

UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

EXPLANATORY NOTES

OVERVIEW AND BACKGROUND

Part 2 – Environment

Chapter 1 – Environmental principles

77. The Act confers on the Scottish Ministers functions relating to environmental principles, and creates duties on Scottish Ministers and other bodies. It replaces the effect of these principles on European law and policy in Scottish domestic legislation, in the preparation of environmental policy and development of environmental regulation in Scotland, following EU exit.

Section 13 - The guiding principles on the environment

78. Section 13 of the Act establishes in domestic law guiding principles on the environment which are equivalent to the requirement that environmental protection requirements are integrated into policy and the EU environmental principles established under EU law. The guiding principles listed in subsection (1) are the principle that protecting the environment should be integrated into the making of policies, the precautionary principle as it relates to the environment, the principle that preventative action should be taken, the principle that environmental damage should be rectified at source, and the principle that polluter should pay.
79. EU law contains a requirement that environmental protection requirements must be integrated into the definition and implementation of policies and activities, in particular with a view to promoting sustainable development. The guiding principle of integration in subsection (1)(a) is derived from this requirement. The other guiding principles reflect the four EU environmental principles that underpin the development of EU environmental policy, and are commonly defined as:
80. Precautionary principle. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
81. Prevention principle. Preventative action should be taken to avoid environmental damage.
82. Rectification at Source principle. Environmental damage should, as a priority, be rectified at source. Polluter Pays principle. The polluter should bear the cost of pollution control and remediation.
83. Subsections (2) and (3) set out how the guiding principles are derived from the equivalent principles, and integration requirement, provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union.

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When the Scottish Ministers prepare guidance under section 17, they are to have regard to the interpretation of those equivalent principles by the CJEU from time to time.

84. Subsections (4) to (7) allow the Scottish Ministers to amend, add, further define or remove environmental principles by regulations. The guiding principles as set out in the Act may be amended, removed or further defined where that is necessary to ensure they continue to correspond to the equivalent EU principles, as they form part of EU law. Any new principle that is introduced in addition to the principles derived from the equivalent principles provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union may be amended or altered by regulations without limitation. Regulations will be subject to affirmative parliamentary procedure and before laying must have gone through appropriate consultation with persons or bodies as stated within the Act.

Section 14 - Ministers' duties to have due regard to the guiding principles

85. Section 14 of the Act imposes on the Scottish Ministers and Ministers of the Crown, as far as they are acting with respect to Scotland, a duty to have due regard to the guiding environmental principles when developing policies, including proposals for legislation. A Minister of the Crown would be required to consider the guiding environmental principles or to have them in view when developing policy for Scotland. The Scottish Parliament has competence to impose a requirement on both the Scottish Ministers and Ministers of the Crown to have regard to the guiding environmental principles as the conferral has a devolved purpose, environmental protection, and related effect. The duty, when read with section 16, will apply to policy development, including proposals for legislation, with the purpose of contributing to the protection and improvement of the environment and sustainable development. Exempt policy areas of national defence or civil emergency and finance or budgets are listed in subsection (3).

Section 15 - Other authorities' duty to have due regard to the guiding principles

86. Section 15 ensures that the guiding principles have effect on all decisions of public authorities in Scotland, other than reserved bodies (as defined in the Scotland Act 1998), with the potential for significant impacts on the environment. It provides that where these public authorities are responsible authorities in terms of the Environmental Assessment (Scotland) Act 2005, they must have due regard to the principles when doing anything in respect of which the duty under section 1 of that Act applies. That requires responsible authorities to carry out environmental assessments under that Act when preparing certain plans or programmes. Subsection (2) defines "responsible authority" in line with the 2005 Act (see section 2 of that Act), and excludes the effect of this section on the Scottish Ministers and Ministers of the Crown because the duty placed on the Scottish Ministers and Ministers of the Crown by section 14 applies to developing policy, which is wider than the circumstances to which the duty under section 1 of the 2005 Act applies.

Section 16 - Purpose of duties under sections 14 and 15

87. Section 16 sets out that the purpose of the duties established in sections 14 and 15 is to protect and improve the environment and contribute to sustainable development.
88. Subsection (2), read together with subsection (3), provides a definition of the environment for the purposes of subsection (1).

Section 17 - Guidance

89. Section 17 requires the Scottish Ministers to publish guidance on the guiding principles and the duties in sections 14 and 15. Subsection (2) sets out content that may be in the guidance, including provision about the interpretation of the duties, how the principles relate to each other, and how the duties relate to other duties relating to the environment (including the duties under the Environmental Assessment (Scotland) Act 2005). The

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guidance will support the interpretation and implementation of the principles duty by Scottish Ministers, Ministers of the Crown and responsible authorities. It is intended to set out how the Scottish Ministers and other public bodies can demonstrate their consideration of the guiding principles through the Environmental Assessment process and is intended to provide advice and case studies for policy makers.

90. Subsection (3) places an obligation on persons subject to the duties to have regard to the guiding principles to have regard to the guidance.

Section 18 - Procedure for publication of guidance

91. Section 18 sets out the procedure for preparation of guidance, placing requirements on the Scottish Ministers to consult on the guidance, and to lay it before the Scottish Parliament prior to publication. Subsection (3) sets out the requirement for the Scottish Ministers to consult a Minister of the Crown, relevant public authorities or other appropriate persons who are subject to the principles duty, and other persons as they consider appropriate, prior to laying the guidance. Subsection (4) sets out that the Scottish Ministers must report on the outcome of the consultation when presenting the guidance to the Parliament. Subsections (5) and (6) provide 40 days, not counting periods of recess or dissolution for more than four days, for Parliament to resolve that the guidance should not be published.