

Scotland

Challenges and opportunities for post-Brexit environmental governance

OCTOBER 2018

The logo features the word 'BREXIT' in dark blue, '&' in dark blue, and 'ENVIRONMENT' in green. To the left of 'BREXIT' are three small dark blue stars, and below '&' are three small dark blue stars.

**BREXIT
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This brief has been funded by the Economic and Social Research Council's UK in a Changing Europe programme, which highlights the major challenges and opportunities of Brexit across the UK. It is based on interviews and workshops with a range of stakeholders¹ on the options available for future Scottish and UK environmental governance, as well as the growing body of parliamentary evidence, academic publications and think tank reports on these issues.



¹ Workshop stakeholders included representatives from local and devolved government, public agencies, and environmental NGOs.

Executive Summary

Brexit represents a major change to environmental governance in Scotland and the United Kingdom (UK), raising both opportunities and challenges. It has prompted a constitutional dispute between the Scottish and UK governments, which may jeopardise future environmental governance. The current constitutional impasse has created even more uncertainty, making Brexit preparations highly challenging for government and civil society actors. Scottish stakeholders are worried that English interests will predominate in the design of environmental governance after Brexit and are also concerned about the prospect of greater instability and weaker environmental protections. Crucially, the key planks of the UK government's 'Green Brexit' strategy—the 25 Year Environment Plan and the Department for Environment, Food and Rural Affairs' (Defra) environmental governance and principles consultation—do not cover governance in the devolved nations. This gap in coverage raises the prospect of policy divergence and inconsistent implementation and enforcement across the UK. Most importantly, there is a strong fear in Scotland that Scottish environmental policy ambition will be thwarted by Brexit and deregulatory pressure from England.

Key Points

- Environmental policy works best where policy-makers can take account of local conditions and allow local communities to get involved. Cooperation and coordination on transboundary problems is also required.
- There are many incentives for the Scottish and UK governments to cooperate on environmental policy in ways that allow Scotland to develop policies sensitive to local conditions whilst cooperating on areas of shared concern.
- However, the absence of trust between the Scottish and UK government may jeopardise the future development of post-Brexit environmental governance.
- The current machinery for coordinating policy (the Joint Ministerial Committee) is not fit for purpose and should be reformed.
- New environmental governance structures (such as watchdogs) must be coordinated across the nations of the UK and be accountable to legislatures and citizens.
- Environmental policy must be properly resourced to enable the development of new policies and the implementation and enforcement of existing policies.

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1. Introduction

The most effective environmental policy facilitates transnational cooperation to deal with transboundary and shared environmental problems, while simultaneously remaining sensitive to local conditions and issues. Public awareness and participation have also long been regarded as essential ingredients of good environmental policy-making. Citizens need to feel a sense of ownership of environmental goals if they are to act to protect the environment, and it is often through citizenship engagement that environmental problems are brought to the attention of policy-makers and the wider public.

These features mean that to be effective, post-Brexit environmental policy must enable the UK government and the devolved administrations to engage in international and regional environmental cooperation, and to coordinate their own policies whilst using local knowledge to create enforceable environmental policies that are transparent and accountable to citizens. There is also increasing emphasis within environmental science on policies designed around landscape features (such as water catchments), which do not respect political boundaries such as national borders. Hence transnational intra-UK cooperation, communication and coordination are essential for environmental protection.

Membership of the European Union (EU) has profoundly shaped environmental policy and governance across the UK.² Brexit will therefore have a significant impact upon Scottish environmental governance. Environmental policy is a devolved matter and the ways in which powers will be exercised after Brexit has become the site of a constitutional dispute. The EU Withdrawal Act (EUWA) states that powers that are currently exercised at the EU level should generally be repatriated to the devolved administrations, but also gives the UK government the ability to restrict their policy-making authority in areas where common UK-wide frameworks are determined to be necessary.³ The Scottish government has adopted a Scottish Continuity Bill, which is subject to legal challenge in the Supreme Court, with a ruling

² Burns, C., Jordan, A. and Gravey, V., 2016. [The EU referendum and the UK environment: The future under a 'hard' and a 'soft' Brexit.](#)

³ [European Union \(Withdrawal\) Act](#), Clauses 10-12. For further information, see: House of Commons Public Administration and Constitutional Affairs Committee, 2018. [Devolution and Exiting the UK: Reconciling differences and building strong relationships](#), especially paragraphs 48-50.

expected in Autumn 2018.⁴ The Scottish position on environmental policy is that Scotland has been and wishes to continue to be a global environmental leader.⁵ Both for these reasons and to retain access to the EU's single market⁶ the Scottish government has committed to maintain and improve EU standards, to continue to align with EU environmental policy and to implement EU environmental policy principles.⁷

The UK government has adopted a 25 Year Environment Plan (25 YEP)⁸, and issued a consultation on environmental principles and governance with a bill due to follow during this parliamentary session.⁹ This bill will be limited to England, although the consultation suggests that co-designed policies or approaches may be developed. The Scottish government cannot move forward with its Brexit plans until the Supreme Court has ruled on the Continuity Bill, which means that UK and Scottish governments' timelines for action are not synchronised.

A key risk that arises from the on-going uncertainty attending the Brexit process is that the environment will be downgraded on the policy agenda. Brexit presents an opportunity to reform and improve Scottish and UK environmental policy ambition, coherence, and coordination to deliver well-designed policy that is fit for 21st century environmental challenges. The 25 YEP, the environmental principles and governance consultation, and the Scottish Environmental Strategy consultation all demonstrate a desire and willingness to improve environmental policy and governance. However, current political and constitutional disagreements make it unlikely that the opportunities for reform presented by Brexit will be realised. A major risk is that the UK government will seek to 'muddle through' making minor adjustments to policies and structures that are already unfit for purpose. Doing so may compromise both UK and Scottish environmental policy ambition.

This policy brief draws together the insights of practitioner workshops, including a session on Scotland held in Edinburgh under Chatham House rules, to discuss the implications of Brexit for environmental policy with a specific focus upon devolution. The lead author (Colin Reid) also participated in a Scottish government expert group considering the implications of

⁴ [UK Withdrawal from the European Union \(Legal Continuity\) \(Scotland\) Bill](#).

⁵ Scottish Government, 2018. [Developing an environment strategy for Scotland: Discussion paper](#).

⁶ Scottish Government, 2018. [Scotland's place in Europe: People, jobs and investment](#).

⁷ Scottish Government, 2018. [Developing an environment strategy for Scotland: discussion paper](#).

⁸ HM Government, 2018. [A green future: Our 25 year plan to improve the environment](#).

⁹ Department for Environment, Food and Rural Affairs, 2018. [Environmental principles and governance after EU Exit](#).

Brexit for Scottish environmental governance. The views of practitioners from the devolved nations are central to this work. We hope we have captured their concerns whilst also developing recommendations that offer practical remedies. We identify several core challenges to the future of environmental governance in Scotland and suggest recommendations for delivering well-coordinated, coherent and effective environmental governance after Brexit.

2. Brexit, Devolution and Scottish Environmental Policy

Devolution in the UK is asymmetrical. England does not have its own representation (instead it is governed directly by Westminster). Scotland, Wales and Northern Ireland enjoy varying degrees of autonomy, but each has responsibilities for the environment and agriculture, fisheries, and energy. These devolution settlements were created in the context of EU membership, and therefore the EU's minimum standards for environmental protection apply to all parts of the UK.¹⁰

Under the environmental guarantee principle, enshrined in Article 193 of the Treaty on the Functioning of the European Union, territories within member states can adopt 'more stringent protective measures' than those stipulated in European Union legislation.¹¹ The intersection of the devolution settlements with EU membership has allowed for 'upward divergence' in environmental policy across the four UK nations. In particular, the Scottish government has sought to create more ambitious environmental policies than the UK, as for example in the areas of energy and climate policy.¹² Scotland has also generally performed better at implementing EU Directives and going beyond their requirements (See Box 1).

The Scottish government has committed to on-going environmental ambition after Brexit, declaring its ambition to 'continue to establish Scotland's place in the world as a country ready to lead global action to address current and future environmental challenges.'¹³ Scotland has also committed to maintaining core EU environmental policy principles.¹⁴

¹⁰ Burns, C., Gravey, V., and Jordan, A., 2018. [UK environmental policy post-Brexit: A risk analysis](#).

¹¹ [Treaty on the Functioning of the European Union, Article 193](#).

¹² Royles, E. and McEwen, N., 2015. Empowered for action? Capacities and constraints in sub-state government climate action in Scotland and Wales. *Environmental Politics* 24 (6): 1034-1054.

¹³ Scottish Government, 2018. [Developing an environment strategy for Scotland: Discussion paper](#), p.2.

¹⁴ Scottish Government, 2018. [Developing an environment strategy for Scotland: Discussion paper](#), p.7.

Box 1: Examples of Scottish environmental leadership

- The [Water Environment and Water Services \(Scotland\) Act 2003](#) introduced sweeping changes to water law going beyond the requirements of the Water Framework Directive.
- The [Environmental Assessment \(Scotland\) Act 2005](#) applies strategic environmental assessment to all government plans, not just those listed in the EU's Strategic Environmental Assessment Directive.
- The [Climate Change \(Scotland\) Act 2009](#) sets higher emissions reduction targets than those in the UK Climate Change Act 2008.
- In February 2018, Scottish ministers announced that they intend to [ban the use of single-use plastics such as cotton buds and straws](#) by 2019.

Whilst the UK government has stated some ambitions in the 25 YEP, there is insufficient detail on planned targets and monitoring for England and whether and how these might be coordinated with Scotland. Similarly, whilst it appears that Scotland and England will commit to similar environmental principles, the way in which those principles are interpreted and given force may vary (see Table 1).

For example, the Scottish bill provides for the principles to be interpreted in a way that is consistent with the EU Treaties and EU jurisprudence. In the case of England, Wales and Northern Ireland the EUWA requires a longer list of principles to be addressed but there is no requirement to interpret them in line with the EU Treaties (see Table 1). Crucially this means that Scotland is prepared to commit legally to a higher level of environmental protection than the rest of the UK.¹⁵

Moreover, if Scotland aligns itself strongly with EU environmental policy there is scope for greater divergence between Scotland and the rest of the UK. EU policies tend to be written and framed with clear targets and expectations backed up by a relatively stringent

¹⁵ This is that state of affairs at the time of writing but may change with the publication of a UK Environment Bill.

enforcement regime. UK governments by contrast have tended to frame legislation with flexible wording that is open to interpretation and have been more open to a consensual and negotiated approach to environmental policy-making.¹⁶

Table 1: Principles in the Scottish Continuity Bill and the EUWA

Scottish Continuity Bill	EUWA
<p>The Continuity Bill requires that the following principles be recognised:</p> <ul style="list-style-type: none"> • Polluter pays principle • Preventative action principle • Tackling pollution at source principle <p>But they are to be interpreted in line with EU Treaties. Article 3 TEU and 191 TFEU require the pursuit of a high level of environmental protection.</p>	<p>The EUWA requires the government to bring forward legislation on principles including at a minimum:</p> <ul style="list-style-type: none"> • Precautionary principle, • Preventative action principle, • Pollution at source principle, • Polluter pays principle, • Sustainable development principle, • Environmental protection principle, • Public access to environmental information, • Public participation in environmental decision-making, • Access to justice in relation to environmental matters. <p>There is no requirement for these principles to be interpreted in line with the EU Treaties.</p>

Hence, the 25 YEP has been roundly criticised for its failure to include the type of clear measurable targets, to which UK citizens and civil society actors have become accustomed.¹⁷ Therefore a key challenge for coordinating future UK environmental policy is how to manage the difference between a regime underpinned by clear targets and enforcement, and one in which interpretative flexibility is valued.

¹⁶ Jordan, A., 2004. The United Kingdom: From policy-taking to policy shaping. In: Jordan, A. and Liefferink, D. *Environmental policy in Europe: The Europeanization of national environmental policy*. Routledge, Abingdon, pp. 204-223.

¹⁷ House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#). Eighth Report of Session 2017-19. HC 803.

3. Challenges to Scottish Environmental Governance and Ambition after Brexit

Our meetings with stakeholders and wider engagement with the policy process have highlighted a range of issues for the future of Scottish and UK environmental governance. There is a series of overarching high-level challenges shaping policy dynamics for environmental governance.

1. Scotland wants to retain control for devising and managing environmental policy. The Scottish government has committed to maintain core EU environmental principles and to mirror EU policy developments. The UK and Scottish governments have committed to different environmental principles (see Table 1) and the UK government has not committed to mirroring EU standards. There is therefore scope for policy divergence.
2. Scotland and England share terrestrial and marine borders, but environmental issues do not respect such national borders. Cooperation and coordination of policy goals and enforcement and monitoring will be necessary.
3. There is a fundamental lack of trust between the Scottish and UK governments.¹⁸ This trust deficit presents an obstacle to policy coordination.
4. There is also a suspicion that Defra and Westminster-based politicians fail to understand or fully respect devolved competencies. Officials in Defra seem to forget whether they are ‘wearing’ an English, or UK ‘hat’ and often prescribe solutions, which whilst appropriate for England, may not be for other parts of the UK.¹⁹

¹⁸ House of Commons, Public Administration and Constitutional Affairs Committee, 2018. [Devolution and Exiting the UK: Reconciling differences and building strong relationships](#), pp. 20-21.

¹⁹ House of Commons, Public Administration and Constitutional Affairs Committee, 2018. [Devolution and Exiting the UK: Reconciling differences and building strong relationships](#), pp. 28-29.

These factors have combined to create a difficult policy context within which four key challenges have to be addressed: policy co-ordination, trade, governance gaps and resources.

3.1 Policy Co-ordination

The devolved nations and the UK government meet to discuss and coordinate ‘devolved’ and ‘reserved’ powers in the Joint Ministerial Committee (JMC), which was created in 1999 to facilitate co-ordination between the UK government and the devolved governments.²⁰ The JMC is comprised of a set of committees composed of ministers from the UK and devolved governments. It is designed to provide central co-ordination of the overall relationship between the UK and the devolved nations.

The Joint Nature Conservation Committee (JNCC) brings together representatives from conservation bodies of the UK’s four nations.²¹ This body provides advice and recommendations, is charged with establishing common standards across the UK for monitoring and researching nature conservation, and analyses the resulting information. Its recommendations are then left to be implemented by the competent legislative authorities in each country. The UK-wide Committee on Climate Change operates on a similar basis, although in relation to devolved matters in Scotland it operates in its distinct capacity as the Scottish government’s designated advisory body on climate change.²² The agencies responsible for helping to implement environmental policy across the UK (the Environment Agency, the Scottish Environmental Protection Agency, Natural Resources Wales and the Northern Ireland Environment Agency)²³ have fora for cooperation but the perception of stakeholders is that cooperation is not well developed.

These policy coordination mechanisms were designed to fit a system in which Scotland and the other nations of the UK were tied to common standards decided at the EU level. The structures were designed to accommodate distinctive policies and approaches but within a

²⁰United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, 2013. [Devolution: memorandum of understanding and supplementary agreements](#). See also: Thimont Jack, M., Owen, J., Paun, A., and J. Kellam, 2018. [Devolution after Brexit: Managing the environment, agriculture and fisheries](#). Institute for Government.

²¹ Joint Nature Conservation Committee, 2018. [About JNCC](#).

²² [Climate Change \(Scotland\) Act 2009](#), sections 24-25.

²³ Northern Ireland does not have an independent environment agency, those functions are carried out by Northern Ireland’s Department for Agriculture, Environment and Rural Affairs.

common envelope. Brexit has highlighted some key limitations, especially in the operation of the JMC.

JMC meetings are infrequent and irregular²⁴, and can only be convened when the UK government deems it necessary.²⁵ The JMC on European Negotiations, set up to deal with Brexit has failed to meet on the planned monthly basis, and did not meet for 8 months between February and October 2017.²⁶ The lack of regular engagement at the highest level has also contributed to a neglect of devolution issues in the Brexit debate and negotiations.²⁷

The current system of cooperation is bilateral with the devolved administrations dealing mostly with central government, whilst the opportunity for all four UK environmental ministers to meet and work together is rare. Similarly, there is no arrangement for joint working between the parliaments and assemblies of the UK's four nations. This issue is starting to be addressed with more in-depth working between the four administrations via civil service 'deep dives' to discuss where common frameworks are necessary and what legal form they would take, with fisheries, environment and agriculture being central to these exercises. At least 30 'deep dives' exercises had been completed by April 2018, addressing all areas in which common legislative frameworks are planned, but current tensions between the Scottish and UK government have seen these discussions grind to a halt.

Hence, while the deep dives illustrate greater cooperation on devolved matters, there are ongoing issues with the JMC and existing arrangements for cooperation beyond the UK are weak, with little engagement of the devolved nations at international negotiations.

These issues are exemplified by recent actions of the UK government in relation to environmental policy. As noted above, the UK government has committed itself to a 'Green Brexit' and pushed ahead with the adoption of a 25 Year Environment Plan (25 YEP) and a consultation on environmental governance and principles to address concerns that Brexit could lead to an environmental governance gap and weaker environmental standards.²⁸

²⁴ See Institute for Government, n.d. [Devolution and the Joint Ministerial Committee](#).

²⁵ House of Lords European Union Committee, 2017. [Brexit: Devolution](#).

²⁶ See Institute for Government, n.d. [Devolution and the Joint Ministerial Committee](#).

²⁷ Farstad, F., 2017. [Green Gove woos environment sector: But what about devolution?](#) Brexit & Environment Blog.

²⁸ HM Government, 2018. [A green future: Our 25 Year Plan to improve the environment](#); Department for Environment, Food and Rural Affairs, 2018. [Environmental principles and governance after EU Exit](#).

However, neither the 25 YEP nor the consultation applied to the devolved nations. The way in which UK-wide environmental policy will be managed and enforced is still to be decided.

These moves by the UK government have caused irritation within the devolved nations. Little notice of the UK government plans was given and the mode of consultation has been more in the style of telling the devolved administrations what the UK governments plans are, with little if any opportunity to comment, rather than offering genuine opportunities for consultation and co-designed policy.

Further evidence of the failure to involve the devolved administrations came on 5 July 2018, when the Scottish Cabinet Secretary for Finance, Michael Russell wrote a joint letter with the Welsh Cabinet Secretary for Finance Mark Drakeford, to David Liddington, Chancellor of the Duchy of Lancaster, who is responsible for overseeing the devolution consequences of Brexit. This letter expressed their disquiet at the lack of involvement of the devolved administration in developing the UK's negotiating position.²⁹

The JMC has agreed a set of principles (see Box 2) to guide post-Brexit policy.³⁰ It has suggested that 142 policy areas will be allocated into three groups:³¹

1. Areas where no further action is necessary (covering 49 areas including 9 related to the environment such as water quality and land use policy);
2. Areas that could require new non-legislative arrangements (covering 82 areas including 10 related to the environment such as biodiversity and air quality policy);
3. Areas that may require new common legislative frameworks (covering 24 areas including 19 related to the environment such as chemicals and pesticides policy).

There are twelve further areas that the UK government believes are reserved but which will still be subject to discussion with the devolved nations, including two areas related to the environment: eco-design and energy labelling, and environmental regulations on international trade in timber.

²⁹ Scottish Parliament, Culture, Tourism, Europe and External Relations Committee, 2018. [SPICe: Brexit update paper](#).

³⁰ HM Government, 2017. [Joint Ministerial Committee communique: 16 October 2017](#).

³¹ HM Government, 2018. [Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland](#).

Box 2: Common Frameworks in the Joint Ministerial Council

Common frameworks will be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

JMC Conclusions (16 October 2017)³²

The allocation of policies to these groups has raised a set of concerns. First it is unclear why some policy sectors have been allocated to particular groups: water policy is identified as an area where no further action is necessary despite the transboundary implications of water use and pollution. There also seems to have been little consideration of how to manage the interaction between policies covered by legislative frameworks (such as chemicals) and those which are not covered (such as water).³³

The Environmental Audit Committee noted that whilst there is no indication that current administrations would seek to weaken regulation, there is also no guarantee that future administrations would not do so.³⁴ Therefore failing to put in place legislative frameworks underpinned by a commitment to high standards leaves the environment vulnerable over the longer term.

³² HM Government, 2017. [Joint Ministerial Committee communique: 16 October 2017](#).

³³ See National Assembly for Wales, Climate Change and Rural Affairs Committee, 2018. [Common frameworks for the environment after Brexit](#); Gravey, V. 2018. [Written evidence](#) provided to the Welsh Assembly Climate Change, Environment and Rural Affairs Committee inquiry into UK common frameworks on agriculture and the environment.

³⁴ House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#). Eighth Report of Session 2017-19. HC 803.

Conclusion: Environmental policy co-ordination across the nations of the UK will be necessary. Current mechanisms are not fit for purpose. They lack transparency and do not allow for full involvement of the devolved administrations in decision-making. Decisions on where and how legislation may be needed have been taken without public consultation and, moreover, seem poorly thought through.

3.2 Trade

Brexit raises environmental policy concerns with regard to both internal and international trade.

Internal (intra-UK) trade: the agreement of common frameworks can prevent a ‘race to the bottom’ in environmental standards between the four nations. If the UK and its devolved governments are able to agree a unified position, their combined strength vis à vis businesses and potential polluters will make it easier to adopt ambitious standards across all four nations. However, if standards across the UK differ significantly, polluters may ‘dump’ (literally, in the case of waste) in the nation that has the least stringent regulations. There are therefore practical commercial advantages of having single standards across UK to avoid pollution tourism.

The greater size of the English economy and the greater familiarity with it in Whitehall may lead to decisions that fail to take account of the different needs of the different nations of the UK.

The devolved administrations may be reluctant to develop policies that differ too much in terms of ambition from those in England, especially if those policies are perceived to impose additional burdens on local industry, e.g. by requiring more thorough clean-up of emissions to air or water.

Here there is a key tension as the current position means Scotland may be aligned with the EU and the rest of the UK may not.

International trade: negotiations of international trade agreements are reserved to the UK government, but such agreements can significantly impinge upon the devolved nations’ policy objectives and competencies (see Box 3).

To date the operation of existing coordination mechanisms has not facilitated meaningful involvement of the devolved nations in international trade negotiations.

Future trade agreements may lead to competitive deregulatory pressure if products that have been subject to lower standards enter the UK market. The EU³⁵ and UK³⁶ have both committed in principle to the inclusion of an environmental non-regression principle in any future trade agreement, but that has yet to be negotiated and these commitments will become moot in the event of a no-deal outcome.

Box 3: International Trade and Genetically Modified Organisms

The issue of Genetically Modified Organisms (GMOs) illustrates the intersection of devolved competences with those matters reserved to the UK government, such as international trade. Scotland (along with Wales and Northern Ireland) has adopted a more restrictive policy on GMOs than England in line with the EU Deliberate Release Directive. This divergence between the devolved administrations and England on the cultivation of GMOs has implications for intra-UK and international trade. For the UK government, ensuring harmonisation and the absence of barriers to trade within the UK internal market is crucial and divergence in standards may restrict such trade.

As the UK government is responsible for negotiating future trade agreements, there is scope for it to reach a deal with pro-GMO states such as Brazil, Argentina and the US that undermines the policy preferences of the devolved nations. Hence, in policy areas where reserved and devolved powers intersect there is scope for policy conflict in future.³⁷

³⁵ See e.g. Barnier, M., 2018. [Is Brexit a threat to the future of the EU's environment?](#) Speech given to the European Parliament, 10 April 2018.

³⁶ HM Government, 2018. [The future relationship between the United Kingdom and the European Union](#), p. 38.

³⁷ See Petetin, L., 2018. [GMO cultivation in the UK: Brexit, the devolved administrations and international trade](#). Brexit & Environment Blog. Available at: <https://www.brexitenvironment.co.uk/2018/01/11/gmos-devolution-trade/>

Conclusion: There is a risk of deregulatory pressures arising from new trade agreements or from differential standards adopted across the UK market. The Scottish government's environmental ambitions and desire to stay aligned with the EU may therefore be undercut by:

1. A failure to coordinate trade policies in a way that respects these environmental ambitions;
and/or,
2. A post-Brexit trade deal that undercuts domestic standards.

3.3 Governance Gaps

New institutions will be required for environmental policy development, implementation and enforcement after Brexit. Policy creation has largely been centred on Brussels where the European Commission formulates policy in its Directorates-General (DGs) for the Environment and Climate Change. After Brexit, such policy-making power will rest within the UK but is likely to be dispersed across the devolved nations depending upon agreement about joint frameworks and the UK Supreme Court ruling on Scotland's Continuity Bill.

The UK contributes to and benefits from the European Environment Agency (EEA) which gathers comparable cross-national data to inform EU and national policy development and implementation. Whilst the UK government has expressed a preference to participate in some agencies, it has not included the EEA in that list.³⁸ There is consequently on-going uncertainty about whether and how the UK will gather and access environmental data. The Scottish government has proposed setting up a series of knowledge accounts to ensure that the best available data are used to inform Scottish environmental policy development.³⁹ The UK government has made no such commitment. There is consequently scope for different types of data being used to inform policy development and implementation across the UK. Such divergence may have implications for citizens wishing to access environmental data

³⁸ HM Government, 2018. [The future relationship between the United Kingdom and the European Union](#), pp. 8-10.

³⁹ Scottish Government, 2018. [Developing an environment strategy for Scotland: discussion paper](#), p. 9.

under the terms of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.⁴⁰

EU institutions such as the Commission and the Court of Justice of the European Union (CJEU) provide ways to hold member state and devolved governments to account and to settle environmental disputes (see Box 4 on air quality). For example, between 2003 and 2016 the Commission brought 29 cases against the UK on environmental matters, 24 of which resulted in a judgment wholly or partly against the UK government. Notably, these cases represent almost half of all the Court's judgments on UK infringements, thereby illustrating the importance of such legal mechanisms for enforcing environmental policy.⁴¹

Box 4: The Challenge of Air Quality

Air quality is a devolved issue and meeting EU targets has been a challenging across the UK. The UK government has been taken to court three times by the environmental group Client Earth over its failure to meet the requirements of the EU Ambient Air Quality Directive.⁴² The enforcement mechanisms of the EU have provided the framework that has allowed Client Earth to take the UK government to court. There is concern amongst stakeholders that without such a framework the UK government would adopt weaker targets. It is worth noting that within the UK, Scotland has taken a leadership position on this issue. In 2016, it moved to become the first country in Europe to adopt the World Health Organization (WHO) recommended guideline value for PM 2.5.⁴³

Once the UK leaves the EU it will need to develop its own mechanisms to hold government to account and to resolve problems around the interpretation of common frameworks.⁴⁴ Defra's governance and principles consultation suggests a new watchdog but the current proposals have been widely criticised for being too weak.⁴⁵ They also do not apply to the UK, but rather

⁴⁰ See United Nations Economic Commission for Europe, n.d. [Public Participation](#).

⁴¹ Hogarth, R. and Lloyd, L., 2017. [Who's afraid of the ECJ? Charting the UK's relationship with the European Court](#). Institute for Government.

⁴² Client Earth, 2018. [Government loses third air pollution case: Judge rules air pollution plans unlawful](#).

⁴³ O'Brien, F., 2016. [Air quality in Scotland](#). SPiCE Briefing.

⁴⁴ Lee, M., 2017. [The UK needs a new independent body to protect the environment after Brexit](#). Brexit & Environment Blog.

⁴⁵ House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#). Eighth Report of Session 2017-19. HC 803.

to England alone and the way in which the body will coordinate with the devolved nations is uncertain. There is scope for the new body to work with equivalent bodies in Scotland, but it is uncertain which bodies will assume monitoring and enforcement powers.

Scotland has established an expert roundtable to offer advice on the impacts of Brexit on the environment and climate change.⁴⁶ The Scottish Continuity Bill also requires the government to prepare and consult on proposals for new legislation. The timetables for developing a new English and possibly Scottish watchdog are not aligned. In addition, there is currently no plan on future dispute resolution mechanisms across the four nations. Disputes are currently decided via the JMC, but as noted above it is regarded as being unfit for purpose. Moreover, there may be a case for a specialist environmental dispute resolution mechanism to provide sufficient expertise.⁴⁷

It is unclear whether and to what extent members of the public and civil society organisations will be able to use such bodies to secure the implementation and enforcement of environmental policy in line with international law obligations under the Aarhus Convention.⁴⁸ The UK's current approach to access to justice is poor: in 2017, the UK was found to be in breach of its Aarhus obligations due to the high costs of judicial reviews. There is an opportunity to address these failings in developing a watchdog that is transparent and accountable.

However, it also remains to be decided how any new body would be held to account. There is a strong presumption in favour of parliamentary accountability. The question then arises as to which legislatures should be involved. If a UK-wide watchdog is developed there is a case for the House of Commons holding the body to account. The Environmental Audit Committee (EAC) has proposed establishing a new Environmental Enforcement and Audit Office that would report to the Parliament and have its budget set by a statutory group of Parliamentarians to ensure its independence.⁴⁹ Whilst the EAC proposals are for an England-only body they could be extended to a UK-wide watchdog, but it would have to be in a way

⁴⁶ See Scottish Government, Roundtable on Environment and Climate Change, 2018. [Environmental governance in Scotland after Brexit: Assessment and options for consideration report](#).

⁴⁷ Thimont Jack, M., Owen, J., Paun, A., and J. Kellam, 2018. [Devolution after Brexit: Managing the environment, agriculture and fisheries](#). Institute for Government.

⁴⁸ See United Nations Economic Commission for Europe, n.d. [Public Participation](#).

⁴⁹ House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#), pp.3-4.

that respected Scottish competence for environmental policy by, for example, requiring reporting to the Scottish government and Parliament. Although it is worth noting that as Scotland has a different legal system and has expressed a preference for aligning itself with the EU, there is a strong case for a Scottish watchdog.

Conclusion: New institutions and coordination will be required for policy development, monitoring and enforcement. Important decisions are required on data collection and coordination of enforcement functions and accountability mechanisms. New governance bodies must be subject to legislative oversight from all relevant parliaments and assemblies. Comparative environmental data should be available to citizens who should also have access to justice and cost should not be a barrier to them raising concerns about the enforcement of environmental law.

3.4 Resources

The question of resources is central. The Scottish government already faces reduced capacity as a consequence of budgetary constraints: the budget it receives from Westminster fell by 7.4% between 2010/11 and 2017/18.⁵⁰ Brexit may further exacerbate these resource constraints. Moreover, the Scottish government has registered its objection to the fact that the funds, which have been released to enable the civil service to prepare for Brexit, have not been distributed to the devolved administrations in line with the Barnett formula.⁵¹ Consequently, Scotland has fewer resources to prepare for Brexit. Finally, Brexit has tight timeframes, with the government setting a deadline of 29 March 2019 for the UK to leave the EU and the EU suggesting that any transition period should end in December 2020. It will be difficult to develop the necessary administrative and governance capacity in such a short space of time.

The ‘opportunity costs’ of Brexit—the resources (staff, money and time) that will be necessary to undertake the administrative challenge of carrying it out—are also considerable.⁵² There is a risk that Brexit might occupy so much civil service time and energy in Edinburgh and Westminster that neither government will be able to advance ambitious environmental

⁵⁰ Scottish Government, 2017. [Scottish Budget: Draft Budget 2017-18](#), pp. 3-4.

⁵¹ Courtsoyan, P., 2018. [SNP accuses Westminster of short-changing Scotland over Brexit fund](#). *The Scotsman*, 13 March.

⁵² National Audit Office, 2017. [Implementing the UK's exit from the European Union: The Department for Environment, Food and Rural Affairs](#).

protections. Moreover, new bodies to coordinate policy and ensure comparability of enforcement will also require resourcing. Here it is important to ensure that the resourcing models adopted for the new bodies do not compromise their independence.

Conclusion: The development and implementation of future environmental policy will need to be appropriately resourced. Brexit raises the risk that with the loss of pooled capacity at the EU level and a further squeeze on Scottish public finances, that environmental policy will be subject to spending cuts and other resource constraints.

4. Future Directions

Brexit offers an opportunity to think carefully about the future ambition and design of environmental policy in Scotland and the UK. The Scottish and UK governments have both indicated their willingness and ability to think strategically over the long term about how to deliver environmental policy that respects local conditions whilst meeting global environmental challenges. However, the way that Brexit has unfolded has served to obscure the common environmental ambitions that unite the Scottish and UK governments and heightened the risk that the environment will be downgraded on the policy agenda.

We found a range of challenges that could obstruct Scottish environmental policy ambition. We suggested in the introduction that the best environmental policy is one that facilitates transnational action whilst remaining sensitive to local conditions. Environmental policy works best when policy-makers can take account of local conditions and allow local communities to get involved whilst also facilitating cooperation and coordination on transboundary problems. Thinking at a landscape scale requires thinking across political boundaries and borders. Developing well-integrated policies has commercial as well as environmental benefits.

We suggest that policy must be transparent and accountable, allowing for citizen involvement and be based upon effective communication, cooperation and coordination. The current model of UK environmental governance falls short on all four counts and the opportunity to address these flaws in developing a post-Brexit environmental settlement has yet to be taken.

4.1 Recommendations

We propose the following recommendations to address these challenges:

1. As a matter of priority, the Scottish government and UK government should reach agreement on how to align their respective environmental policy ambitions in ways that respect the environment and facilitate intra-UK commerce. Such an agreement should be genuinely co-designed. Any agreement should be underpinned by a

commitment to deliver a high level of environmental protection. Common agreement on principles and their interpretation must also be negotiated.

2. Common frameworks must be agreed and there should be a presumption in favour of transparent legislative frameworks underpinned by common standards and principles to avoid gaps in implementation and to create the conditions for successful policy coordination and cooperation.
3. The Joint Ministerial Council is unfit for purpose and should be reformed to allow parity for the devolved nations. Sufficient notice should be given of policy developments and consultation should be genuinely consultative.
4. A dispute resolution mechanism should be established to manage environmental disputes between Scotland and the UK and the other devolved nations.
5. Scotland has a different legal system from the rest of the UK and has expressed a preference to align with the EU. There is therefore a case for Scotland to have its own environmental watchdog either by creating new structures or by empowering an existing set of institutions to perform this role. Having a Scottish environmental watchdog could foster a sense of ownership of environmental policy. The new watchdog(s) must be transparent, accountable and provide access to citizens.
6. Citizens living in Scotland that have suffered negative environmental consequences from policies in one of the other nations of the UK should be able to raise environmental issues with the watchdog in that state and vice versa.
7. Watchdogs must be subject to parliamentary scrutiny and accountability. If a UK-wide watchdog is developed it should be held to account by the House of Commons. If a series of watchdogs is developed, each legislature should hold each watchdog to account.
8. Environmental policy must be properly resourced to enable the development of new policies and the implementation and enforcement of existing policies.

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