 534 judgements in cases before Scottish courts (including the House of Lords/Supreme Court sitting in Scottish cases) which referred to EU law. Of these judgements, 40 of these (7.5% of the total) related to environmental law matters. 111 cases (20.8% of the total) were judicial review proceedings. During the course of the research, 12 CJEU rulings in Scottish preliminary references were located over the period, none of which concern environmental law matters.

Scottish Government to account in relation to devolved matters and the UK Government in relation to reserved matters.

### **Question 8: How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?**

We consider that the loss of EU scrutiny and assessment of performance could be mitigated to some extent by the establishment of a new environmental body or widening the scope of an existing body. We consider that a legislative basis is required to ensure that there is a clear basis, scope and effect of the body's oversight.

Steps taken could include additional powers being given to, and duties being undertaken by, existing bodies such as the Scottish Environment Protection Agency (SEPA), Scottish Natural Heritage (SNH), Audit Scotland, and/or the Scottish Public Sector Ombudsman (SPSO). SEPA is Scotland's environmental regulator and is involved in protecting the environment and ensuring that businesses are aware of and complies with environmental regulation. SNH is a public body which is responsible for Scotland's natural heritage. It has a role in advising the Scottish Government on relevant matters. Audit Scotland is an independent public body with responsibility for auditing a number of Scotland's public organisations, including the Scottish Government, local authorities and others. The SPSO is the final stage for complaints about a number of bodies, including the Scottish Government, local authorities and a number of other authorities.

While there are elements of all of these bodies which may have some bearing, it may be perceptually difficult to give oversight powers to, for example a body such as SEPA with a 'watchdog' role, as arguably they should also be subject to oversight, or SNH which currently provides advice to the Scottish Government on relevant matters.

It is crucial that any body with a scrutinising role is able to hold Scottish Ministers to account. This requires the body to be independent and able to apply sanctions that will have sufficient deterrent effect on the acts of Scottish Ministers. The EC is arguably 'above and outside' the government, whereas any supervisory body in Scotland will necessarily be a creation of the legislature. We also recognise the existing role of the Scottish Parliament in scrutinising the performance of Government.

It would also be crucial for a body to be properly and independently funded. We consider that this will be key to the body's effectiveness. If the body is not funded independently from Scottish Government, there is the potential for funding to be reduced, thereby affecting the body's functions as an independent entity. We note comments in our answer to question 13 in relation to the possibility of a body being able to issue financial penalties.

In addition, we note that it is crucial that the new body, whether an existing body taking on additional powers or a new body established for this purpose, is properly resourced and staffed. For example, we

understand that the EU's Directorate General for the Environment has approximately 500 staff members and shares a resources directorate of around 90 staff with the Directorate General for Climate Action. While we recognise that this staffing requirement is for a much larger geographical area, it is clear that substantial resources are required in order to ensure a body can properly carry out its functions.

We consider that the body should have the powers to raise its own legal proceedings on judicial review grounds by referring the government authority to an independent court or tribunal, for that court or tribunal to determine whether the government authority has failed to comply with its legal obligations and any steps it must take to bring it into compliance. We address this further in our answer to question 13.

We note that the scrutiny of the Government, advisory functions and complaints and enforcement may be dealt with by one body or split between more than one. There is the potential for conflict of interests to arise in the event that the same body is fulfilling both an advisory role and one dealing with complaints and enforcement. On the other hand, having separate bodies may result in the duplication of work and require considerable resource. Extending the scope of the powers and remit of an existing body would require significant change in terms of resources and expertise, and we note that this should not be underestimated.

### **Question 9: Which policy areas should be included within the scope of any scrutiny arrangements?**

We note the difficulties around defining the environmental matters to fall within the scope of scrutiny arrangements. Any exclusions from the scope of scrutiny arrangements require to be carefully framed, so as not to exclude consideration of relevant matters. For example, there may be a role for matters arising in the scope of agriculture which are relevant to environmental law and a limited role in relation to planning policy insofar as it relates to areas of environmental responsibility, including Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA).

In addition, we note that noise is omitted from the list of policy areas detailed at paragraph 72 of the consultation and given its importance, suggest that this be included. With regard to waste, we expect that plastic waste will be fully addressed. We also note the potential to cover other issues including nano-materials, light, pathogens, and genetically modified organisms (GMOs).

We agree with the proposal that there should be scope to deal with the marine environment given the inextricable link between the marine and land environments. We note the intention to include climate change mitigation and adaptation obligations within the scope and consider this to be merited given the potential difficulties in extrapolating climate change matters from other environmental matters such as air quality. Any overlap with functions of the Climate Change Committee could be addressed by way of a memorandum of understanding or similar document.

**Question 10: What do you think will be the impact in Scotland of the loss of EU complaint mechanisms?**

We consider that there will be loss of the supranational presence in this regard. There are limitations of the current domestic complaint mechanisms as set out in the consultation paper<sup>11</sup>. Without such mechanisms, citizens may lose the means to raise concerns and have them investigated and where appropriate, followed through by an expert and well-resourced body. Without such mechanisms, individuals may have to bear the practical and financial burden themselves of challenging actions for the benefit of society.

We also note the loss of the European Commission's 'soft' role as detailed in our answer to question 7.

**Question 11: Will a new function be required to replace the current role of the European Commission in receiving complaints from individuals and organisations about compliance with environmental law?**

Yes. We consider there would be a benefit in there being a new function to replace the current role of the European Commission in relation to complaints. We suggest that any body which has this function should not be under a duty to investigate complaints but should instead have discretion as to whether to do so. This would allow such complaints to act as a source of information, which may give rise to awareness about possible breaches of environmental law but would also allow the body to concentrate on significant, novel and underlying issues rather than being overloaded with dealing in detail with a large number of complaints which relate to the same issue.

It will be important for this function to be carefully defined to enable appropriate control.

**Question 12: What do you think the impact will be in Scotland of the loss of EU enforcement powers?**

We consider the loss will be in respect of the power to ensure the Scottish Ministers and other public authorities adhere to their commitments even when to do so may be challenging or expensive. The impact of this loss could be significant.

**Question 13: What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed?**

<sup>11</sup> At page 38.



As referred to above, the EC has a supranational role whereas any supervisory body in Scotland, will necessarily be a creation of the legislature. It is therefore important that if any such body is to be created or powers granted to an existing body in relation to enforcement, the body is able to hold Scottish Ministers and public authorities to account. This requires there to be independence of the body from Scottish Government. A model of a body being accountable to Parliament may be of some assistance in this regard.

It will also be necessary for the body to be able to compel compliance. We note that this could include a system of financial penalties as in current EU arrangements. We recognise the potentially circular nature of enforcement against public authorities by way of fines, which may result in reducing the budget available for compliance in the future. However, significant penalties may provide a strong deterrent against non-enforcement. We suggest that this be given careful consideration.

We note the option to create a function for a Scottish body to have powers to refer the Scottish Government or a public authority to a court for failure to properly implement or enforce environmental law. We consider it necessary that any arrangements reflect the existing model of separation of powers and therefore support a function for a body to refer matters to a court. It is important that there are clear mechanisms in place for circumstances where a court rules that the Scottish Government or a public authority has failed to meet the necessary standards. While it may not be effective or provide value for money to establish a separate court to deal with environmental matters, such matters can be technical in nature and it is important that there is sufficient technical expertise in the court to deal with cases arising. There may be merit in a designated court procedure for environmental matters, similar to the procedure for commercial matters, or for specialisation to be undertaken.

We note that as currently framed, the scope of any such mechanisms will be in relation to the environmental principles only. We recognise that if a wider approach is taken, this will considerably affect the scope and remit of work which might require to be undertaken by a court.

In addition, we note that it is important that arrangements are made to deal with cross-border matters and where necessary, to interact with processes in the rest of the UK.

We note that powers to refer the Scottish Government or a public body to court, for a judicial review, may be of limited value in some situations. The judicial review is a review of the original decision by an authority. There is the potential for there to be a considerable delay between a decision being made by an authority and action taken and concluded. We recognise that powers to take interim measures have rarely been used. Nevertheless, environmental damage, which could be significant, may take place during the time taken for a case to reach conclusion. We therefore note the importance of the relevant body having powers to take interim measures. As the time of writing, the power to take interim measures are required under Article 3 of Annex 4 of the *Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, as endorsed by leaders at special meetings of the European Council on 25 November 2018 and on 11 April 2019.





Law Society  
of Scotland

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**Policy areas that are subject to more detailed discussion to explore whether legislative common framework agreements might be needed, in whole or in part – in connection with environmental matters, and as per Cabinet Office, Revised Frameworks Analysis, April 2019**

Responsible UK Government Department	Area of EU Law (Policy Area)	Devolution Intersection			Additional Information
		NI	S	W	
DEFRA	Agriculture – fertiliser regulations	x	x	x	<p>Regulations providing common standards for compositional ingredients, labelling, packaging, sampling and analysis of fertilisers. The UK is also signed up to a number of international agreements (e.g. the Gothenburg Protocol) and EU agreements (the National Ceilings Directive related to fertiliser regulation).</p> <p><u>Law Society Scotland Comments</u></p> <p><u>EU Law</u> Regulation (EC) No 2003/2003 relating to fertilisers consolidates all the EU rules that apply to fertilisers. The Regulation ensures that these technical requirements are implemented throughout the EU. This consolidated version is of documentary value only.</p> <p>The regulation applies to mineral fertilisers consisting of one or more plant nutrients. Other fertilisers are governed by EU countries' national legislation.</p> <p>The regulation lists fertiliser types according to their specific characteristics. Once a fertiliser meets this designation it may bear the letters 'EC' which guarantees farmers that the fertilisers contain a minimum nutrient content and are safe to use. Information, including the manufacturer's details and the fertiliser's characteristics, must appear on packages, labelling and accompanying documents.</p> <p><u>English Law</u> The EC Fertilisers (England and Wales) Regulations 2006</p> <p><u>Scottish Law</u></p>

					<p>The EC Fertilisers (Scotland) Regulations 2006</p> <p><u>UK Government Technical Notices</u>  Manufacturing and marketing fertilisers if there's no Brexit deal, 24 September 2018-  <a href="https://www.gov.uk/government/publications/manufacturing-and-marketing-fertilisers-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/manufacturing-and-marketing-fertilisers-if-theres-no-brexit-deal</a></p> <p><u>European Commission Preparedness Notices</u>  The European Commission Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Fertilisers, 25 September 2018  <a href="https://ec.europa.eu/info/sites/info/files/fertilisers_en.pdf">https://ec.europa.eu/info/sites/info/files/fertilisers_en.pdf</a></p> <p><u>EU Exit Regulations</u>  <u>UK Law</u>  The Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2019 (draft)  <a href="https://www.legislation.gov.uk/ukdsi/2019/9780111178577/contents">https://www.legislation.gov.uk/ukdsi/2019/9780111178577/contents</a></p> <p><u>English Law</u>  The Pesticides and Fertilisers (Miscellaneous Amendments) (EU Exit) Regulations 2019  <a href="http://www.legislation.gov.uk/uksi/2019/306/contents/made">http://www.legislation.gov.uk/uksi/2019/306/contents/made</a></p> <p><u>Scottish Law</u>  The Fertilisers and Pesticides (EU Exit) (Scotland) (Miscellaneous Amendments etc.) Regulations 2019  <a href="http://www.legislation.gov.uk/ssi/2019/25/introduction/made">http://www.legislation.gov.uk/ssi/2019/25/introduction/made</a></p>
DEFRA	Agriculture – GMO marketing and civilisation	x	x	x	<p>Standards for marketing and cultivation of genetically modified organisms.</p> <p><u>Law Society Scotland Comments</u></p> <p><u>EU Law</u></p>

				<p>Directive 2001/18/EC (Deliberate Release)          Directive (EU) 2015/412 (Deliberate Release-possibility to restrict cultivation of GMOs in Member State's territory)          Directive 2009/41/EC (Contained Use)          Regulation 1829/2003 (Food and Feed)          Regulation 1830/2003 (Traceability and Labelling)          Regulation 1946/2003 (Transboundary Movements)          Genetically Modified Organisms (GMO) technology is strictly regulated and the EU has had a legal framework since the 1990s.</p> <p>EU legislation establishes the conditions for the development, use or marketing of a GMO or a food/feed product derived from GMOs. EU legislation on GMOs has two main objectives:          To protect health and the environment: a GMO or a food product derived from a GMO can only be put on the market in the EU after it has been authorised on the basis of a detailed EU procedure based on a scientific assessment of the risks to health and the environment and to ensure the free movement of safe and healthy GM products in the EU. GM authorisation in Europe adopts a precautionary, case-by-case approach where the scale of release is related to the level of risk.</p> <p>There are the following levels of authorisation:</p> <ol style="list-style-type: none"> <li>a. Contained use – This is GM research carried out in a contained environment, under Directive 2009/41/EC.</li> <li>b. Research releases - this is the deliberate release to the environment authorised under the Deliberate Release into the Environment of GMOs Directive, 2001/18/EC. These are small scale releases carried out under tight control.</li> <li>c. Commercial releases – is the deliberate release to the environment authorised under Part C of the Deliberate Release into the Environment of GMOs Directive, 2001/18/EC, or under the Genetically Modified Food and Feed Regulation, 1829/2003. This type of authorisation covers import and use of a GMO for food or feed and non-food use and it can allow EU-wide commercial scale growing of a</li> </ol>
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				<p>GM crop. The Food Standards Agency (FSA) is responsible for food safety issues whilst Defra and the devolved agriculture departments are responsible for assessing risks to the environment. All new crop varieties (GM and non GM) also have to be approved as suitable for agriculture via the National List trials route. The Traceability and Labelling Regulation 1830/2003/EC and Food and Feed Regulation 1830/2003/EC require the labelling of any intentional use of GM ingredients in food and feed. A GMO that has not been approved is not allowed in food and feed for sale in the EU.</p> <p><u>UK Law</u></p> <p>Environmental Protection Act 1990</p> <p>The Genetically Modified Organisms (Contained Use) Regulations 2014</p> <p>The competent authority responsible for the Regulations consists of the Health and Safety Executive (HSE) and the Secretary of State for the Environment, Food and Rural Affairs (Defra) in England and Wales <a href="http://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs">www.gov.uk/government/organisations/department-for-environment-food-rural-affairs</a></p> <p>In Scotland, the HSE and the Scottish Government are the joint competent authority. The HSE considers the risk to the operator and the Scottish Government considers the risk to the environment from any GMO release.</p> <p><u>Scottish Law</u></p> <p>Enforcement in Scotland</p> <p>In Scotland there are four sets of regulations granting powers to authorised officers for enforcement, and creating penalties for non-compliance. Local authorities are responsible for the enforcement of traceability and labelling requirements and for sampling and testing food and feed for GMOs. The GM Inspectorate and Science and Advice for Scottish Agriculture (SASA) is responsible for ensuring compliance with the regulations governing the deliberate release into the environment of GMOs in Scotland.</p> <p>The Genetically Modified Organisms (Deliberate Release) (Scotland) Regulations 2002</p>
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				<p>Genetically Modified Food (Scotland) Regulations 2004          Genetically Modified Organisms (Traceability and Labelling) (Scotland) Regulations 2004          Genetically Modified Organisms (Transboundary Movements) (Scotland) Regulations 2005</p> <p><u>UK Government Technical Notices</u>          Developing genetically modified organisms (GMOs) if there's no Brexit deal, 23 August 2018  <a href="https://www.gov.uk/government/publications/developing-genetically-modified-organisms-gmos-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/developing-genetically-modified-organisms-gmos-if-theres-no-brexit-deal</a></p> <p><u>European Commission Preparedness Notices</u>          The European Commission Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules on Genetically Modified Food and Feed and the Deliberate Release of Genetically Modified Organisms into the Environment, 23 January 2018  <a href="https://ec.europa.eu/food/sites/food/files/plant/docs/brexit-notice_gmo.pdf">https://ec.europa.eu/food/sites/food/files/plant/docs/brexit-notice_gmo.pdf</a></p> <p><u>EU Exit Regulations</u></p> <p><u>UK Law</u>          The Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019  <a href="http://www.legislation.gov.uk/uksi/2019/90/contents/made">http://www.legislation.gov.uk/uksi/2019/90/contents/made</a></p> <p>Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc) (EU Exit) Regulations 2019  <a href="https://www.legislation.gov.uk/uksi/2019/720/contents/made">https://www.legislation.gov.uk/uksi/2019/720/contents/made</a></p> <p>Genetically Modified Food and Feed (Amendment etc) (EU Exit) Regulations 2019  <a href="https://www.legislation.gov.uk/uksi/2019/705/contents/made">https://www.legislation.gov.uk/uksi/2019/705/contents/made</a></p> <p><u>English Law</u>          The Genetically Modified Organisms (Amendment) (England) (EU Exit) Regulations 2019</p>
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HSE and DERRA	Chemicals regulation (including pesticides)	*x	*x	*x	<p>EU regulations on the classification, labelling and packaging of substances and mixtures (CLP); the placing on the market and use of biocidal products (e.g. rodenticides); the export and import of hazardous chemicals; the registration, evaluation, authorisation and restriction of chemicals (REACH); and plant protection products (e.g. pesticides).</p> <p><u>Law Society Scotland Comments</u></p> <p><u>EU Law</u> The Sustainable Use of Pesticides Directive 2009/128/EC The European Commission is responsible for the approval of active substances for use in pesticides in Member States. Approval is given after a rigorous assessment process involving the European Food Safety Authority, Member States and scientific experts. The Directive includes provisions aimed at reducing risks and impacts on human health and the environment, and to improve controls on distribution and use:</p> <ol style="list-style-type: none"> <li>a. A National Action Plan</li> <li>b. compulsory testing of application equipment</li> <li>c. provision of training for and arrangements for the certification of operators, advisors and distributors</li> <li>d. a ban (subject to limited exceptions) on aerial spraying</li> <li>e. provisions to protect water, public spaces and conservation areas</li> <li>f. the minimisation of risks from handling, storage and disposal</li> <li>g. the promotion of low input regimes</li> </ol> <p><u>UK Law</u> The Food and Environmental Protection Act 1985 as amended by the Pesticides Act 1998.</p>



				<p>When an active substance is approved by the EU, companies can apply to the regulatory authority in each Member State for permission to place their product on the market. In the UK this is the Chemicals Regulation Division (CRD) of the Health and Safety Executive. The CRD publishes guidance on the Health and Safety Executive website.</p> <p>Code of Practice for Using Plant Protection Products in Scotland:  <a href="http://www.gov.scot/resource/doc/161422/0043816.pdf">http://www.gov.scot/resource/doc/161422/0043816.pdf</a></p> <p>The Code of Practice reflects the Scottish Government's policy to reduce the effect of pesticide use on people and on the environment while controlling pests, diseases and weeds.          The Plant Protection Products (Sustainable Use) Regulations 2012 are UK regulations which implement Directive 2009/128/EC.</p> <p>The power of the Secretary of State, as designated Minister, to make Regulations that extend to Scotland remains exercisable by virtue of section 57(1) of the Scotland Act 1998.</p> <p><u>UK Government Technical Notices</u>          Regulating chemicals (REACH) if there's no Brexit deal, 24 September 2018  <a href="https://www.gov.uk/government/publications/regulating-chemicals-reach-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/regulating-chemicals-reach-if-theres-no-brexit-deal</a></p> <p>Regulating pesticides if there's no Brexit deal, 12 October 2018  <a href="https://www.gov.uk/government/publications/regulating-pesticides-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/regulating-pesticides-if-theres-no-brexit-deal</a></p> <p>Regulating biocidal products if there's no Brexit deal, 12 October 2018  <a href="https://www.gov.uk/government/publications/regulating-biocidal-products-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/regulating-biocidal-products-if-theres-no-brexit-deal</a></p> <p>Classifying, labelling and packaging chemicals if there's no Brexit deal, 12 October 2018  <a href="https://www.gov.uk/government/publications/classifying-labelling-and-packaging-chemicals-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/classifying-labelling-and-packaging-chemicals-if-theres-no-brexit-deal</a></p> <p>Export and import of hazardous chemicals if there's no Brexit deal, 12 October 2018  <a href="https://www.gov.uk/government/publications/export-and-import-of-hazardous-chemicals-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/export-and-import-of-hazardous-chemicals-if-theres-no-brexit-deal</a></p> <p><u>European Commission Preparedness Notices</u></p>
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DEFRA	Environmental quality – chemicals	*x	*x	*x	<p>Regulation of the manufacture, authorisation and sale and use of chemical products primarily through the REACH regulation but also including: Persistent Organic Pollutants (POP's), Polychlorinated Biphenyls (PCBs) and Minamata.</p> <p><u>Law Society Scotland Comments</u></p> <p><u>EU Law and Policy</u>  EU REACH (registration, evaluation, authorisation and restriction of chemicals) Regulation 1907/2006/EC: <a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1907-20140410">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1907-20140410</a>  REACH provides a single regulatory framework for the control of chemicals, replacing the previous patchwork of controls. It ensures that information on the properties of chemicals is transmitted down the supply chain, so they can be safely handled.  The Water Framework Directive 2000/60/EC: <a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0060">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0060</a> established provision for a list of Priority Substances (Annex X of the Directive). Decision 2455/2001/EC: <a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001D2455">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001D2455</a> established the First list, and Directive 2008/105/EC, the Environmental Quality Standards Directive – EQSD: <a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0105">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0105</a>, set the quality standards as required by Article 16(8) of the Water Framework Directive. Annex II to the EQSD replaced Annex X of the Water Framework Directive.</p> <p>Member States are required to take actions to meet the quality standards in the EQSD by 2015 as part of chemical status (Water Framework Directive Article 4 and Annex V point 1.4.3). Community policy concerning dangerous or hazardous substances in European waters was introduced in 1976 by Council Directive on pollution caused by discharges of certain dangerous substances (Directive 76/464/EEC,</p>

				<p>codified as 2006/11/EC). Several substances have been regulated in specific directives defining community-wide emission limit values and quality objectives in the surface and coastal waters. Directive 76/464/EEC was integrated into the Water Framework Directive: <a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0060">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0060</a> Commission Directive 2009/90/EC:<a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0090">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0090</a> on technical specifications for chemical analysis and monitoring of water came into effect on 21 August 2009. This Directive established common chemical analysis standards and monitoring of water, sediment and biota.</p> <p>Strategic approach to pharmaceuticals in the environment: The Commission is consulting a strategic approach to pharmaceuticals in the environment. This follows the provision in Article 8c of Directive 2008/105/EC as amended by Directive 2013/39/EU, which requires that the approach be followed by proposals for measures as appropriate.</p> <p><u>UK Law</u> The REACH Enforcement Regulations 2008: <a href="http://www.legislation.gov.uk/ukxi/2008/2852/contents/made">http://www.legislation.gov.uk/ukxi/2008/2852/contents/made</a> Under the European Communities Act 1972 the power of the Minister to make regulations in relation to matters in or as regards Scotland is preserved by section 57(1) of the Scotland Act 1998. DEFRA have the policy lead on which REACH complements the Control of Substances Hazardous to Health Regulations 2002 (COSHH). The Health and Safety Executive publishes <a href="http://www.hse.gov.uk/reach/">http://www.hse.gov.uk/reach/</a>. SEPA: <a href="https://www.sepa.org.uk">https://www.sepa.org.uk</a> is one of the enforcement authorities for chemical restrictions and bans under REACH.</p> <p><u>UK Government Technical Notices</u> Upholding environmental standards if there's no Brexit deal, 13 September 2018 <a href="https://www.gov.uk/government/publications/upholding-environmental-standards-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/upholding-environmental-standards-if-theres-no-brexit-deal</a></p> <p>Regulating chemicals (REACH) if there's no Brexit deal, 24 September 2018 <a href="https://www.gov.uk/government/publications/regulating-chemicals-reach-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/regulating-chemicals-reach-if-theres-no-brexit-deal</a></p> <p>Control on persistent organic pollutants if there's no Brexit deal, 12 October 2018 <a href="https://www.gov.uk/government/publications/control-on-persistent-organic-pollutants-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/control-on-persistent-organic-pollutants-if-theres-no-brexit-deal</a></p> <p>Regulating biocidal products if there's no Brexit deal, 12 October 2018</p>
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DEFRA	Environmental quality – ozone depleting substances and F-gases	x	x	x	<p>The UK has international obligations under the Montreal Protocol to phase out the use of ODS, phase down hydrofluorocarbons by 85% by 2036, licence imports and exports and report on usage to the UN. EU Regulations and institutions currently deliver these obligations through quota restrictions, licencing and reporting requirements. The EU Regulations also go further with product bans; leakage controls measures and certification requirements for technicians.</p> <p><u>Law Society Scotland Comments</u></p>

				<p><u>EU Law</u>  Unofficial consolidated EU Emissions Trading Directive 2003/87/EC Directive 2009/29/EC (Phase III). This Directive amends Directive 2003/87/EC to improve and extend the EU's emission allowance trading scheme. The revised EU ETS Directive forms part of the EU 2020 Climate &amp; Energy Package agreed in December 2008. Aviation Directive 2008/101/EC: This Directive amends the EU Emissions Trading Directive 2003/87/EC to include aviation from 2012.  Linking Directive (2004/101/EC) : This Directive amends the EU Emissions Trading Directive 2003/87/EC to enable Member States to allow operators to use credits obtained through Kyoto Mechanisms (CERs - Certified Emissions Reductions and ERUs - Emission Reduction Units).  EU Emissions Trading Directive 2003/87/EC : Monitoring, reporting and verification of greenhouse gas emissions in the EU ETS.</p> <p><u>UK Law</u>  The Greenhouse Gas Emissions Trading Scheme Regulations 2012  Under section 57 of the Scotland Act 1998 (c. 46), despite the transfer to the Scottish Ministers of functions in relation to observing and implementing obligations under Community law in respect of devolved matters, any function of the Secretary of State in relation to any matter continues to be exercisable as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972. And similarly, under paragraph 5 of Schedule 3 to the Government of Wales Act 2006 (c. 32), despite the transfer to the Welsh Ministers of functions under section 2 of the 1999 Act so far as exercisable in relation to Wales (except in relation to offshore oil and gas exploration and exploitation), those functions continue to be exercisable by the Secretary of State in relation to Wales for such purposes.</p> <p><u>UK Government Technical Notices</u>  Upholding environmental standards if there's no Brexit deal, 13 September 2018  <a href="https://www.gov.uk/government/publications/upholding-environmental-standards-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/upholding-environmental-standards-if-theres-no-brexit-deal</a></p> <p>Using and trading in fluorinated gases and ozone depleting substances if there's no Brexit deal, 13 September 2018</p>
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DEFRA	Environmental quality – pesticides	x	*x	*x	<p>Regulations governing the authorisation and use of pesticides products and the maximum residue levels in food, and framework for action on sustainable use of pesticides.</p> <p><u>UK Government Technical Notices</u> Upholding environmental standards if there's no Brexit deal, 13 September 2018 <a href="https://www.gov.uk/government/publications/upholding-environmental-standards-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/upholding-environmental-standards-if-theres-no-brexit-deal</a></p> <p>Regulating pesticides if there's no Brexit deal, 12 October 2018 <a href="https://www.gov.uk/government/publications/regulating-pesticides-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/regulating-pesticides-if-theres-no-brexit-deal</a></p> <p><u>European Commission Preparedness Notices</u> Questions and answers related to the United Kingdom's withdrawal from the European Union with regards to plant protection products and pesticides residues, 2 October 2018 <a href="https://ec.europa.eu/info/sites/info/files/qa-plant-protection-products_en_0.pdf">https://ec.europa.eu/info/sites/info/files/qa-plant-protection-products_en_0.pdf</a></p> <p>The European Commission Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules on plant protection products <a href="https://ec.europa.eu/food/sites/food/files/plant/docs/brexit-notice_pesticides.pdf">https://ec.europa.eu/food/sites/food/files/plant/docs/brexit-notice_pesticides.pdf</a></p>



					<p><u>EU Exit Regulations</u></p> <p><u>UK Law</u></p> <p>The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (draft)  <a href="http://www.legislation.gov.uk/ukdsi/2019/9780111176931/contents">http://www.legislation.gov.uk/ukdsi/2019/9780111176931/contents</a></p> <p>The Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2019 (draft)  <a href="https://www.legislation.gov.uk/ukdsi/2019/9780111178577/contents">https://www.legislation.gov.uk/ukdsi/2019/9780111178577/contents</a></p> <p>Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019 (draft)  <a href="http://www.legislation.gov.uk/ukdsi/2019/9780111176924">http://www.legislation.gov.uk/ukdsi/2019/9780111176924</a></p> <p><u>English Law</u></p> <p>The Pesticides and Fertilisers (Miscellaneous Amendments) (EU Exit) Regulations 2019  <a href="http://www.legislation.gov.uk/uksi/2019/306/contents/made">http://www.legislation.gov.uk/uksi/2019/306/contents/made</a></p> <p><u>Scottish Law</u></p> <p>The Fertilisers and Pesticides (EU Exit) (Scotland) (Miscellaneous Amendments etc.) Regulations 2019  <a href="http://www.legislation.gov.uk/ssi/2019/25/introduction/made">http://www.legislation.gov.uk/ssi/2019/25/introduction/made</a></p>
DEFRA	Environmental quality – waste packaging and product regulations	x	x	x	<p>Policies and Regulations that aim to meet certain essential product requirements and set product standards including for packaging (e.g. POHS in Electrical and Electronic Equipment, Batteries and Vehicles) in order to manage waste.</p> <p><u>Law Society Scotland Comments</u></p> <p><u>EU Law</u></p> <p>Directive 94/62/EC on Packaging and Packaging Waste (consolidated version)</p> <p>Amending laws:</p>

				<p>a. Directive 2004/12/EC amending Directive 94/62/EC on packaging and packaging waste.</p> <p>b. Directive 2005/20/EC amending Directive 94/62/EC on packaging and packaging waste (extension of deadlines for the attainment of the recycling and recovery targets for the Member States acceding the EU in 2004)</p> <p>c. Commission Directive 2013/2/EU amending Annex I to Directive 94/62/EC on packaging and packaging waste.</p> <p>d. Directive (EU) 2015/720 amending Directive 94/62/EC as regards the consumption of lightweight plastic carrier bags.</p> <p>e. The Waste Framework Directive 2008/98/EC sets the basic concepts and definitions related to waste management, including definitions of waste, recycling, recovery. It explains when waste ceases to be waste and becomes a secondary raw material (end-of-waste criteria), and how to distinguish between waste and by-products.</p> <p>The Directive lays down some basic waste management principles: that waste be managed without a. endangering human health and harming the environment, b. risk to water, air, soil, plants or animals, c. causing a nuisance through noise or odours, and d. adversely affecting the countryside. The Directive introduced the "polluter pays" principle and "extended producer responsibility". It incorporated provisions on hazardous waste and waste oil and requires that Member States adopt waste management plans and waste prevention programmes.</p> <p><u>UK Law</u></p> <p>Producer Responsibility Obligations (Packaging Waste) Regulations 2007 These Regulations are made by the Secretary of State for Environment, Food and Rural Affairs as respects England, Scotland and Wales in exercise of the powers conferred upon him by section 2(2) of the European Communities Act 1972 and sections 93 – 95 of the Environment Act 1995. Under section 57 of the Scotland Act 1998, despite the transfer to Scottish Ministers of functions in relation to implementing obligations under Community law in respect of devolved matters, the function of the Secretary of State in relation to implementing those obligations continues to be exercisable by him as regards Scotland.</p> <p>Environmental Protection Act 1990 <a href="http://www.legislation.gov.uk/ukpga/1990/43/contents">http://www.legislation.gov.uk/ukpga/1990/43/contents</a> Part II, Waste on Land Control of Waste (Dealing with Seized Property) (England and Wales) Regulations 2015: <a href="http://www.legislation.gov.uk/uksi/2015/426/contents/made">http://www.legislation.gov.uk/uksi/2015/426/contents/made</a></p>
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BEIS	Implementation of EU Emissions Trading System	x	x	x	<p>Directives 2003/87/EC establishes the European Union Emissions Trading Scheme for greenhouse gas. The Scheme sets a maximum amount of greenhouse gas that can be emitted by all participating installations and aircrafts these operators then monitor, verify and report their emissions, and must surrender allowances equivalent to their emissions annually. Allowances are issued either by being sold at auction or allocated for free to some operators, and can be traded. With the price determined by the market.</p> <p><u>Scottish Policy and Law</u></p> <p><u>EU Law</u> The EU emissions trading system or carbon market (EU ETS) is designed to combat climate change and reduce greenhouse gas emissions.</p> <p>The EU ETS works on the 'cap and trade' principle. A cap is set on the total amount of greenhouse gases that can be emitted by installations in the system. The cap is reduced over time so that total emissions fall. Within the cap, companies receive or buy emission allowances which they can trade with one another as needed. They can also buy limited amounts of international credits from emission-saving projects globally.</p> <p>Each year a company must surrender enough allowances to cover all its emissions. If a company reduces its emissions, it can keep the allowances to cover its future needs or sell them to another company that is short of allowances.</p> <p>Consolidated version of Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC</p> <p>EU Policy and law: <a href="https://ec.europa.eu/clima/policies/lowcarbon/ccs/directive_en">https://ec.europa.eu/clima/policies/lowcarbon/ccs/directive_en</a> Directive on the Geological Storage of Carbon Dioxide (2009/31/EC): <a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0031">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0031</a></p>

				<p><u>UK Law</u> The Greenhouse Gas Emissions Trading System Regulations 2012 require operators that carry out an activity covered by the EU ETS to hold an emissions permit which is a licence to operate and emit greenhouse gases under EU ETS see: Annex I to the EU ETS Directive. The EU ETS Regulators enforce compliance with the EU ETS Regulations, such as granting and maintaining permits and emissions plans (for aviation), monitoring and reporting (including monitoring plans), assessing verified emission reports (and tonne-kilometre reports), assessing applications to the NER, determining reductions in allocations as a result of changes in capacity or cessation of activities, exchanging information with UKAS on verifier activities.</p> <p>Regulators include: the Environment Agency, <a href="https://www.gov.uk/government/organisations/environment-agency">https://www.gov.uk/government/organisations/environment-agency</a>, Scottish Environment Protection Agency (SEPA), Northern Ireland Environment Agency (NIEA), Natural Resources Wales, and the Department for Business, Energy &amp; Industrial Strategy (BEIS) <a href="https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy">https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy</a> for offshore installations.</p> <p><u>UK Regulatory Regime</u> The Energy Act 2008: <a href="https://www.legislation.gov.uk/ukpga/2008/32/contents">https://www.legislation.gov.uk/ukpga/2008/32/contents</a> provides a licensing regime that governs offshore storage of carbon dioxide. The regime applies to storage in the offshore area comprising both UK territorial sea and beyond. The Secretary of State for BEIS is the licensing authority for offshore storage except within the territorial sea adjacent to Scotland, where it is Scottish Ministers.</p> <p><u>Scottish Policy and Law</u> <a href="http://www.gov.scot/Topics/Business-Industry/Energy/Energy-sources/traditional-fuels/new-technologies/SGactionCCS">http://www.gov.scot/Topics/Business-Industry/Energy/Energy-sources/traditional-fuels/new-technologies/SGactionCCS</a> SEPA supervised the transposition of Directive (2009/31/EC): The Energy Act 2008 (Storage of Carbon Dioxide) (Scotland) Regulations 2011: <a href="http://www.legislation.gov.uk/sdsi/2011/9780111011911/introduction">http://www.legislation.gov.uk/sdsi/2011/9780111011911/introduction</a> The Storage of Carbon Dioxide (Licensing etc) (Scotland) Regulations 2011: <a href="http://www.legislation.gov.uk/ssi/2011/24/contents/made">http://www.legislation.gov.uk/ssi/2011/24/contents/made</a> The Environmental Liability (Scotland) Amendment Regulations 2011: <a href="http://www.legislation.gov.uk/ssi/2011/116/contents/made">http://www.legislation.gov.uk/ssi/2011/116/contents/made</a></p>
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				<p>These regulations flow from the Energy Act 2008, which designates the Scottish Ministers as the competent authority under the Directive for CO2 storage in Scotland.</p> <p><u>UK Government Technical Notices</u> Meeting climate change requirements if there's no Brexit deal, 12 October 2018 <a href="https://www.gov.uk/government/publications/meeting-climate-change-requirements-if-theres-no-brexit-deal">https://www.gov.uk/government/publications/meeting-climate-change-requirements-if-theres-no-brexit-deal</a></p> <p><u>EU Exit Regulations</u> <u>UK Law</u> The Greenhouse Gas Emissions Trading Scheme (Amendment) (EU Exit) Regulations 2019 <a href="https://www.legislation.gov.uk/uksi/2019/107/contents/made">https://www.legislation.gov.uk/uksi/2019/107/contents/made</a></p>
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