

# Northern Ireland

## Challenges and opportunities for post-Brexit environmental governance

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 **BREXIT  
& ENVIRONMENT**



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*Cover photograph courtesy of Viviane Gravey.*

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<sup>1</sup> Workshop stakeholders included representatives from local and devolved government, public agencies, environmental NGOs, rural and farming organisations, and the energy sector.

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# Executive Summary

Brexit represents a major change to environmental governance in Northern Ireland and the UK. Yet it is occurring at a time when Northern Ireland has no government, curtailing its ability to engage in both local and UK-wide preparations. Northern Irish stakeholders are worried that tensions between England and Scotland are dominating Brexit preparations, hampering discussions of UK-wide cooperation, as well as of the specific needs of Northern Ireland. They are concerned pre-existing environmental governance issues in the region (such as the lack of an independent environmental agency or the prevalence of cross-border environmental crime) will remain unaddressed, and that current North/South cooperation on environmental issues will be negatively impacted by the Brexit deal. Crucially, the key planks of the UK government's 'Green Brexit' strategy (such as the commitments laid out in the 25 Year Environment Plan and the Environmental Principles and Governance consultation) do not cover the devolved nations. This raises the prospect of further policy divergence and inconsistent implementation and enforcement across the UK, and for Northern Ireland's environment to continue deteriorating.

## Key Points

- Northern Ireland is in many ways a unique case for post-Brexit environmental governance: it has extensive cooperation with Ireland on environmental issues and the Irish border is a key issue in Brexit negotiations. However, the lack of a Northern Ireland Executive means that its concerns are not strongly represented in cross-UK discussions.
- Northern Ireland has long lagged behind the UK (and most of the EU) in terms of the quality of its environmental governance. As a result, strategies to address post-Brexit governance gaps in Northern Ireland must also consider pre-existing domestic governance weaknesses.
- An independent environment agency should be established as a matter of urgency (to further align Northern Ireland with best practice in environmental governance) and a separate environment commissioner should be appointed who can participate in a UK-wide environmental watchdog.
- Common UK environmental frameworks must be created. There should be a presumption in favour of transparent legislative frameworks underpinned by common

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standards and principles to avoid gaps in implementation and to create the conditions for successful policy coordination and cooperation.

- These common frameworks must be sufficiently flexible to accommodate continued cooperation between Northern Ireland and Ireland on a North/South basis under the umbrella of the Good Friday/Belfast Agreement in policy areas such as water quality, waste management, electricity generation, animal welfare etc.
- This flexibility must be underpinned by an intra-UK non-regression principle, irrespective of what is agreed with the EU. This would enable each nation to diverge upward, while preventing an internal 'race to the bottom' within the UK.

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# 1. Introduction

Over the last forty years, UK environmental policy and systems of governance have been profoundly shaped by the UK's membership of the European Union. While EU-UK influence was not a one-way process (the UK pushed for greater ambition on climate change and blocked the adoption of environmental taxes), EU membership prompted the UK to adopt a 'more preventative approach to policy, with fixed standards and clearer timetables of improvement, and an explicit set of guiding principles such as precaution, prevention and sustainability.'<sup>2</sup>

Brexit thus poses profound questions for UK environmental policy. What will happen to EU standards, intended to be carried over into UK law through the EU Withdrawal Act, without the underpinning EU system of governance? Will these standards become 'zombie legislation', present on the statute book but without proper enforcement?<sup>3</sup> Or will the UK government's proposed 'Green Brexit' lead to a revolution in how the environment is governed, ensuring that post-Brexit 'governance gaps' are not only filled, but addressed in such a way to make the UK a world leader in environmental affairs?

Brexit will not only change relations between the UK and the EU. Within the UK, the influx of competences repatriated from the EU level also raises questions for the devolved and UK governments. Who should be 'taking back control'? Is Brexit an opportunity for policy divergence not only vis-à-vis the EU but between the UK's four nations?<sup>4</sup> These questions are particularly salient for environmental issues.

Environmental policy is heavily Europeanised and has been devolved to Scotland, Wales and Northern Ireland since the late 1990s. Environmental problems are also notoriously difficult to address within national borders. Environmental problems—such as water pollution, biodiversity loss and climate change—have transboundary effects and require cooperation to tackle them (in this case, both within the UK and between the UK and the EU).

This brief is part of a series analysing the challenges for environmental governance after Brexit in the UK, Wales, Scotland and Northern Ireland.

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<sup>2</sup> Burns, C., Jordan, A., Gravey, V., Berny, N., Bulmer, S., Carter, N., Cowell, R., Dutton, J., Moore, B., Oberthür, S., Owens, S., Rayner, T., Scott, J. and Stewart, B, 2016. [The EU referendum and the UK environment: An expert review](#).

<sup>3</sup> House of Commons, Environmental Audit Committee, 2017. [The future of the natural environment after the EU referendum](#). Sixth Report of Session 2016–17. HC 599.

<sup>4</sup> Reid, C., 2017. [Brexit and the devolution dynamics](#). *Environmental Law Review*, 19 (1): 3–5.

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*“Northern Ireland is central to the Brexit negotiations, yet with no government to handle Brexit preparations.”*

It focuses on Northern Ireland, a region which occupies a paradoxical place in the Brexit process. Northern Ireland and the Irish border have become major issues in the EU-UK negotiations. At the same time, Northern Ireland as an actor is absent in the domestic preparations (there has been no devolved government since January 2017,

and direct rule has not been instituted). The lack of a Northern Irish government in Stormont is problematic for Brexit negotiations in general. For example, as a net food exporter, Northern Ireland is likely to have very different trade priorities from England, Scotland and Wales. But this situation also raises two additional issues for environmental governance. First, Northern Ireland has long lagged behind the UK (and most of the EU) in terms of the quality of its environmental governance. As a result, strategies to address post-Brexit governance gaps in Northern Ireland must also consider pre-existing domestic governance weaknesses. Second, the region faces additional, distinct, cross-border and all-island environmental challenges that it shares with Ireland—such as how to tackle pollution or invasive species that affect both jurisdictions. Every form of Brexit, from a soft Brexit to a hard, unplanned exit, will have impacts on the environment and on how much the UK continues cooperating with its EU neighbours.<sup>5</sup> But the ways in which the Irish border dilemma is solved (or not)—from full/partial regulatory alignment between the UK and the EU, to a hardened Irish border or increased checks in the Irish Sea—will impact Northern Ireland first and foremost. This is likely to have consequences for environmental governance too—shaping cooperation across the island of Ireland as well as policy divergence within the UK.

This brief discusses challenges and opportunities for post-Brexit environmental governance in Northern Ireland. It starts by discussing the issues facing environmental governance in Northern Ireland before Brexit. It then analyses the challenges posed by Brexit and how the region is preparing, before debating options for Northern Irish environmental governance after Brexit and how the rest of the UK can learn from this unique case.

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<sup>5</sup> Burns, C., Jordan, A. and Gravey, V., 2016. [The EU referendum and the UK environment: The future under a ‘hard’ and a ‘soft’ Brexit](#); Burns, C., Gravey, V. and Jordan, A., 2018. [UK environmental policy post-Brexit: A risk analysis. A report for Friends of the Earth](#), p. 40.

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## 2. Governance before Brexit: Overcoming Systemic Failures?

For over twenty years, devolution of environmental competences has given the three devolved nations the opportunity to develop their own approaches to environmental policy. In line with the EU Treaties, EU environmental policy provides a baseline—offering the possibility for EU Member States (or regions within them) to go beyond the minimum standards set at EU level. This has been the case for example in Wales, (as evidenced by the 2015 Wellbeing of Future Generations Act) and Scotland (which is leading the way on renewable energy, and more recently, on banning single-use plastics). This, critically, has not been the case in Northern Ireland. A number of reviews of environmental governance in Northern Ireland over the last twenty years have concluded that the region is lagging behind the rest of the UK, experiencing ‘the relegation of environmental concerns down the list of political imperatives’ which is often found in post-conflict societies.<sup>6</sup> Common issues include the lack of an independent environmental agency, the absence of an environmental audit committee in the NI Assembly, and the lack of a specific environmental tribunal or at least environmental experts within the judiciary and prosecution services.<sup>7</sup>

These limited enforcement and oversight capacities, together with a focus on economic development after the Troubles and a lack of political support for environmental ambition, have led to ‘a systemic failure to regulate environmentally harmful activities’.<sup>8</sup> This failure is illustrated by frequent reports of environmental crimes, from quarrying taking place without proper planning permission or environmental impact assessments, to (often cross-border) waste crimes (illegal dumping of waste in bogs, rivers, fields) and fuel laundering. The recent Renewable Heat Incentive scandal—which saw the Northern Ireland Executive greatly

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<sup>6</sup> Brennan, C., Purdy, R. and Hjerp, P., 2017. [Political, economic and environmental crisis in Northern Ireland: The true cost of environmental governance failures and opportunities for reform](#). Northern Ireland Legal Quarterly, p. 125.

<sup>7</sup> Macrory, R., 2004. [Transparency and trust: Reshaping environmental governance in Northern Ireland](#), p. 72; Burke, T., Bell, G. and Turner, S., 2007. [Foundations for the future: The review of environmental governance](#), p. 118.

<sup>8</sup> Brennan, C., Purdy, R. and Hjerp, P., 2017. [Political, economic and environmental crisis in Northern Ireland: The true cost of environmental governance failures and opportunities for reform](#). Northern Ireland Legal Quarterly, p. 134.



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overspend on a badly-designed renewable energy scheme that generously subsidised the use of wood pellet burners with few controls—is one of many environmental governance scandals in Northern Ireland, which often spill over to the Irish side of the border.<sup>9</sup>

## 2.1 Cross-border environmental crime

Cross-border environmental crimes have two negative consequences for Northern Ireland. First, environmental crimes undermine NI's natural environment (central to a current boom in tourism) with concerns that ongoing environmental damages may be extremely difficult, if not impossible, to offset. Second, in a resource-poor environment, environmental crimes are particularly costly to address, further limiting the availability of public funding for environmental action. Hence, these crimes represent a loss in tax revenue (on fuel, waste, etc.) as well as extremely high costs to repair the damages to the environment.

### Box 1: Cross-border environmental crimes

Different rules and costs for waste management between Ireland and Northern Ireland have fuelled waste smuggling in the past. A price-hike for landfill costs in Ireland in the early 2000s led to an estimated 250,000 tonnes of waste being illegally dumped in Northern Ireland. A cross-border repatriation plan established under the auspices of the 2006 EU Shipment of Waste Regulation was to be completed by 2018.<sup>10</sup> However, illegal waste disposal continues on both sides of (and across) the border with enforcement once more lagging behind. A review in 2013 of illegal waste at the Mubouy site in Derry/Londonderry (on the Northern Ireland side of the border) found it contained over 900,000 m<sup>3</sup> of illegal waste.<sup>11</sup> On the Irish side, the Carndonagh tyre dump is the largest in Europe, with over 16 million tyres illegally disposed of, most of which come from NI.<sup>12</sup> Beyond waste, unclear responsibilities over Lough Foyle and Carlingford Lough (as the Irish border is not settled) is leading to unregulated economic activity with damaging environmental impacts (e.g. an increase from 2,000 to 30,000 Oyster beds in Lough Foyle between 2014 and 2016).<sup>13</sup>

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<sup>9</sup> BBC, 2017. [Renewable Heat Initiative Timeline](#).

<sup>10</sup> Northern Ireland Assembly Research and Information Service, 2016. [Background paper on waste management in Northern Ireland](#), p. 18.

<sup>11</sup> Northern Ireland Department of Agriculture, Environment and Rural Affairs, n.d. [The Mubouy Road Waste Project](#).

<sup>12</sup> Village Magazine, 2018. [Island of Tyreland](#). Highland Radio, 2018. [16 million tyres could be illegally buried in North Inishowen](#).

<sup>13</sup> BBC News, 2016. [Lough Foyle oyster farms cashing in on political deadlock](#).

A recent review commissioned by the NI environmental sector found that ‘the cost to the UK taxpayer in lost taxes from Northern Ireland could be as much as £80 million annually for illegal fuel laundering, £2 million annually for illegal quarrying, and we estimate (to date) that it could be between £100 and £150 million for illegal waste disposal’.<sup>14</sup> As for cleaning illegal waste, this same review found that it would cost up to £440 million.

## 2.2 Cross-border and all-island environmental cooperation

Formal and informal cooperation on environmental issues between Northern Ireland and Ireland has grown over the last twenty years. This can take a cross-border form—focused on local cooperation in the border region—or instead take shape through an all-island strategy.

**Table 1: Cross-border and all-island areas of environmental cooperation between Northern Ireland and Ireland.**

Cross-border areas of cooperation	All-island areas of cooperation
<ul style="list-style-type: none"> <li>• Environmental funding</li> <li>• Fuel laundering</li> <li>• Marine environment</li> <li>• Protected habitats</li> <li>• Strategic Environmental Assessments</li> <li>• Waste and waste crime</li> <li>• Water catchments</li> <li>• Water pollution and regulation</li> <li>• Wildfires</li> </ul>	<ul style="list-style-type: none"> <li>• Air quality</li> <li>• Birds and Habitats Directives</li> <li>• Climate change</li> <li>• Energy supply</li> <li>• Invasive species</li> <li>• Marsh fritillary</li> <li>• Plant health</li> <li>• Pollinator Plan</li> <li>• Radiation</li> </ul>

Source: Northern Ireland Environment Link, 2017.

The environment is one of six areas of cooperation identified under the 1998 Good Friday/Belfast Agreement (GFA). The North South Ministerial Council (NSMC) set up by the GFA thus includes environmental cooperation within its remit and has overseen joint efforts on tackling waste crime, cooperating on managing shared water resources, and sharing information on available funding and research opportunities.<sup>15</sup>

<sup>14</sup> Purdy, R. and Hjerp, P., 2016. [Environmental governance in Northern Ireland: Identifying the drivers for change and considering solutions](#), p. 6.

<sup>15</sup> North South Ministerial Council, 2016. [North South Ministerial Council Environment meeting: Joint communiqué](#).

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Institutional cooperation between the two jurisdictions also goes beyond the NSMC. This cooperation includes specific cross-border agencies (such as the Loughs Agency on cross-border marine/fisheries issues), frequent cooperation between the NI Environment Agency (NIEA) and the Irish Environment Protection Agency (EPA) to jointly implement EU environmental directives (e.g. cooperation on international water catchments for the Water Framework Directive and joint reporting under the Birds Directive and Habitats Directive) and ambitious all-island strategies that include city councils, government departments and agencies on both sides of the border (such as the All-Ireland Pollinator Plan). Cooperation extends beyond public actors, with, for example, environmental NGOs on both sides of the border putting together joint bids for European funding.

In conclusion, the *status quo* in Northern Ireland offers some key lessons for (re)building environmental governance after Brexit.

1. Common standards are not sufficient to guarantee equivalent high levels of environmental quality on the ground. Common EU rules have been enforced very differently across the UK and across the island of Ireland. Divergence creates opportunity. While this opportunity has been seized to achieve greater environmental ambitions in Wales and Scotland, it has meant lower ambition in NI and the development of environmental crime. The risk of environmental crime increases further when responsibilities are unclear, as in Carlingford Lough and Lough Foyle where the position of the Irish border is not settled.
2. Cooperation across jurisdictions is key to tackle these abuses. Cross-border cooperation to address environmental damages or increase environmental benefits goes beyond state actors, with a wide network of civil society and public organisations involved in formal and informal cooperation. The four UK nations 'going it alone' on environmental policy risk mishandling cross-border challenges.
3. Current systems of environmental governance are far from perfect. As Brennan et al. argue, 'the problematic history of environmental governance in Northern Ireland demonstrates not only the power and influence of the EU's enforcement architecture,

***“Northern Ireland has been left behind as the dirty corner of the former ‘Dirty Man of Europe’”***

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but also some of its core weaknesses'.<sup>16</sup> Northern Ireland has been left behind as the dirty corner of the former 'Dirty Man of Europe', using its status as a post-conflict society to argue for differential treatment from the European Commission and to resist calls for an independent environmental agency. While environmental infringement cases have been brought forward by the European Commission (6 were still ongoing in 2016) Northern Ireland has never been fined.<sup>17</sup> Delivering 'gold standard' environmental governance in the future means taking a hard look at the weaknesses of the EU and domestic systems—and developing new models that address both.

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<sup>16</sup> Brennan, C., Dobbs, M., Gravey, V. and Ui Bhroin, A., 2018. [The future of environmental governance in Northern Ireland](#), p. 16.

<sup>17</sup> Purdy, R. and Hjerp, P., 2016. [Environmental governance in Northern Ireland: Identifying the drivers for change and considering solutions](#).

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# 3. Governance for Brexit: Preparation without Representation?

While Brexit negotiations are led by the UK government and the European Commission, preparing for Brexit involves a much greater range of public and private actors. Ongoing preparations are proving highly political and divisive (who should ‘take back control’ and to what end?) and are putting strain on institutions that were not designed for this purpose.<sup>18</sup>

## 3.1 Existing cooperation mechanisms

Intra-UK cooperation exists both at sectoral level (between actors involved in environmental protection) and between central and devolved governments. Specific environmental bodies such as the Joint Nature Conservation Committee (JNCC) and the Climate Change Committee are UK-wide, advisory bodies. The JNCC, for example, brings together representatives from conservation bodies of the UK’s four nations.<sup>19</sup> It 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 Committee on Climate Change (CCC) operates on a similar UK-wide basis. Such cooperation can extend beyond providing advice, thus 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) have fora for cooperation.<sup>20</sup> However, the perception of stakeholders is that cooperation is not well developed.

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

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<sup>18</sup> Thimont Jack, M., Owen, J., Paun, A., and J. Kellam, 2018. [Devolution after Brexit: Managing the environment, agriculture and fisheries](#). Institute for Government.

<sup>19</sup> Joint Nature Conservation Committee, 2018. [About JNCC](#).

<sup>20</sup> 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.

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facilitate co-ordination between the UK government and the devolved governments.<sup>21</sup> 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 implementation of EU environmental law falls under the remit of the JMC (EU) formation.

For Northern Ireland, two further cooperation mechanisms are important for both North/South and East/West cooperation: the North South Ministerial Council, which includes a specific environment and agriculture remit, and the British-Irish Council, which brings together the governments of the UK, Ireland, the Isle of Man, Guernsey and Jersey.<sup>22</sup>

### 3.2 Institutions under strain

These policy coordination mechanisms were designed to fit a system in which Northern Ireland and the other nations of the UK (and of the EU) were tied to common standards decided at the EU level. Brexit has highlighted some key limitations, especially in the operation of the JMC.

JMC meetings are infrequent and irregular, and can only be convened when the UK government deems it necessary.<sup>23</sup> 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.<sup>24</sup> The lack of regular engagement at the highest level has also contributed to a neglect of devolution issues in the Brexit debate and negotiations.<sup>25</sup> This neglect of devolution and intergovernmental cooperation can also be seen through engagement with the British-Irish Council. While all other parties are represented at Prime Minister level, neither Theresa May nor before her David Cameron have attended BIC meetings.<sup>26</sup>

The current system of cooperation is largely informal and bilateral, with the devolved administrations dealing mostly with the UK government. The opportunity for all four UK

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<sup>21</sup> United 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.

<sup>22</sup> Torrance, D., 2018. [Intergovernmental relations in the United Kingdom](#), p. 32.

<sup>23</sup> See Institute for Government, n.d. [Devolution and the Joint Ministerial Committee](#); House of Lords European Union Committee, 2017. [Brexit: Devolution](#).

<sup>24</sup> Institute for Government, n.d. [Devolution and the Joint Ministerial Committee](#).

<sup>25</sup> Farstad, F., 2017. [Green Gove woos environment sector: But what about devolution?](#) Brexit & Environment Blog.

<sup>26</sup> Emerson, N., 2018. [Neglecting the British-Irish Council is a terrible mistake](#). The Irish Times.

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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 system of 'below the radar' cooperation worked well for technical matters.<sup>27</sup> It has been further intensified 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.<sup>28</sup> Fisheries, environment and agriculture are central to these exercises. At least 30 'deep dive' exercises had been completed by April 2018, addressing all areas in which common legislative frameworks are planned.<sup>29</sup>

But political and constitutional tensions between the Scottish and UK government have seen these technical discussions slow down, waiting for a resolution in front of the UK Supreme Court in the autumn. Furthermore, while the deep dives illustrate greater cooperation on devolved matters, existing arrangements for wider cooperation are weak, with little engagement of the devolved nations at international negotiations.

### 3.3 Who speaks for Northern Ireland?

Brexit preparations are unfolding even though Northern Ireland has been without either a functioning Northern Irish Executive or a sitting Assembly since January 2017. This means that while the Scottish and Welsh governments, and the Assembly for Wales and the Scottish Parliament, can organize consultations, hearings and inquiries to discuss what their positions should be on Brexit, no similar official

***“The absence of ministers constrains preparations in Northern Ireland as key actions—such as putting out documents for consultation or making decisions—require ministerial assent.”***

forums exist in Northern Ireland. This is leading to a critical 'deficit in leadership on the future of environmental governance'.<sup>30</sup> Paradoxically, Northern Ireland is the most-discussed devolved nation in the UK-EU negotiations while simultaneously having no official voice during internal UK preparation, although the Democratic Unionist Party, whose 10 MPs

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<sup>27</sup> Gallagher, J., 2012. [Intergovernmental relations in the UK: co-operation, competition and constitutional change](#), British Journal of Politics and International Relations, p. 200.

<sup>28</sup> Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office, 2018. [Oral evidence given to the House of Lords, 25 January 2018](#).

<sup>29</sup> National Assembly for Wales, External Affairs and Additional Legislation Committee, 2018. [Scrutiny session with the Cabinet Secretary for Finance](#).

<sup>30</sup> Brennan, C., Dobbs, M., Gravey, V. and Uí Bhroin, A., 2018. [The future of environmental governance in Northern Ireland](#), p. 3.

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support the UK government in Westminster, can offer some indirect representation for part of the Northern Irish electorate.

The absence of ministers means Northern Ireland is represented in the JMC by Northern Irish civil servants, not its own ministers. Northern Ireland's influence in the JMC is already limited by its small size, a situation that is further exacerbated by the lack of a NI government. The absence of ministers also constrains preparations in Northern Ireland as key actions—such as putting out documents for consultation or making decisions—usually require ministerial assent. For example, civil servants in the Department of Agriculture, Environment and Rural Affairs (DAERA) have continued to convene stakeholder working groups (on fisheries, rural affairs, environment, agriculture etc.) set up after Brexit. But the absence of ministers means that the work of these groups can be difficult to make public (although this has started to change with the recent DAERA 'public engagement exercise' in future agricultural policy for Northern Ireland).<sup>31</sup> Northern Irish civil servants' narrow margins of manoeuvre have been clarified (and further constrained) by the NI Court of Appeal, which in July 2018 confirmed the annulment of a planning decision taken in the absence of ministers. It stated that: 'Any decision which as a matter of convention or otherwise would normally go before the minister for approval lies beyond the competence of a senior civil servant in the absence of a minister.'<sup>32</sup> Critically, the State Secretary for Northern Ireland, Karen Bradley MP, has indicated wanting to introduce legislation in Westminster to increase civil servants ability 'to continue to take decisions in Northern Ireland in the public interest and to ensure the continued delivery of public services' in the wake of the Court of Appeal ruling.<sup>33</sup> This demonstrates on-going uncertainties about who governs Northern Ireland.

In conclusion, Brexit preparations are putting great strains on intergovernmental institutions across the UK. The JMC is widely regarded as being unfit for purpose. Moreover, the absence of a government in Northern Ireland is limiting the ability of civil servant and stakeholders to engage meaningfully with the Brexit negotiations.

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<sup>31</sup> Northern Ireland Department of Agriculture, Environment and Rural Affairs, 2018. [DAERA seeks views on a future agricultural policy framework for NI.](#)

<sup>32</sup> Rutter, T., 2018. [Court dismisses appeal by NI civil servants over decision made without ministers.](#) Civil Service World.

<sup>33</sup> Secretary of State for Northern Ireland, 2018. [Oral statement to Parliament: Update on UK Government effort to restore the Northern Ireland Executive.](#)



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# 4. Governance after Brexit: Preserving both UK-wide and All-island Cooperation?

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 governance and principles consultation to address concerns that Brexit could lead to an environmental governance gap and weaker environmental standards.<sup>34</sup> 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. The devolved administrations were given little notice of the UK government’s plans and the mode of consultation has been more in the style of telling the devolved administrations what the UK government’s plans are, with little if any opportunity to comment, rather than offering genuine opportunities for consultation and co-designed policy.

## 4.1 Identifying scope for cooperation

The JMC has agreed a set of principles (see Box 2) to guide post-Brexit policy.<sup>35</sup> It has suggested that 145 policy areas will be allocated into three groups:<sup>36</sup>

1. Areas where no further action is necessary (covering 49 areas including 9 related to environment and energy, such as water quality and land use);
2. Areas that could require new non-legislative arrangements (covering 82 areas including 10 related to environment and energy, such as biodiversity and air quality);
3. Areas that may require new common legislative frameworks (covering 24 areas including 19 related to environmental and energy, such as chemicals and pesticides).
4. There are also 12 areas that the UK government believes should be reserved but which will still be subject to discussion with the devolved nations.

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<sup>34</sup> 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](#).

<sup>35</sup> HM Government, 2017. [Joint Ministerial Committee communique: 16 October 2017](#).

<sup>36</sup> HM Government, 2017. [Joint Ministerial Committee communique: 12 December 2017](#).

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The proposed frameworks offer some specific flexibility for Northern Ireland. The JMC agreement states that frameworks could apply to UK as a whole or to Great Britain only (and not Northern Ireland), opening the possibility for Northern Ireland to continue to follow a distinct approach. The common frameworks are ‘also subject to the need to find practical solutions that recognise the unique economic, social and political context of the land border between Northern Ireland and Ireland; frameworks will adhere to the Belfast Agreement’.<sup>37</sup>

### **Box 2: JMC Principles for Common Frameworks (October 2017)**

1. 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.

2. Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
- maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
- lead to a significant increase in decision-making powers for the devolved administrations

3. Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.

Hence, Northern Ireland could theoretically choose between either continued North/South cooperation on certain environmental issues, participation in UK-wide Common Frameworks,

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<sup>37</sup>HM Government, 2018. [Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland.](#)

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or both. The possibility to be in both all-island and UK-wide frameworks is opened by the current very loose definition of what frameworks entail:

“This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate” (JMC Conclusions, Oct 2017)

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 that are not (such as water).<sup>38</sup>

*“failing to put in place legislative frameworks leaves the environment vulnerable over the longer term”*

The Environmental Audit Committee noted that whilst, there is no indication that the current UK government would seek to weaken regulation, there is also no guarantee that future governments would not do so.<sup>39</sup> Therefore, failing to put in place legislative frameworks leaves the environment vulnerable over the longer term. This is particularly the case in Northern Ireland, where environmental governance is already weaker.

## 4.2 Governing frameworks

In the on-going discussions around the future of environmental governance in the UK, the devolved nations are faced with four shared challenges:

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<sup>38</sup> 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.

<sup>39</sup> House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#). Eighth Report of Session 2017-19. HC 803.

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## 1. Striking the balance between diverging freely and influencing UK-wide developments

While divergence may become possible across a wide range of issues, the respective market sizes may make it extremely costly for e.g. Wales to diverge from England, or Northern Ireland to diverge from Great Britain. This raises the prospect that the bigger market, England, risks setting the terms of trade.

This issue is compounded by the fact that devolved competences may increase, but they will remain severely constrained by choices made in London. Trade, immigration but also the overall UK-EU deal and what parts of the EU acquis and institutions the UK stays in are all under the remit of the UK government (subject to the results of the negotiations with the EU).

## 2. Ensuring devolved concerns are heard in the design of common frameworks

Participation in UK-wide common legislative frameworks does not offer a guarantee that the devolved nations' concerns will be heard. The April 2018 Inter-governmental Agreement signed between the Welsh and the UK governments sets out a process for creating legislative common frameworks.<sup>40</sup> Building on the civil service led 'deep dives', the legislation would be drafted by the UK government, after which the devolved administrations would be given 40 days to grant consent. If consent is withheld, the regulations could still be agreed if the UK Parliament voted in their favour (after being presented by explanatory documents from both the UK government and devolved legislatures which refused consent). This raises questions of a balance of power between executives and legislatures—with devolved legislatures only able to grant consent, not amend. It further raises concerns about participation and stakeholder engagement, leaving only 40 days for devolved legislatures to consult before deciding.

Beyond the adoption of frameworks, it is unclear how they will be implemented and how disputes between parties will be settled. Currently, political and financial agreements between devolved and central government are supposed to be settled through the JMC (with the arbitration of a senior UK minister), while legal disagreements are settled by the Supreme Court.<sup>41</sup> Yet in practice, disputes are mostly settled informally. This approach is highly problematic because it lacks transparency, and because of the dual role of UK ministers in arbitrating the dispute (the UK government being both judge and party).

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<sup>40</sup> UK Government and Welsh Government, 2018. [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the establishment of common frameworks.](#)

<sup>41</sup> Torrance, D., 2018. [Intergovernmental relations in the United Kingdom.](#) London: House of Commons Library.

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### 3. Resources will remain limited, acting as a de facto constraint on divergence

While divergence in some areas may be useful to achieve environmental aims, developing new policies from scratch for 140 new areas of responsibility (in the case of Northern Ireland) risks submerging the smallest of the three devolved administrations. For years, DAERA had seen its staff cut. This has meant limited staff members available to deal with Brexit. Speaking in March, the head of Northern Ireland's Civil Service stated that compared to the 1,200 staff working on Brexit in Defra, DAERA was "barely able to muster 30 people to do similar work".<sup>42</sup> While staff numbers for Brexit preparation are increasing through the (contested<sup>43</sup>) application of the Barnett formula to the recent large increase in staff in Whitehall, Northern Ireland will remain a small administration faced with a growing number of responsibilities. These challenges come at a time when the Renewable Heat Incentive inquiry is raising profound questions about the quality of governance in the region. This means picking areas of divergence carefully—and carrying over legislation from other parts of the UK equally carefully. 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.<sup>44</sup>

For Northern Ireland, a further dilemma emerges. As the weakest link in UK environmental governance, closer cooperation with the other three UK nations is more likely to mean the pursuit of higher environmental ambition. In contrast, looser cooperation may lead to a situation where NI politicians are tempted to continue ignoring environmental challenges. However, putting in place looser arrangements would also make it easier to continue North/South cooperation on key environmental matters. Moreover, the current UK government seems comfortable with a less ambitious set of policies for Northern Ireland. Speaking to the NI Affairs Committee in July 2018, Defra Minister George Eustice MP explained that while English agricultural support would shift towards a 'public money for public goods' model, Northern Ireland 'might want to be more cautious about the pace of change and it will be open to them (sic) to do that'.<sup>45</sup>

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<sup>42</sup> BBC Radio Ulster, 2018. [Is there a stand-off between the secretary of state and the head of the Civil Service over abuse victims?](#)

<sup>43</sup> Courtsoyan, P., 2018. [SNP accuses Westminster of short-changing Scotland over Brexit fund](#). The Scotsman, 13 March.

<sup>44</sup> National Audit Office, 2017. [Implementing the UK's exit from the European Union: The Department for Environment, Food and Rural Affairs](#).

<sup>45</sup> House of Commons, Northern Ireland Affairs Committee, 2018. [Oral evidence. Brexit and Northern Ireland: Agriculture](#).

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## 4.3 Addressing the Brexit governance gaps

New institutions will be required for environmental policy development, implementation and enforcement after Brexit.

### 1. Policy development

Policy development has largely been centred on Brussels where the European Commission formulates policy in its Directorates General (DGs) for the Environment and Climate Action. 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 common frameworks and the 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.<sup>46</sup> There is consequently on-going uncertainty about whether and how the UK will gather environmental data. This means scope for different types of data being used to inform policy development and implementation across the UK. Data collection and sharing also matters for citizens' rights to environmental information under the Aarhus convention (and guaranteed in the EU Withdrawal Act). Diverging data collection practices could detrimentally impact the exercise of this right.

### 2. Compliance and accountability

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. 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.<sup>47</sup> In Northern Ireland, where

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<sup>46</sup> HM Government, 2018. [The future relationship between the United Kingdom and the European Union](#), pp. 8-10.

<sup>47</sup> Hogarth, R. and Lloyd, L., 2017. [Who's afraid of the ECJ? Charting the UK's relationship with the European Court](#). Institute for Government.

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officials ‘always operate with the risk of infraction from the Commission’<sup>48</sup>, six EU environmental infringement cases were ongoing at the time of the EU referendum.

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.<sup>49</sup> Defra’s governance and principles consultation suggests a new watchdog but the current proposals have been widely derided for being too weak. They also do not apply to the UK, but rather to England alone, meaning that 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 Northern Ireland, but it is uncertain which bodies will assume monitoring and enforcement powers. Furthermore, the distinct status of NIEA—it is not independent as its Scottish, Welsh and English equivalents are, even if their independence has been undermined over time—raises further questions as to how the new, independent watchdog would cooperate with the agency.

In addition, 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 the Aarhus Convention.<sup>50</sup> While the EU Withdrawal Act lists the Aarhus principles of participation, access to information and justice as key environmental principles for the UK, the Aarhus Convention compliance committee found the four UK nations wanting in 2014. It reiterated its condemnation in 2017 stressing the need to ‘reduce financial barriers to access to justice’, especially in relation to the allocation of costs which should be ‘fair and equitable and not prohibitively expensive’.<sup>51</sup>

It also remains to be decided how any new body would be held to account. There is a strong presumption in favour of legislative accountability. The question then arises as to which legislatures should be involved. Particular arrangements should be made for Northern Ireland. First, the Assembly should create, as suggested by many existing reviews, its own Environmental Audit Committee for such situations. Second, alternative accountability mechanisms should be set up in the case of a break-down in devolution such as collaboration

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<sup>48</sup> Northern Ireland Assembly, 2016. [Official report: Minutes of evidence, Committee for Agriculture, Environment and Rural Affairs, meeting on Thursday, 16 June 2016](#), p. 3.

<sup>49</sup> Lee, M., 2017. [The UK needs a new independent body to protect the environment after Brexit](#). Brexit & Environment Blog.

<sup>50</sup> See United Nations Economic Commission for Europe, n.d. [Public Participation](#).

<sup>51</sup> United Nations Economic Commission for Europe, 2017. [Decision VI/8k: Compliance by United Kingdom with its obligations under the Aarhus Convention](#).

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between the Northern Ireland Affairs Committee and the Environmental Audit Committee in the House of Commons.

If a UK-wide watchdog is developed there is a case for the House of Commons holding the body to account. If a series of watchdogs are developed there is a case for each legislature holding each watchdog to account. If a mixed (4+1) system is adopted, with, for example, an Environment Commissioner in each of the nations as part of a UK-wide body, both levels could be included. Hence, a cross-national committee comprising representatives from each of the four legislatures could also be used to review and hold to account either a UK-wide watchdog with cross-national powers or a group of watchdogs.



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# 5. Future Directions

Northern Ireland's environmental governance has long lagged behind the rest of the UK. Brexit offers an opportunity to rethink how the UK governs its environment. The UK government's pledge to deliver 'gold standard' environmental governance appears ambitious—but for now only concerns England. Together with the absence of a Northern Ireland Executive, this creates two likely options for Northern Ireland: either muddling through with no changes to its 'systemic governance failures' which are likely to grow worse; or adopt a new governance system, developed by and for England, only becoming common by default.

Environmental problems do not respect borders. Showing leadership in the environmental field requires cross-border cooperation—both within the UK and between the UK and its closest neighbours: Ireland and the rest of the EU. Creative solutions are required to make sure the UK's environment does not become a victim of either failed UK-EU negotiations or internal UK constitutional stalemate. This is why a third option is needed: a truly co-designed UK-wide environmental governance system which encourages a race to the top in environmental ambition and recognizes the specificities of each of the UK's four nations.

Cooperation cannot—and should not—be imposed from the top. Across the UK, the stakeholders we met testified to the lack of trust between the central and devolved governments. Such co-design will take time. Agreeing on common frameworks requires agreeing on which institutions will design them, how they will be designed and how disputes between parties will be resolved. For Northern Ireland in particular, it also means deciding where and how cooperation on environmental matters will continue or even intensify with Ireland.

## 5.1 Recommendations

Northern Ireland is in a unique situation in the Brexit process. The absence of a sitting Northern Ireland Assembly and Executive hampers the representation of Northern Irish interests in UK-wide talks. It also undermines the development of a much needed 4-nations approach to tackle shared Brexit challenges and opportunities.

Key decisions, such as whether and how Northern Ireland should participate in common frameworks or a common environmental watchdog, will need to be made in the coming

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months. These decisions need to be informed by a wide range of stakeholders and made by politicians, not civil servants. If the stalemate in Stormont continues, key decisions may need to be made by the Secretary of State for Northern Ireland. If so, a future Northern Ireland Executive should have the power to reverse or amend those decisions.

Based on discussions with stakeholders, we have identified a set of recommendations:

1. As a matter of priority, all 4 nations must work together to 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.
2. Common UK frameworks must be created. 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. These common frameworks must be sufficiently flexible to accommodate continued cooperation between Northern Ireland and Ireland on a North/South basis under the umbrella of the Good Friday/Belfast Agreement in policy areas such as water quality, animal welfare etc.
4. This flexibility must be underpinned by an intra-UK non-regression principle, irrespective of what is agreed with the EU. This would enable each nation to diverge upward, yet prevent an internal 'race to the bottom' across the nations of the UK.
5. 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 the process should be genuinely consultative. A reformed JMC should have a) at least as much transparency as the Council of the EU and b) a clear dispute resolution settlement overseen by an independent body.
6. While UK-wide discussions focus on making UK environmental governance 'Brexit proof', Northern Ireland requires further reforms to inure environmental governance to current and future break-downs in the Executive. An independent environment agency should be established as a matter of urgency (to further align Northern Ireland with best practice in environmental governance) and a separate environment commissioner should be appointed who can sit on an UK-wide environmental watchdog (4+1 model).

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7. A Northern Ireland Environment Commissioner within a broader UK infrastructure would provide Northern Irish stakeholders with a much-needed sense of ownership over environmental policy after Brexit, and ensure that the future environmental watchdog is aware of local challenges.
  8. The new watchdog(s) must be transparent, accountable and provide access to citizens.
  9. Citizens living in Northern Ireland 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 nation and vice versa.
  10. Whatever type of watchdog is adopted, it must be subject to parliamentary scrutiny and accountability.
  11. Methods of reporting and accountability should also plan for the absence of a Northern Ireland Assembly and Executive. The director of a future independent environment agency and an environment commissioner should be asked to present annual reports to either the relevant Northern Ireland Assembly Committee or to a joint committee made up of members of the Northern Ireland Affairs Committee and the Environmental Audit Committee in the House of Commons.
  12. 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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