

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

ENVIRONMENT BILL

1. This supplementary memorandum has been lodged by Michael Matheson MSP, Cabinet Secretary for Net Zero, Energy and Transport, under Rule 9.B.3.1(c) of the Parliament's standing orders. The latest version of the Environment Bill ("the Bill") can be found at: <https://bills.parliament.uk/bills/2593>

2. This memorandum augments the original Legislative Consent Memorandum (LCM-S5-39)¹ on the Bill, which was lodged on 27 May 2020, and the Legislative Consent Motion (S5M-23324)² agreed on 12 November 2020.

Need for a supplementary LCM

3. During the Commons Committee Stage (which took place during November 2020) seventy-seven UK Government amendments were tabled and agreed to in the Bill.³ A substantial number of UK Government amendments have been tabled during the Lords Committee Stage [that is currently on-going]. The Scottish Government considers that the majority of the amendments do not have any significant impact on the provisions to which the Scottish Parliament has already consented.

4. It is, however, the view of the Scottish Government that two UK Government amendments fall within the legislative competence of the Scottish Parliament and, as such, require a supplementary memorandum to be lodged.

5. The Scottish Government considers that the UK Government amendments in relation to forest risk commodities, tabled on 27 November 2020⁴ and agreed to at the Commons Committee stage, fall within the legislative competence of the Scottish Parliament. The UK Government does not consider that these amendments fall within devolved competence and as such have not sought consent from the Scottish Parliament. There is further discussion of this provision in paragraphs 7 – 11.

6. The Scottish Government considers that the UK Government amendment (Amendment 80), regarding the application of the duties on Ministers of the Crown set out in section 14(2) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ("Continuity Act"), lodged on 8 June 2021 falls within the legislative competence of the Scottish Parliament. The UK Government does not consider that these amendments fall within devolved competence and, as such, has not sought consent from the Scottish Parliament. There is further discussion of this provision in paragraphs 12 – 17.

¹ [SPLCM-SO5-39.pdf \(parliament.scot\)](#)

² [S5M-23324 | Scottish Parliament Website](#)

³ [PBC009 Environment Bill 1st-22nd Combined 26 11 2020.pdf \(parliament.uk\)](#)

⁴ Amendment NS1, https://publications.parliament.uk/pa/bills/cbill/58-01/0009/amend/environment_day_pbc_1125.pdf

Clause 107 - Due diligence for the use of forest risk commodities in commercial activity

7. Amendments in relation to forest risk commodities were agreed to at the Commons Committee stage on 27 November. Clause 107 and the associated Schedule 16 bring into place a new regime for due diligence for the use of forest risk commodities in commercial activity. The new provisions on due diligence will allow UK Ministers to make regulations placing an obligation on businesses to ensure that they do not import materials that have been produced on cleared forest land.

8. Clause 107 and associated Schedule 16 require large businesses to ensure that 'forest risk' commodities they use, those which can cause wide-scale deforestation, have been produced legally. Forest risk commodities are defined in the associated schedule as being "a commodity specified in regulations made by the Secretary of State." The regulations may specify only a commodity which has been produced from a plant, animal or other living organism. The provision makes it illegal for businesses within scope to use, either in production or trade within the UK, forest risk commodities which have not been produced in accordance with relevant laws in the country where they are grown.

9. The provision places an obligation on businesses within scope to conduct due diligence to ensure that forest risk commodities which have not been legally produced do not enter their supply chain, and requires businesses within scope to publicly report on the exercise annually. The provision further enables the UK Government to specify in Regulations fines and other civil sanctions against businesses which continue to use forest risk commodities which have not been produced legally or which do not have a robust system of due diligence in place. Schedule 16 enables the Secretary of State to make regulations about enforcement, which may include the conferral of functions and powers on an 'enforcement authority'.

10. The UK Government is of the view that these measures are reserved, arguing that they are solely concerned with the regulation of business activities (as set out in Head C, Part II, Schedule 5 of the Scotland Act 1998 – the creation, operation, regulation and dissolution of types of business association). The Scottish Government does not agree with this position and considers that the regulation of businesses for this particular environmental purpose falls within the Scottish Parliament's devolved competence. The environmental purpose of these measures appears clear, indeed, Ms Pow MP, Parliamentary Under Secretary of State for the Department for Environment, Food and Rural Affairs, wrote in a letter to MPs on 10 November 2020 that these proposals are "legislation to protect rainforests".

11. Schedule 16 confers regulation making powers only on the UK Secretary of State, and not on Scottish Ministers, nor does it require the Secretary of State to seek the consent or views of Scottish Ministers when making regulations under Schedule 16, which may impact on Scottish policies and interests. This means that Scottish Ministers, under the scrutiny of the Scottish Parliament, would have no involvement in making regulations which fall under our devolved competence and no mechanism for requiring the UK Government to ensure that such regulations adequately align with and reflect Scottish policy and interests. The Scottish Government believes that the UK Government should be seeking legislative consent for these provisions in devolved

competence, and designing the provisions to ensure appropriate consent for regulations covering devolved competence. The Scottish Government does not intend to recommend the necessary consent for the provisions, as drafted, as the regulation-making power in Clause 107 is framed in a manner which does not require the consent of, or consultation with, the Scottish Ministers. The Scottish Government has made clear to the UK Government that, therefore, it should not pursue these amendments.

Amendment 80 - Guiding principles on the environment

12. The UK Government has tabled amendments to the Bill in Lords Committee to the effect that, where a Minister of the Crown is making policy relating to reserved matters in Scotland, the Minister must have due regard to the policy statement of environmental principles for which the Bill provides. The amendment also provides that section 14(2) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“the Continuity Act”) – which provides that Ministers of the Crown must, in making policies (including proposals for legislation) so far as extending to Scotland, have due regard to the guiding principles on the environment for which that Act provides - does not apply to policies so far as relating to reserved matters.

13. The amendment will substitute the UK principles provisions (in clause 18 of the Bill) for the provision in section 14(2) of the Continuity Act where Ministers of the Crown are making policies in relation to reserved matters in Scotland. The UK Government contends that these amendments are within reserved competence, and is not seeking the consent of the Scottish Parliament.

14. During the development of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill (“the Continuity Bill”) and the UK Environment Bill, there was detailed discussion between the Scottish and UK Governments about the development of proposals on environmental principles. At that time, the UK Government expected that the principles that would apply to Ministers of the Crown with respect to decisions, including in reserved competence, that affected Scotland would be the Scottish set of principles. This is clearly the basis on which the provisions in the UK Environment Bill, as introduced, were developed.

15. Late in the passage of the Continuity Bill in the Scottish Parliament, the UK Government stated that their view was now that duties in the Continuity Bill would have to be “read down” under section 101 of the Scotland Act 1998 (“SA 98”) so as not to apply to the exercise of powers by Ministers of the Crown in reserved areas. The UK Government asked that the provisions were removed from the Continuity Bill and that a subsequent Order under section 104 SA 98 set the duty for UK Ministers. The Scottish Government did not accept this and responded confirming its view that the duty can apply to UK Ministers in relation to Scotland whether they are making policy which does not relate to a reserved matter or making policy which does relate to a reserved matter, so the provision does not require by virtue of section 101 SA 98 to be read down to exclude the latter. The UK Government informed the Scottish Government in early June that it would table amendments at Lords Committee Stage. The UK Government considers that these amendments are necessary in order to rectify what the UK Government considers is a ‘governance gap’ in the application of environmental principles to Ministers of the Crown acting for Scotland in reserved areas.

16. As noted, the Scottish Government remains of the view that the duty placed on Ministers of the Crown by section 14(2) of the Continuity Act can apply to UK Ministers when making policy in respect of both devolved and reserved functions in Scotland. The provision has a clear devolved purpose within the scope of devolved competence for the environment. The provision, therefore, does not require to be read down by virtue of section 101 SA 98 to exclude its application to reserved functions of Ministers of the Crown and there is no governance gap regarding the application of environmental principles in Scotland which requires to be addressed.

17. The Scottish Government believe that the UK Government's proposed amendments on environmental principles do not simply address a purported gap, which in any case we do not believe exists. The UK Government's amendments also change the previously agreed approach by disapplying the Scottish guiding principles on the environment when UK Ministers are acting in reserved areas in Scotland, and replacing them with the principles set by UK Government Ministers. As with provision in section 14(2) of the Continuity Act, the purpose of the amendments concerns the devolved matter of the environment. These amendments are, therefore, for a devolved purpose, and would require the consent of the Scottish Parliament under section 28(8) SA 98. The Scottish Government does not intend to recommend the necessary consent, for the reasons set out above, and we have made clear to the UK Government that, therefore, it should not pursue this amendment.

Clause 57 – Waste tracking – Proposed amendment

18. Scottish Government officials have contacted UK Government officials to request that amendments are made to Clause 57 of the Bill, in relation to waste tracking. The amendment seeks to add the Scottish Environment Protection Agency ("SEPA") as an "enforcement authority" for the purposes of the waste tracking clause.

19. If this amendment is not made, Scottish Ministers could not use the proposed waste tracking powers in the UK Environment Bill to make regulations allowing SEPA to impose the whole range of civil sanctions, for which provision can be made under the Regulatory Enforcement and Sanctions Act 2008 ("RESA 2008"). Scottish Ministers have powers under the Regulatory Reform (Scotland) Act 2014 to make provision for civil sanctions to be used by SEPA, but these powers do not cover granting SEPA powers to issue stop notices or make discretionary requirements, so they are not entirely aligned with the powers in the RESA 2008.

20. The policy intention as regards Clause 57 is for the other GB enforcement authorities to be given powers to issue stop notices and compliance notices. In addition, other powers in the UK Environment Bill, which are jointly conferred on Scottish Ministers and the Secretary of State, provide powers to make provisions for sanctions under RESA 2008. It seems the waste tracking provision is not consistent with similar provisions in relation to other powers in the UK Environment Bill (e.g. on resource efficiency or producer responsibility). It, therefore, seems preferable for consistent sanctions to be made available to SEPA and other GB enforcement authorities under the waste tracking provisions. Without these powers there could be potential inconsistency in enforcement and less effective implementation. The Scottish

Government has requested that the UK Government table the necessary amendment and will continue to press for this to happen.

21. The Scottish Government believes that this amendment, if agreed, would be covered by terms of the existing legislative consent motion, which granted legislative consent in relation to creation of a UK-wide electronic waste tracking regime. The requested amendment does not seek to alter the scope of the UK's legislative powers in relation to Clause 57, but instead state that SEPA has the same enforcement powers under the regulation as the other devolved administrations.

Consultation

Clause 107 - Due diligence for the use of forest risk commodities in commercial activity

22. The policy aim of Clause 107 and associated Schedule (regarding forest risk commodities) is broadly in line with Scottish Government policies on sustainability of consumption and biodiversity. The UK Government held a consultation exercise on this issue in autumn 2020⁵. Scottish Ministers, however, were not consulted on the development of the policy, and do not consider that it is acceptable for policy to be made for the UK in areas of devolved competence without the involvement of the Scottish Government and the Scottish Parliament. The UK Government has offered early informal engagement with the Scottish Government on the preparation of draft regulations for consultation, and some discussions have taken place at official level. While this engagement is welcome, it is no substitute for a proper recognition of devolved competence.

Amendment 80 - Guiding principles on the environment

23. The Scottish Government published a consultation paper on our proposals for environmental principles and governance in spring 2019. The consultation paper⁶ and analysis of responses⁷ are available online. There was also evidence taken from stakeholders and experts during the progress of the Continuity Bill through the Scottish Parliament⁸.

24. The UK Government consulted in 2018 on the development of its policy on environmental principles⁹. In that consultation paper, the UK Government said: "*Our starting point is that the statutory statement of environmental principles and the environmental body should cover England and environmental matters that are not devolved. This consultation therefore relates only to areas for which the UK government is responsible.*" It is our view that the amendments to Clause 18 represent a change to the UK Government's position compared to that stated in the consultation paper. The Scottish Government is not aware of any consultation carried out by the

⁵ <https://consult.defra.gov.uk/eu/due-diligence-on-forest-risk-commodities/>

⁶ consult.gov.scot/environment-forestry/environmental-principles-and-governance/

⁷ <https://www.gov.scot/publications/analysis-responses-consultation-environmental-principles-governance/>

⁸ <https://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/115449.aspx>

⁹ https://consult.defra.gov.uk/environmental-principles/draft-policy-statement/supporting_documents/Environmental%20Principles%20and%20Governance%20after%20EU%20Exit%20%20Consultation%20Document.pdf

UK Government on their change in policy from their original position and Scottish Ministers were not consulted on the proposed amendment before it was introduced and the UK Government's letter of 24 March 2021, which indicated that it was considering "its legislative options" in relation to the duty in section 14(2) of the Continuity Act did not provide any further detail. The UK Government has consulted on its draft policy statement on environmental principles.¹⁰

Financial implications

Clause 107 - Due diligence for the use of forest risk commodities in commercial activity

25. Due to the manner in which these amendments have been developed, a detailed assessment of the costs associated with the amendments has not been carried out by the Scottish Government. The UK Government considers that the new measures introduced by Clause 107 and associated Schedule will involve moderate costs, which are justified by the policy goals. It is anticipated that the large proportion of initial costs will be administrative costs on importing businesses to demonstrate compliance with the obligation. It is not anticipated that there will be initial significant changes to the unit costs of the imports, as the UK only represents a very small proportion of the total global volume of traded produce. The imposition of this obligation on UK importers is likely to change the sourcing of some raw materials by UK importers, but the prices will be set by general global market conditions, where most buyers are not covered by a similar obligation.

Amendment 80 - Guiding principles on the environment

26. There are no direct financial implications from the UK Government's amendment on environmental principles. The impacts over time will be on decision making by the UK Government in reserved policy areas with respect to Scotland that impacts on devolved environmental competence, and thus potentially on the quality of the environment in Scotland. It is very difficult to estimate the costs of this impact, however, this dilution of devolved competence will make it more difficult for the Scottish Government to uphold high environmental standards. Over time, this will have an impact on many sectors that depend on Scotland's high environmental reputation and standards, for example tourism and food exports.

Draft Legislative Consent Motion

27. A draft motion is not included in this Memorandum as the Scottish Government does not intend to lodge such a motion. Under Rule 9B.3.3 (d) of the Parliament's Standing Orders, if a member of the Scottish Government does not propose to lodge a legislative consent motion, the Memorandum must explain why not. We have set out in paragraphs 11 and 17 above the Scottish Government's reasons for not lodging a motion.

¹⁰ <https://consult.defra.gov.uk/environmental-principles/draft-policy-statement/>

Conclusion

28. The Scottish Government broadly supports the policy position provided for in the provision at Clause 107 and associated Schedule on forest risk commodities. The Scottish Government, however, has made clear to the UK Government that it cannot recommend to the Scottish Parliament that it gives consent to provisions which have been developed and drafted without adequate consideration of devolved competence. The Scottish Government disagrees with the UK Government's view that provision falls within reserved competence, and considers that Clause 107 and associated Schedule, as currently drafted, makes provision in relation to Scotland, within the legislative competence of the Scottish Parliament.

29. The Scottish Government remains of the view that the duty placed on Ministers of the Crown by section 14(2) of the Continuity Act can apply to UK Ministers when making policy in respect of both devolved and reserved functions in Scotland. The provision has a clear devolved purpose within the scope of devolved competence for the environment. The provision, therefore, does not require to be read down by virtue of section 101 of the Scotland Act 1998 to exclude its application to reserved functions of Ministers of the Crown and there is no governance gap regarding the application of environmental principles in Scotland which requires to be addressed. In addition, it is inappropriate for the UK Government to seek to impose its own environmental principles on UK Ministers with respect to decisions with respect to Scotland. The Scottish Government is of the view that these matters are clearly within devolved competence and has strongly objected to the approach now being taken by the UK Government.

SCOTTISH GOVERNMENT
July 2021

This Supplementary Legislative Consent Memorandum relates to the Environment Bill (UK legislation) and was lodged with the Scottish Parliament on 9 July 2021

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