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Scotland after Brexit: Environmental Law



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OCCASIONAL PAPER

These issues were discussed at a recent academic-practitioner workshop on Brexit and the environment in Scotland organised at the University of Strathclyde by the Strathclyde Centre for Environmental Law and Governance on 3 May 2017.

For more information, see
<http://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/research/labsincubators/globalenvironmentallawlab/ourworkonbrexit/>.

However this IPPI Policy Brief is the responsibility of the author alone and is his reflections on the topics and papers discussed in that forum; it does not reflect the views expressed at the workshop.

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I Introduction

Environmental law is a founding competence of the Scottish Parliament. It is also an area of extensive EU competence as a flanking policy of the single market and in response to developments in international law. Setting a Scottish specific approach to the repatriation of environmental competence from the EU will be a key area of policy development during and after the Brexit negotiations. As such it will be a key shaper of the overall approach Scotland takes to determining its post Brexit future. This blog looks at the key issues involved, including whether there will be opportunities to extend Scottish powers with regard to those held at UK level. It also looks at ways in which Scotland can keep in line with EU environmental policy and practice, for example if it decides to pursue constitutional change to allow a closer relationship with the EU than the UK seems ready to develop.

II Scottish Government Environment Policy

The Scottish Government's key stated objective¹ is to work towards a Greener Scotland² by improving the natural and built environment and protecting it for present and future generations. Action is being taken to reduce local and global environmental impact through tackling climate change, moving towards a zero-waste Scotland and increasing the use of renewable energy. In more specific terms, the Scottish Government is committed to:

- making Scotland a leading low carbon investment destination;
- developing an innovative approach to waste management through a circular economy strategy that aims to benefit the environment: cutting waste and carbon emissions and reducing reliance on scarce resources
- developing Natural Capital to benefit communities across Scotland through the goods and services that it provides, including food, renewable energy, water purification, flood mitigation and places for recreation, education and inspiration.

Roseanna Cunningham MSP, the Scottish Environment and Climate Change Cabinet Secretary, believes³ that the European Union has been a significant driver of environmental

¹ <http://www.gov.scot/Topics/Environment>

² <http://www.greenerscotland.org/>

³ <https://www.holyrood.com/articles/news/roseanna-cunningham-brexit-puts-scotlands-environment-risk>

policy and legislation for the past 40 years and that Scotland membership of the EU has helped Scotland to achieve a high level of environmental protection and progress Scotland's world leading low carbon ambitions. She is keen that Scotland continues to protect its position as a climate change leader, where EU climate leadership and diplomacy was central to delivering an ambitious international climate agreement, and contribute to EU-wide environmental policies.

III UK policy on leaving the EU

The UK White Paper on the Great Repeal Bill⁴ states that the UK's current legislative framework at national, EU and international level has delivered tangible environmental benefits, such as cleaner rivers and reductions in emissions of sulphur dioxide and ozone depleting substances emissions. Many existing environmental laws also enshrine standards that affect the trade in products and substances across different markets, within the EU as well as internationally. It intends that the Great Repeal Bill will ensure that the whole body of existing EU environmental law continues to have effect in UK law. The UK Government would consult on future changes to the regulatory frameworks, including through parliamentary scrutiny. The UK Government has made it clear that its longer term aim is to improve the environment over a generation through an outcome based approach. The environmental coalition Greener UK⁵ is arguing for policies and investment to return the UK's land, seas, lochs/lakes and rivers to good health and an ambitious new Environment Act, which aims restore the "natural commonwealth". There have, however, been press reports⁶ that the UK Government is looking at ways to reduce the burden of EU environmental legislation, with the UK press reporting in spring 2017 that UK Government intends to review and possibly repeal the EU Habitats Directive after Britain exits the EU with the aim of simplifying and speeding up development projects.

IV Powers of the Scottish Parliament and Brexit.

In Scotland, and especially on the part of the current Scottish Government, there is a widely held view that where policy issues such as agriculture, fisheries and the environment are not reserved under the Scotland Act, the Scottish Parliament has powers over the range of policy issues covered by that subject. This is based upon the principle in the Scottish Constitutional Convention Report of 1995⁷ that Scotland's Parliament would have a defined range of powers and responsibilities which would encompass sole or shared responsibility for all functions except those retained to the United Kingdom Parliament. On this basis there is a clear expectation that where questions of further devolution, or amendments to the current system

⁴https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

⁵ <http://greeneruk.org/>

⁶ See e.g. Financial Times "Developers set for Brexit triumph over great crested newt" 10.2.2017 <https://www.ft.com/content/83cf8ff0-eef0-11e6-ba01-119a44939bb6>

⁷ Republished in <https://paulcairney.files.wordpress.com/2015/09/scc-1995.pdf>

are discussed, the starting point would be that where powers are not explicitly reserved to the UK the expectation would be that Scotland would expect to frame the basis of the way the new powers would be applied.

The UK Government, on the other hand, takes the view that the powers of the Scottish Parliament, in the context of the reservations set out above, are those as currently exercised – they are not absolute across all aspects of the subject matter. In the UK White Paper on exiting the EU, the UK Government explains this point by stating in 3.4⁸

“This has meant that, even in areas where the devolved legislatures and administrations currently have some competence, such as agriculture, environment and some transport issues, most rules are set through common EU legal and regulatory frameworks, devised and agreed in Brussels. When the UK leaves the EU, these rules will be set here in the UK by democratically elected representatives.”

It then goes on to add, in 3.5

“As the powers to make these rules are repatriated to the UK from the EU, we have an opportunity to determine the level best placed to make new laws and policies on these issues, ensuring power sits closer to the people of the UK than ever before. We have already committed that no decisions currently taken by the devolved administrations will be removed from them and we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved.”

It then explains, in the context of strengthening the United Kingdom in s 3.5-6, that the UK Government acts in the interests of the whole UK and is responsible for the UK's international relations, including negotiations with the EU. “The guiding principle will be to ensure that – as we leave the EU – no new barriers to living and doing business within our own Union are created. The UK Government will maintain the necessary common standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world and protecting our common resources.”

IV Implications of Brexit for environmental law in Scotland

The [Scottish Universities Legal Network on Europe](#) has published a [scoping paper](#) setting out key implications of Brexit for environmental law in Scotland.⁹ It notes that EU environmental regulation can be divided into 5 types: 1) nature protection; 2) citizens' environmental rights; 3) regulation of activities; 4) regulation of products; and 5) repartition (management) of common resources. The first three types tend to be ones which are devolved to Scotland, with certain

⁸https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_U_nited_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

⁹ <http://dspace.stir.ac.uk/bitstream/1893/24816/1/environment-paper-sulne-20161214%20%281%29.pdf>

elements (overall objectives, timelines and general policy frameworks) being set at EU level. In these cases the key question for Scotland and UK will be whether there is a need for a general framework at UK level to replace the EU level and how such a framework, if needed, would be agreed.

The fourth category, regulation of products, applies directly, mostly without any discretion left to the Member States. Presently, as norms concerning the regulation of products affect the internal market, their implementation falls within Westminster's reserved trade competence. It can be expected that the UK Government will argue that this area needs to be primarily left to UK competence given its implications for international trade, although the devolved authorities will wish a degree of involvement in the process given the environmental implications of these decisions. The Scottish Government already applies an opt-out available under the EU directive for the registration of GMO seeds and will wish to see this continue in the future.

The key area in the fifth category, management of common resources, is the Common Fisheries Policy - discussed in more detail in the IPPI blog "[Brexit, Powers and the Scottish Parliament: The Case of Agriculture and Fisheries](https://pure.strath.ac.uk/portal/en/publications/brexit-powers-and-the-scottish-parliament(9c77b2ac-e5d2-4001-8e4f-80b9eb45f970).html)"¹⁰ and in the SCELG policy brief "A Legal Perspective on the Value of Scotland's EU Membership for the Agro Environment" "¹¹. At present intergovernmental processes allows Scottish interests to influence positions taken by the UK in EU led negotiations. When the UK leaves the EU Scottish based interests will want to be sure that the mechanisms for reflecting Scottish scientific advice and agreed positions is properly given weight when the UK negotiates directly with EU and non EU states. Again, as for international trade, if the UK Government want to be sure that existing powers of the Scottish Parliament and Government are reflected, having an effective dispute resolution mechanism which places Scotland on a roughly equal basis with the UK when direct Scottish interests are at stake will be required.

V Key Policy Issues

(a) Enforcement

At present, the EU dimension plays a key role in the enforcement of environmental legislation in Scotland. As part of its powers to supervise the implementation of EU treaty and legislative obligations, the Commission can act to ensure Member States and their authorities act effectively, with recourse to the European Court of Justice if necessary. With Brexit, these enforcement mechanisms will cease to apply to the UK. Brexit will therefore entail the loss of a powerful means of scrutiny over how the UK manages its environment, with no obvious replacement for it. Instead, UK citizens will only be able to access national courts to complain

¹⁰ [https://pure.strath.ac.uk/portal/en/publications/brexit-powers-and-the-scottish-parliament\(9c77b2ac-e5d2-4001-8e4f-80b9eb45f970\).html](https://pure.strath.ac.uk/portal/en/publications/brexit-powers-and-the-scottish-parliament(9c77b2ac-e5d2-4001-8e4f-80b9eb45f970).html)

¹¹ http://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/strathclydecentreforenvironmentallawandgovernance/pdf/MGeelhoed_SCELG_v3.pdf.

about breaches of domestic environmental law. After Brexit, both Scotland and the UK could explore new avenues to ensure better law enforcement, such as enhancing public access to justice in environmental matters (discussed in SULNE policy brief “Rights protected under EU Law concerning the environment”¹² and SCELG policy brief “Contribution of the EU Birds and Habitats Directives to Nature Protection in Scotland”¹³, and/or the establishment of a dedicated environmental court, and/or an environmental ombudsman, but this could be a major area of tension between the Scottish and UK Governments if there are different policy approaches north and south of the border.

A further expected area of tension lies in respect of the public right to have access to environmental information. In Scotland, the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 provide separate regimes for access to environmental information, implementing EU law requirements. EU law has introduced much greater transparency in many regulatory regimes, notably through the establishment of public registers recording applications, permits and enforcement action. This is in addition to the specific right of members of the public under the 2004 Regulations to request environmental information from public authorities with only limited grounds on which it can be withheld. A key issue to be considered in the context of Brexit will be the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), which imposes obligations on access to environmental information very similar to those in current EU law. The Convention’s compliance mechanism can hear complaints from individuals or groups and determine whether or not a state has complied with its obligations. The determinations of the Compliance Committee do not have legal force in domestic law, but can be a source of embarrassment to the government and have been referred to by UK courts (e.g. *Walton v Scottish Ministers* [2012] UKSC 44 at [100]). For a discussion, see SULNE policy brief “Rights protected under EU Law concerning the environment”.¹⁴

(b) Planning Law

The EU does not have competence over land use planning as such, which is the responsibility of the relevant national or devolved Government. As such it represents a key competence of the Scottish Parliament and Government, which has set National Planning Frameworks for Scotland which cover infrastructure (including energy), transport and key areas such as

¹² <https://sulne.files.wordpress.com/2016/11/environmental-rights-sulne-roundtable-oct-2016-rev2.pdf>

¹³ http://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/strathclydecentreforenvironmentallawandgovernance/pdf/Final_with_Cover_BREXIT_BIODIVERSITY.pdf

¹⁴ <https://sulne.files.wordpress.com/2016/11/environmental-rights-sulne-roundtable-oct-2016-rev2.pdf>

housing. In practice national and local planning policy can have more impact on planning decisions than EU law, especially in relation to landscape and aesthetic issues.

Key EU legislation does however impact directly on planning law, notably through the environmental impact assessment directive which sets procedures for issues such as public consultation for projects with environmental impact which is transposed into legislation in Scotland through the Environmental Assessment (Scotland) Act 2005. Scotland has chosen to go beyond EU law in the 2005 Act, which embodies a distinct policy choice in applying SEA to all public sector plans, not just to those in the specific categories identified in EU law as requiring this process, whereas the law in the rest of the UK is limited to the scope of the EU rules.

Another key EU piece of legislation which impacts on planning decisions is the Habitats directive (Natura 2000), which sets out a broad range of measures to promote and protect species and habitats across the EU. In Scotland this legislation has proven controversial in the past. There were major concerns in the mid 2000s that the strictness of measures to promote wild bird protection could have a detrimental impact on proposals to develop wind energy in remote areas of Scotland with strong wind energy potential, notably the Western and Northern Isles. These came to a head in 2008, when the Scottish Government turned down proposals for a major windfarm on Lewis.¹⁵ In practice, however, as environmental impact was reviewed and the impact on local communities was ameliorated, revised proposals were agreed on Lewis in 2012 and a further major proposal on Shetland was approved, despite a judicial review which went to the Supreme Court. The Scottish Government led work in Europe to demonstrate and embed good practice in environmental and community impact of windfarms in a major cross European Project GP WIND in 2012-13¹⁶. The Scottish Government also provided support to the European Commission for its regulatory review of the Habitats Directive in 2015-16, which concluded that the system in place was working effectively. For a discussion, see SCCLG policy brief "Contribution of the EU Birds and Habitats Directives to Nature Protection in Scotland."¹⁷

(c) Climate Change

The EU has been a key driver of climate change law and policy in the UK. The present EU legislative framework consists of three main elements: the EU Emissions Trading Scheme (ETS), covering emissions from energy intensive industries; legislation addressing emissions not covered by the ETS; and measures promoting renewable energy; energy efficiency; and carbon capture and storage (CSS). The EU ETS is one of the most heavily centralised pieces of EU legislation, attributing a key role to EU institutions. Other pieces of EU climate legislation,

¹⁵ <https://www.theguardian.com/environment/2008/apr/21/windpower.renewableenergy>

¹⁶ https://ec.europa.eu/energy/intelligent/projects/sites/iee-projects/files/projects/documents/gpwind_good_practice_guide_gp_wind_en.pdf

¹⁷ http://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/strathclydecentreforenvironmentallawandgovernance/pdf/Final_with_Cover_BREXIT_BIODIVERSITY.pdf

conversely, afford a higher degree of discretion to Member States, setting targets they should meet, or providing tools to aid the development and testing of new technologies, but leaving them to determine how to proceed. Importantly, the EU is party to international climate treaties and its member States have opted to implement their obligations under those treaties jointly. As such, there is a direct link between EU member States' obligations under international law and their obligations under EU law. EEA member States have also opted to implement their commitments jointly with the EU and have access to funds supporting the development and application of emission reduction technologies to varying degrees.

At present Scotland sets its climate change targets separately from the UK through the Climate Change Scotland Act and uses its devolved powers to promote climate change action (for example promoting renewables through its housing and planning powers and its newly strengthened responsibilities for energy efficiency¹⁸). But a range of measures crucial to climate change delivery lie with the UK Government, notably the financial support for renewable energy set through the electricity market reform process (via CFD's, contracts for differences). In addition the Scottish Government has agreed to implement a range of devolved measures such as the ETS through cross border measures which in effect depend on UK legislation.

The policy environment in London and Edinburgh on renewables has already diverged strongly, with the UK Government committed to a moratorium in wind energy in England and (according to press reports) planning to withdraw at an early stage from the EU's renewables target¹⁹. There is also evidence that the UK Government, previously a leader within the EU on climate change ambition, is downgrading the importance it attaches to this work in preparation for focusing its international efforts on trade²⁰. For this reason it seems unlikely that it will be easy for Edinburgh and London to agree on UK wide frameworks on climate change and that this could be a major area of tension in future years.

(d) International Cooperation

The UK leaving the EU would remove Scotland from many networks, partnerships and joint projects which are directly linked to the delivery of EU legislation and policy, often supported by EU funding. Such cooperation promotes the practicability and enforceability of environmental law through exchange information and experience and the development of capacity building. For example the Scottish Environment Protection Agency (SEPA), with its world leading expertise on a risk based approach to managing the environmental impact of industry, plays a leading role in the European Union Network for the Implementation and Enforcement of

¹⁸ <https://beta.gov.scot/publications/national-infrastructure-priority-energy-efficiency-scotlands-energy-efficiency-programme/>

¹⁹ <https://www.bloomberg.com/news/articles/2017-04-05/u-k-said-to-seek-end-for-clean-energy-goal-that-may-sour-brexite>

²⁰ <https://www.theguardian.com/environment/2016/dec/07/uk-slashes-number-of-foreign-office-climate-change-staff>

Environmental Law (IMPEL), which aims to strengthen the implementation of environmental law in Europe. Scotland would also lose direct contact with the key European level agencies which play key advisory and regulatory roles in policy implementation, including the European Environment Agency.

In seeking to develop strategies for keeping in touch with international developments after Brexit, the Scottish Government and its agencies will need to review existing links and reach decisions about where to concentrate its efforts as the process of UK disengagement with EU environmental processes continues. Where cooperation, with networks or individual countries is focused on the exchange of professional practice there should be little if any obstacle to the continuation of links which offer mutual benefit to Scotland and to partners. One area where difficulties could arise, however, is where there is a need to have a legal basis for international cooperation, especially where Scotland wishes to act individually rather than part of the UK. At present the EU framework provides a firm legal basis for Scottish bodies to work together with external Governments and bodies in a manner consistent with the current devolution framework. If, however, Scotland is asked by other countries to develop a legal agreement on cooperation this is likely to fall foul of the fact that the UK constitutional order does not allow devolved governments to reach agreements with any international obligations with third countries. This contrasts for example with the position in countries such as Belgium where the regional authorities can reach international agreements in their areas of devolved competence.

VI Conclusion: keeping close to the EU

A key unresolved issue for the Scottish Government in its approach to Brexit is its wish to keep close to the European Union whatever is Scotland's future constitutional position. The Scottish Government, in its December 2017 paper "Scotland's Place in Europe"²¹ has made it clear that Scotland is a nation with a strong European heritage, outlook and values and that Scotland's relationship with the EU is mutually beneficial. It places strong emphasis on making sure that Scotland's assets and opportunities, people, natural resources and universities with their innovation and research capabilities can continue to make a serious and long term contribution to Europe's future and to secure such benefits which can be obtained from a deepening of this relationship, especially as the UK retreats from active EU engagement.

In this context environmental policy and law offer a clear focus for such activity. The absence of a strong policy framework for enforcement and policy development in areas such as climate change is likely to be exacerbated by growing tensions between Scotland and the UK Government about the direction of policy in future years. There are likely to be growing synergies between Scottish and EU partners on areas such as nature protection, industrial emissions and renewables development, including floating wind and tidal energy, where EU

²¹ <http://www.gov.scot/Publications/2016/12/9234/2>

investment in recent years has been the main source of investment in Scotland²². How such synergies will be effected and managed is a moot point. Notwithstanding this, they would also provide a very clear context for deciding where Scotland should best place its future focus in terms of international cooperation following the implementation of Brexit.

²² Source Scottish Enterprise internal report.

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