

EU Exit: ensuring the continuing operation of environmental legislation

The Scottish Government believes that staying in the EU is the best option for the whole of the UK and Scotland. Failing that, we believe that the UK and Scotland must remain in the European Single Market and Customs Union. Scottish Ministers continue to put this position to the UK Government (UKG) and make representations on the necessity of avoiding a hard EU Exit.

However, as the Cabinet Secretary for Government Business and Constitutional Relations set out on 11 September, the Scottish Government is also intensifying its preparations for all EU Exit possibilities in order to protect the Scottish economy, businesses, people and public services in these uncertain times.

An important part of this preparation involves ensuring we have done everything that we can to ensure our legislation continues to operate after exit day. This is particularly important for our environmental legislation, 80% of which is derived from the EU.

This note is to inform you about the work the Scottish Government is doing to ensure environmental legislation continues to operate after EU Exit in the event there is no deal with the EU.

The European Union (Withdrawal) Act 2018 (Withdrawal Act) and UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (Continuity Bill)

The Withdrawal Act provides that EU-derived domestic legislation continues to have effect after EU Exit and incorporates directly applicable EU law into domestic law. Together, these will become 'retained EU law'.

However, on EU Exit, retained EU law may stop having the desired policy effect or may not operate effectively. The parts of legislation which require correction to ensure the law continues to operate are called 'deficiencies'.

Deficiencies can be relatively simple references to EU law or an EU institution, or involve functions which previously rested with EU institutions which, where appropriate, now need to be transferred to either an authority in the UK or in the Devolved Administrations (DAs).

The Withdrawal Act provides powers for UK Ministers and Ministers in the DAs to make regulations to address these deficiencies. The Continuity Bill similarly prepares Scotland's devolved laws for EU Exit. However, on 17 April, the UKG referred the Continuity Bill to the UK Supreme Court. A judgement is expected on whether the Bill is within the competence of the Scottish Parliament this autumn.

Regardless of which mechanism is used, the Scottish Government will do everything it can to ensure legislation continues to operate after EU Exit.

Deficiencies in environmental legislation

The Scottish Government has analysed a significant volume of instruments for deficiencies. There were over 250 environmental policy instruments which needed to be considered. Approximately 60% of these instruments contain deficiencies.

The next stage has involved working constructively with UKG, where appropriate, to develop corrections for the deficiencies. In the majority of cases, the deficiencies are minor and technical. Proposed deficiency corrections are as simple as possible to ensure the law continues to operate effectively.

The solutions will be legislated for through either a UK Statutory Instrument (SI) or a Scottish Statutory Instrument (SSI).

Scottish Ministers have been clear that the most effective way to ensure a functioning statute book on EU Exit is through co-operation and co-ordination with UKG and the other DAs. Scottish Ministers will continue to co-operate with UKG, as long as that co-operation can take place in a way that respects the principles of devolution and gives the Scottish Parliament its proper role in the process.

Consenting to UK SIs

Where corrections are to be legislated for in a SI, the Scottish Government must prepare a document notifying the Scottish Parliament of its intention to consent to devolved matters being included in the SI. The relevant Parliamentary Committee will then scrutinise Scottish Ministers' intention to consent. These notifications will be prepared for each policy area and describe the legislation impacted, the nature of the deficiencies, the proposed corrections and why these are necessary in the event there is no deal with the EU.

We expect to lay the majority of notifications relating to environmental legislation in November and December 2018. These notifications must be made before Scottish Ministers give their formal consent to any SI and before the SI is laid in the Westminster Parliament.

We will publish the notifications at the below link, at the same time as these are submitted to the Scottish Parliament for consideration:

<https://beta.gov.scot/environment-and-climate-change/>

Use of SSIs

Where a SSI will be used to correct deficiencies in devolved legislation, these will be laid later this year and into early 2019. This is because in many cases, the corrections which are needed to fix deficiencies in Scottish primary or secondary legislation, may be dependent on the corrections taken to fix deficiencies in SIs.

Further information

The work detailed in this note has been primarily driven by the UKG's parliamentary timetable and planning assumptions. As a result, whilst the Scottish Government is committed to ensuring transparency of process and approach in the event there is no deal with the EU, including on deficiency corrections, there are limited opportunities for engagement on this element of our preparations.

If you have any general questions on the content of this update and the process for correcting deficiencies in environmental legislation please contact the Scottish Government's [EU Hub for Environment, Forestry and Agriculture](mailto:Env&AgrEUHub@gov.scot) (Env&AgrEUHub@gov.scot).