Environment Links UK and Greener UK submission to the Lords EU Select Committee Inquiry – Brexit: devolution

March 2017

Introduction

Greener UK is a coalition of 13 major environmental organisations that are united in the belief that leaving the EU is a pivotal moment to restore and enhance the UK's environment.

Environment Links UK brings together environment and animal protection organisations to advocate for the conservation and protection of wildlife, countryside and the marine environment. The network comprises the combined memberships of Wildlife and Countryside Link, Scottish Environment LINK, Wales Environment Link and Northern Ireland Environment Link.

Taken together, Greener UK and Environment Links UK members have the support of over eight million people in the UK and manage over 750,000 hectares of land.

This response is submitted on behalf of the 39 organisations listed below. It sets out our collective view on the potential environmental implications of Brexit following the repatriation of powers currently shared between the devolved legislatures and the EU. It is largely based on a more detailed paper which also forms part of this submission and is attached as **Annex 1**.

- Angling Trust
- Bat Conservation Trust
- The British Mountaineering Council
- Buglife
- Bumble Bee Conservation Trust
- Butterfly Conservation
- Campaign for Better Transport
- Chartered Institution for Wastes Management
- ClientEarth
- Council for British Archaeology
- Campaign to Protect Rural England
- Environmental Investigation Agency
- Fish Legal
- Freshwater Habitats Trust
- Friends of the Earth (England, Wales and Northern Ireland)
- Friends of the Earth Scotland
- Green Alliance
- Greenpeace
- Institute of Fisheries Management
- National Trust
- Northern Ireland Environment Link
- Open Spaces Society
- Plantlife
- RSPB
- RSPB Scotland
- RSPCA
- Salmon & Trout Conservation UK
- Scottish Environment LINK
- Scottish Wildlife Trust
- Wales Environment Link
- Whale and Dolphin Conservation
- Wildlife and Countryside Link
- Wildfowl and Wetlands Trust
- Wildlife Gardening Forum
- The Wildlife Trusts
- Woodland Trust
- Woodland Trust Scotland
- WWF Scotland
- WWF-UK

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EU Environmental Legislation, Brexit, and Devolution

Powers relating to most environmental matters are currently devolved. In the absence of any changes to the devolution settlements, our understanding is that such powers will remain devolved post-Brexit.[1] As noted by the ESRC-funded UK in a Changing Europe initiative *"a range of competences currently shared between the devolved legislatures and the EU will revert to the former, unless Westminster legislates to take them back to itself."*[2] Depending on the outcome of the upcoming negotiations with the EU, at minimum this is likely to include agriculture, fisheries, and at least some elements of environmental policy (e.g. nature protection).[3]

The UK Government has stated *that "no decisions currently taken by the devolved administrations will be removed from them"*[4] as part of the UK's withdrawal from the EU but precisely what this will mean in terms of those decisions currently taken at EU level remains unclear. While the UK Government could in theory seek to re-reserve certain powers post-Brexit, to do so in the absence of devolved consent would be *"politically highly controversial".*[5]

EU law accounts for much of the law on environmental matters across the four nations. To date, the requirement to comply with the common framework provided by EU law has meant that the exercise of devolved competences relating to most environmental matters has been constrained – in a relatively uncontentious way – across the four nations.[6] This has limited the scope for substantial policy and legislative divergence or fragmentation to occur[7] and arguably allowed *"a more permissive and asymmetrical devolution settlement"* to emerge than might otherwise have been possible.[8]

As recognised by the UK Government's '*Review of the Balance of Competences between the United Kingdom and the European Union'*, this common framework has provided a number of clear benefits in terms of effectively addressing transboundary environmental challenges and providing a level playing field for economic operators.[9] For example, evidence from the recent European Commission 'fitness check' of the Birds and Habitats Directives suggests that the common framework provided by these laws has helped to create a level playing field and avoid a potential deregulatory 'race to the bottom' in environmental standards. They have also provided *"a more effective way to achieve…conservation objectives…due to the transnational character of nature and the steps required to conserve it"*.[10]

Similar arguments exist when it comes to the approaches adopted across the four nations. For example, prior to the EU referendum, the Environmental Audit Committee concluded that *"while many EU Directives are flexible in implementation, they also ensure a common approach is adopted...when addressing cross-border environmental problems"*. As such, they have generally been successful in providing "*a framework within which the UK's devolved governments have developed different approaches towards achieving…common environmental objectives."*[11]

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[1] Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415.
[2] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[3] Burns et al. (2016). *The EU Referendum and the UK Environment: An Expert Review. How has EU membership affected the UK and what might change in the event of a vote to Remain or Leave?*
[4] HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union*.
[5] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.
[6] HM Government (2017) describes the situation as follows: *"The current devolution settlements were created in the context of the UK's membership of the EU. All three settlements set out that devolved legislatures only have legislative competence – the ability to make law – in devolved policy areas as long as that law is compatible with EU law. This has meant that, even in areas where the devolved legislatures and administrations currently have some competence, such as agriculture, environment and some transport issues, most rules are set through common EU legal and regulatory frameworks..."*
[7] Burns et al. (2016). *The EU Referendum and the UK Environment: An Expert Review. How has EU membership affected the UK and what might change in the event of a vote to Remain or Leave?;* Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415.
[8] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[9] HM Government. (2014). *Review of the Balance of Competences between the United Kingdom and the European Union: Environment and Climate Change*.
[10] Milieu, IEEP and ICF. (2016). *Evaluation Study to support the Fitness Check of the Birds and Habitats Directives*.
[11] House of Commons Environmental Audit Committee. (2016). *EU and UK Environmental Policy*. Third Report of Session 2015–16.

Post-Brexit, the devolved administrations may have greater freedom to develop their own more distinct approaches in those policy areas where the requirement to comply with common EU standards no longer applies. As noted by Professor Alan Page in a paper prepared for the Scottish Government's European and External Relations Committee, leaving the EU could therefore mean that "*what in some cases are largely notional devolved competences...because of the impact of EU membership, would for the first time become real competences."*[12] Or, to put it another way, devolved powers would in effect be extended *"as the current constraints set out in the devolution acts for laws to be in compliance with EU law are removed."*[13]

This could give rise to a much greater degree of policy and legislative divergence between the four nations of the UK than has existed up to this point.[14] In the case of fisheries, for example, a recent report by the House of Lords EU Energy and Environment Sub-Committee noted that to date the EU Common Fisheries Policy has *"provided the legislative framework within which responsibility for fisheries has been devolved within the United Kingdom"* and that the absence of this common framework post-Brexit could lead to *"four different fisheries management regimes within the UK"*.[15] While there are substantial differences between the fishing industries in the devolved nations, it is also the case that *"fish know nothing of political borders"*.[16]

Brexit therefore represents a fundamental challenge to the current model of devolution within the UK and "*is likely to reopen questions about the distribution of powers between central and devolved government, and the funding arrangements for devolution".*[17] This is of great relevance to the future of environmental protection across the four nations.

Factors Affecting Future Legislation and Policy

The extent of policy and legislative divergence on environmental matters across the four nations post-Brexit will be affected by a number of key factors such as the nature of the post-Brexit deal between the UK and the EU and the range of on-going obligations associated with international treaties and conventions, both of which are currently reserved matters.[18]

For example, the exercise of powers reserved to the UK Government (e.g. on trade) during the process of exiting the EU and agreeing the terms of a future trade deal will result in unavoidable interactions with devolved powers (e.g. on agriculture and fisheries).[19] As noted by Hunt and Keating (2017) in the case of agricultural policy, for example, *"under current arrangements, agricultural support policy will be the exclusive competence of the devolved governments post-Brexit…international agricultural trade will remain a competence of the UK government, but this is in practice intimately linked to agricultural support."*[20]

The UK is also signatory to a range of international conventions (e.g. relating to the conservation of migratory species and wetlands, international shipment of waste and chemicals etc.), the requirements of which will also interact with policy and legislation across the four nations post-Brexit.

From an internal UK perspective, it will also be necessary to consider how the UK 'single market' might be affected by further policy and legislative divergence. For example, the UK in a Changing Europe initiative notes the potential need for "*coordination mechanisms within the UK and provisions to maintain the single UK market"* post-Brexit.[21] Similarly as noted by Professor Alan Page, *"withdrawal could...call into question the UK*

[12] Page, A. (2016). *The implications of EU withdrawal for the devolution settlement*.
[13] http://ukandeu.ac.uk/the-supreme-court-judgment-in-miller-and-its-implications-for-the-devolved-nations/
[14] Page, A. (2016). *The implications of EU withdrawal for the devolution settlement*.
[15] House of Lords European Union Committee. (2016). *Brexit: fisheries*. 8th Report of Session 2016–17.
[16] House of Lords European Union Committee. (2016). *Brexit: fisheries*. 8th Report of Session 2016–17.
[17] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government Briefing Paper.
[18] Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415.
[19] Whitman, R. G. (2017). *Devolved External Affairs: The Impact of Brexit*.
[20] Hunt, J. and Keating, M. (2016). *Brexit – six months on: The nations and regions*.
[21] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.

single market...unless the UK as a whole continues to follow EU rules or common rules are otherwise adopted."[22]

At least some degree of alignment on environmental matters across the four nations is therefore likely to be required post-Brexit (e.g. in order to maintain the UK 'single market' and a level playing field for economic operators, to minimise barriers to trade and distortions in competition, and not least to enable the four nations to achieve their shared international obligations).

Two other constraining factors that may arise post-Brexit when it comes to additional policymaking responsibilities are likely to be capacity and funding. For example, Professor Colin Reid notes that *"...there must be doubts over the capacity of all the administrations in this continuing age of austerity to take over responsibility for all the work currently undertaken through the EU in developing and maintaining the law across all the sectors where EU law operates."*[23]

Similarly, the financial implications of Brexit for the devolved nations could be significant in terms of the potential loss of access to key EU funding streams relied on to implement environmental policies (e.g. agri-environment funding). The way in which any replacement funding is allocated will be critical in terms of the extent to which it enables the effective implementation of such policies in line with environmental needs across the four nations.[24]

Environmental Considerations

From a purely environmental perspective, the cross-border nature of environmental challenges (e.g. air and water pollution, the conservation of migratory and wide-ranging species) and the proven effectiveness of transboundary action in tackling such challenges mean that a degree of policy alignment and coordination/cooperation between the four nations and with the remaining 27 EU Member States will remain vital in at least some policy areas post-Brexit, noting here the *"particular and significant"* environmental challenges likely to be posed by the Irish border in this regard.[25]

The available evidence suggests that working together to develop and implement common standards is often a more effective and efficient means of tackling cross-border environmental challenges. For example, it can enable more ambitious collective action to be taken than would be possible if acting alone and can help to limit the scope for any one nation to lower standards in response to short-term political pressures (thereby providing a greater degree of long-term policy stability and helping to avoid a deregulatory 'race to the bottom'). It can also provide 'economies of scale' through pooling of resources and sharing of expertise. By providing a 'level playing field' for economic actors, common standards can also help to facilitate compliance (by avoiding inconsistencies and fragmentation) and avoid serious distortions in competition.[26]

However, there is rarely a perfect one-size-fits-all approach, so a degree of flexibility is generally required in order to allow policies to be appropriately tailored to the local/regional/national context at the same time as ensuring coherence and consistency. Achieving the right balance between efforts to maintain high common standards on the one hand and allow sufficient flexibility on the other hand is not always straightforward.

Recommendations

There are a number of clear justifications for seeking at least some degree of alignment on environmental matters between the four nations post-Brexit, not least given that nature does not respect administrative borders.

[22] Page, A. (2016). *The implications of EU withdrawal for the devolution settlement*.
[23] Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415
[24] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government Briefing Paper.
[25] House of Lords European Union Committee. (2017). *Brexit: environment and climate change*. 12th Report of Session 2016–17.
[26] IEEP. (2013). *Report on the influence of EU policies on the environment*.

Such 'joint' approaches would not be without precedent. For example, as noted by Hunt et al. (2016) *"In some cases EU environmental law has been jointly implemented across the UK in order to ensure coherence, so that the UK meets national targets and standards, as well as for political or resource reasons."*[27]

In recognising the potential environmental benefits of the UK Government and devolved administrations seeking to reach a consensus on the joint development and agreement of common UK 'frameworks' (i.e. common standards and approaches) in at least some policy areas in order to replace the loss of the common 'frameworks' provided by EU law, we also recognise that new, more effective mechanisms for intergovernmental coordination and cooperation will need to be established.

We also recognise that, to be effective, such frameworks should:

- Set ambitious common standards that are at least as high as those set out in existing EU law, at the same time as retaining an appropriate degree of flexibility so as to allow implementation to be tailored to the specific environmental context in each nation.

- Prevent a deregulatory 'race to the bottom' but not prevent any nation from seeking to develop more ambitious approaches/from introducing higher standards (as is currently the case under EU law).[28]

- Be developed alongside a new set of fair and transparent funding arrangements to replace the loss of EU funding streams and to enable effective implementation.

- Include robust shared governance arrangements (e.g. clear monitoring and reporting obligations and associated enforcement mechanisms) as a means of holding all four nations to account and resolving disputes following the loss of the functions currently carried out by the EU institutions in this respect.

Environment Links UK and Greener UK March 2017.

[27] Hunt et al. (2016). Winners and Losers: the EU Referendum Vote and its Consequences for Wales. *Journal of Contemporary European Research*, *12*(4).
[28] Article 193 of the Treaty on the Functioning of the EU states that protective measures adopted by the EU *"shall not prevent any Member State from maintaining or introducing more stringent protective measures"* subject to compatibility with the Treaties.

Annex 1

Section 1. Implications of Brexit for devolved powers on environmental matters

1.1 Devolution and EU environmental law
1.2 Devolution and Brexit
1.3 Constraining factors
1.4 Politics and inter-governmental relations
1.5. Legislating for Brexit – Article 50 and the Great Repeal Bill

Section 2. Environmental implications

2.1 Potential advantages and disadvantages of a common UK-wide approach
2.2 Political context

Section 3. Spotlight on individual policy areas

3.1 Agriculture
3.2 Fisheries
3.3 Nature protection

Section 1. Implications of Brexit for devolved powers on environmental matters

1.1 Devolution and EU environmental law

As set out by Professor Colin Reid in his recent paper on the future of UK environmental law post-Brexit, the devolution settlements that came into force in 1999 *"...created legislative and executive bodies in Scotland, Wales and Northern Ireland. The precise extent of their powers varies, but generally extends to most environmental matters"*.[29]

Nevertheless, an important element of the current arrangements is that the powers of the devolved administrations in these (and all other areas) are circumscribed by EU law. Specifically, the devolution settlements *"...prohibit the devolved administrations from acting in a way incompatible with EU law"*.[30] The devolution settlements are thus *"deeply embedded"* in EU membership.[31]

As noted by the ESRC-funded UK in a Changing Europe initiative, *"With EU law setting the outer limits of what can be done with devolved powers, a more permissive and asymmetrical devolution settlement than might otherwise have been possible has emerged",* due for example to the fact that issues relating to competition and the UK 'internal market' were largely dealt with by the EU.[32] Indeed, Professor Richard Whitman goes so far as to argue that *"…many competences were devolved in part because they are predominantly legislated and enforced at the EU level."*[33]

The UK Government's Brexit 'White Paper' has described the situation as follows: *"The current devolution settlements were created in the context of the UK's membership of the EU. All three settlements set out that devolved legislatures only have legislative competence – the ability to make law – in devolved policy areas as long as that law is compatible with EU law. This has meant that, even in areas where the devolved legislatures and administrations currently have some competence, such as agriculture, environment and some transport issues, most rules are set through common EU legal and regulatory frameworks..."*[34]

[29] Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415.
[30] Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415.
[31] External Affairs and Additional Legislation Committee, National Assembly for Wales. (2017). *Implications for Wales of leaving the European Union.*
[32] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[33] Whitman, R. G. (2017). *Devolved External Affairs: The Impact of Brexit.*
[34] HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union.*

Given that much of the UK's environmental legislation stems from its membership of the EU, the scope for significant differences to emerge between the four nations has therefore been constrained by the need to comply with the same fundamental framework of EU law. According to Professor Reid: *"...the facts that EU law accounts for so much of the law on environmental matters and that all jurisdictions are bound to operate within the framework set by EU law have meant that the capacity for each country to head off in its own direction has been limited....there is room for national differences to emerge, but within limits."*

Similarly, Dr Jo Hunt notes: *"EU law has…set important parameters for how devolved nations exercise their powers, limiting the degree to which laws across the UK can diverge in those areas which are both devolved and Europeanised. To date, rulemaking in these areas has taken place in a framework of pooled state sovereignty, and in which responsibility for action is shared."*[35]

Therefore, although areas such as agriculture, fisheries, and environmental protection are in principle devolved under the current settlements, in practice the fact that these areas are largely dominated by EU legislation[36] has meant that a *"broadly similar approach has been required"*[37] that has limited the scope for divergence.[38]

Of course, this does not mean that the law in each nation has had to be identical. Devolution has allowed for a diversity of approaches to be developed by each of the devolved administrations set within the common framework of EU law. Essentially, *"EU policy has provided a common framework which allows some national differences to emerge but limits the scope for substantial divergences"*[39].

Indeed, as noted by Professor Reid: *"Most EU environmental law takes the form of Directives, which set out the results to be achieved, but leave it to each Member State, or each constituent government within a Member State, to ensure that their law produces this result...this leaves room for different states, and the different parts within a state where they have the relevant powers, to implement the basic requirements in different ways."*

Nevertheless, the scope for *"too much disparity and fragmentation"* has been considerably restricted by harmonising effects of EU law.[40]

1.2 Devolution and Brexit

"Leaving the EU will have a significant impact on the powers and budgets of the devolved bodies...Brexit is likely to reopen questions about the distribution of powers between central and devolved government, and the funding arrangements for devolution" – Institute for Government (2016).[41]

As highlighted by the UK in a Changing Europe initiative in their report *'Brexit and Beyond: How the UK might leave the EU'*, there remains *"profound uncertainty"* about the kind of future relationship that is likely to emerge between the UK and the EU.[42] Nevertheless, it seems clear that withdrawal will mean the repatriation of at least some powers from the EU with potentially significant implications for the existing devolution settlements.

In a paper prepared for the Scottish Government's European and External Relations Committee on the implications EU withdrawal for the Scottish devolution settlement, Professor Alan Page notes that the UK Parliament will acquire *"the majority of the policy responsibilities... following withdrawal from the EU,*

[35] http://senedd.assembly.wales/documents/s56778/IOB%2042%20Individual%20response.pdf
[36] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.
[37] Baldock et al. (2016). The potential policy and environmental consequences for the UK of a departure from the European Union. Institute for European Environmental Policy.
[38] http://environmenteuref.blogspot.co.uk/2016/05/what-about-devolution.html
[39] Burns et al. (2016). *The EU Referendum and the UK Environment: An Expert Review. How has EU membership affected the UK and what might change in the event of a vote to Remain or Leave?*
[40] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/assessment-of-euuk-environmental-policy/written/24036.pdf
[41] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.
[42] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.

including those in respect of the free movement of goods, persons, services and capital, and the negotiation and conclusion of trade agreements with non-EU countries." [43]

However, as highlighted by the UK in a Changing Europe initiative, there will nevertheless be *"...a particularly acute devolution dimension"* to the Brexit process.[44] Under existing arrangements, the default legal position will be that *"...a range of competences currently shared between the devolved legislatures and the EU will revert to the former, unless Westminster legislates to take them back to itself."* Depending on the outcome of the UK/EU negotiations, these are likely to include agriculture, fisheries, and at least some elements of environmental policy. [45]

Professor Alan Page (in the Scottish context) agrees: *"In the absence of any amendment to the Scotland Act 1998, the UK's withdrawal from the EU would not affect the distribution of legislative competences between the UK and Scottish Parliaments...what in some cases are largely notional devolved competences, however, because of the impact of EU membership, would for the first time become real competences."*

As such, devolved powers will in effect be potentially extended *"…as current constraints set out in the devolution acts for laws to be in compliance with EU law are removed."*[46]

One key consequence of this could be the emergence of *"further policy and legislative divergence"* [47] or *"greater disparities"* [48] in those areas of devolved competence where the UK Government and the devolved administrations are no longer be bound by EU law.[49] According to the House of Commons Library, this fragmentation would *"probably be particularly noticeable in policy areas such as the environment or agriculture and fisheries, which are currently strongly governed by EU policy and legislation."*[50]

Professor Alan Page (in the Scottish context) agrees: *"In the latter three areas* [agriculture, fisheries and the environment]*, the prospect is said to be one of increasing policy and legislative divergence between the nations and regions of the UK in the absence of a common EU framework..."*[51]

Prior to the EU Referendum, the Scottish Parliament's European and External Relations Committee made a similar point: *"This could result in greater policy divergence between the constituent parts of the UK where currently EU law gives effect to a large degree of policy coherence."* [52]

Similarly, writing from a Welsh perspective, Hunt et al. (2016) note: *"Amongst the areas devolved to Wales have been some areas which have been heavily Europeanised...most notably, the areas of agriculture and the environment...to date, EU law has set the parameters for the exercise of Wales's powers in these areas and on the withdrawal from the EU of the UK, such constraints may... no longer apply. This could then see a transfer of significant 'real' powers to Wales (and the other devolved administrations), taking them beyond the de facto powers of implementation defining their position so far."*[53]

Although the devolved administrations will no longer be obliged to act in accordance with EU law, one potential scenario following the repatriation of competences post-Brexit could be that the devolved administrations decide to *"shadow"* or *"align"* with EU environmental policies voluntarily.[54] For example, in

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[43] Page, A. (2016). *The implications of EU withdrawal for the devolution settlement*.
[44] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[45] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[46] http://ukandeu.ac.uk/the-supreme-court-judgment-in-miller-and-its-implications-for-the-devolved-nations/
[47] House of Commons Library. (2016). *Brexit: impact across policy areas*. Briefing Paper Number 07213.
[48] Burns et al. (2016). *The EU Referendum and the UK Environment: An Expert Review. How has EU membership affected the UK and what might change in the event of a vote to Remain or Leave?*
[49] Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415.
[50] House of Commons Library. (2016). *Brexit: impact across policy areas*. Briefing Paper Number 07213.
[51] Page, A. (2016). *The implications of EU withdrawal for the devolution settlement*.
[52] European and External Relations Committee. (2016). *EU reform and the EU referendum: implications for Scotland*. SP Paper 978 2nd Report, 2016 (Session 4).
[53] Hunt et al. (2016). Winners and Losers: the EU Referendum Vote and its Consequences for Wales. *Journal of Contemporary European Research*, *12*(4).
[54] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.

the Scottish context, Professor Alan Page has suggested that the Scottish Government might choose to do so *"in order, for example, to maintain access to EU markets, or for reasons of legislative or administrative convenience".* Such a scenario has been described by the UK in a Changing Europe initiative as *"the least constitutionally disruptive means by which the divergent policy interests of the devolved nations could be accommodated within the current state structure"*.[55] However, it could prove challenging in areas such as agricultural policy given the likely reliance on funding from the Treasury and the need to maintain a single UK market.

At the other extreme, the UK Government retains the ability to re-reserve powers by amending the relevant devolution statutes, and some have argued that they may seek to do so (e.g. in order to maintain the internal UK market and enable them to effectively negotiate trade deals with the EU and the rest of the world). However, this would be *"politically highly controversial"*[56] and would likely meet very strong objections from the devolved administrations.[57]

To date the UK Government has upheld a convention (the 'Sewel Convention') under which it *"does not normally invite the UK Parliament to legislate on devolved matters or on the scope of devolved powers without gaining consent from the relevant devolved legislature"* given as a legislative consent motion.[58] This Convention was reflected in statute in the Scotland Act 2016, and is also reflected in the Wales Act 2017. As noted by the Institute for Government, *"While Westminster retains the legal ability to override the devolved bodies, to do so on such a major issue* [as Brexit] *would be without precedent."*[59]

A third, more consensual, way might be to consider potential mechanisms for ensuring a jointly agreed UK-wide approach in areas of mutual interest. Indeed, this would not be without precedent. For example, as noted by Hunt et al. (2016): *"In some cases EU environmental law has been jointly implemented across the UK in order to ensure coherence, so that the UK meets national targets and standards, as well as for political or resource reasons."*[60]

For example, the Institute for Government notes: *"…there might be a desire to create new UK-wide coordinating systems to replace the EU-wide systems the country will be leaving... the devolved governments are unlikely to consent to Westminster taking back powers, so there might instead be a need for new federal-style systems that are jointly owned by the four governments...involving recognition that some policy areas should be considered neither fully devolved nor fully reserved but in fact shared between central and subnational government".*[61]

Another issue that needs to be considered is funding. The financial implications of Brexit for the devolved nations could be significant *"as the monies previously coming from the EU* [to the UK] *to finance these policies* [in areas of devolved competence]*...will have to be diverted to the devolved administrations."* [62] The Institute for Government notes that *"all the devolved governments have concerns about the impact of Brexit on their budgets, since the three nations benefit from EU funds to a greater extent than England."*[63]

Although the UK is currently a net contributor to the EU budget, the devolved nations are net recipients, and simply allocating post-Brexit agricultural spending, for example, via the Barnett Formula, would leave them significantly worse off compared to the status quo. A decision will therefore need to be made regarding the basis on which replacement funding from the UK Government will be allocated.

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[55] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[56] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.
[57] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[58] House of Commons Library. (2017). *Legislating for Brexit: the Great Repeal Bill*. Briefing Paper Number 07793.
[59] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.
[60] Hunt et al. (2016). Winners and Losers: the EU Referendum Vote and its Consequences for Wales. *Journal of Contemporary European Research*, *12*(4).
[61] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*.
[62] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[63] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.

According to the UK in a Changing Europe initiative, *"there is no clear resolution to any of these issues but Brexit will have a big impact on devolution."* Regardless of the outcome, *"...the process will be difficult and controversial".*[64]

1.3 Constraining factors

Although there may well be considerable scope for *"greater policy differentiation between the different nations of the UK"*[65] post-Brexit, the extent to which the devolved nations have the capacity to develop radically different approaches will clearly depend on a number of external factors such as the nature of the post-Brexit deal between the UK and the EU (especially as regards trade) and the range of on-going obligations associated with international treaties and conventions, both of which are currently reserved matters.

For example, as stated by Professor Reid: *"In leaving the EU the UK will lose many restrictions on its freedom to make its own environmental law, but it will not be free from all constraints. The UK will continue to be bound by many international treaties...new obligations are also inevitable. At present we have no idea what shape it will take, but the withdrawal agreement will create a new legal relationship with the EU, including more or less access to the Single Market and with that more or less freedom to set standards on environmental and other grounds."* [66]

As such, future environmental policies will have to be developed within these constraints. From a trade perspective, for example, if the UK were to join the European Economic Area (EEA) then many EU environmental laws would continue to apply. There would still be some very notable gaps, including when it comes to key pieces of legislation like the Birds and Habitats Directives and sectoral policies covering agriculture and fisheries, but many other policy areas would be largely unaffected. [67]

More generally, the key point here is that the exercise of powers reserved to the UK Government (e.g. on trade policy) during the process of exiting the EU is likely to result in unavoidable interactions with devolved powers (e.g. relating to agriculture) thereby potentially limiting their scope. As noted by Professor Richard Whitman: *"In the last few decades the division between domestic and foreign policy has become increasingly blurred. While foreign policy remains reserved for the UK government, some policy areas with external dimensions have been devolved to Scotland, Wales and Northern Ireland and these include agriculture, fisheries and the environment. These areas are of significance for the UK in developing a post-EU external trade and commercial policy."*[68]

A second issue to consider is that, regardless of the scenario, the UK Government and devolved administrations will continue to be bound by a range of international environmental commitments/obligations (many of which are currently reflected in EU law).[69] For example, the UK is a signatory to a number of international agreements e.g. in relation to migratory species, air pollution, and chemicals regulation.[70] Any changes made to domestic environment legislation would therefore need to be consistent with the UK's international law obligations. As such, this might limit the scope for a lowering of standards and/or further policy and legislative divergence.

For example, as stated by Professor Alan Page in his report to the Scottish Government's European and External Relations Committee: *"...the extent of international obligations has led some observers to question how much scope there would be for change in the environmental field."*[71]

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[64] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[65] Hazell, R. and Renwick, A. (2016). *Brexit: Its Consequences for Devolution and the Union*. UCL Constitution Unit Briefing Paper.
[66] Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415.
[67] Burns et al. (2016). *The EU Referendum and the UK Environment: the Future Under a 'Hard' and a 'Soft' Brexit*: Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.
[68] Whitman, R. G. (2017). *Devolved External Affairs: The Impact of Brexit.*
[69] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/assessment-of-euuk-environmental-policy/written/26795.pdf
[70] House of Commons Environmental Audit Committee. (2016). *EU and UK Environmental Policy*. Third Report of Session 2015–16.
[71] Page, A. (2016). *The implications of EU withdrawal for the devolution settlement*.

From an internal perspective, it will also be necessary to consider how the UK 'single market' might be affected by further policy and legislative divergence. For example, as noted by Professor Alan Page: *"...withdrawal could...call into question the UK single market...unless the UK as a whole continues to follow EU rules or common rules are otherwise adopted."*[72] Similarly, the Institute for Government notes that *"...having left the EU Single Market (assuming this is the outcome), steps will need to be taken to ensure that the UK Single Market does not itself fragment."*[73] The UK in a Changing Europe initiative also notes the potential need for "*coordination mechanisms within the UK and provisions to maintain the single UK market"* post-Brexit.[74] As such, this issue could place an additional constraint on the exercise of devolved competences post-Brexit.

It is worth acknowledging that, given the differing preferences of the devolved nations regarding continuing access to the Single Market and indeed continuing membership of the EU, there may arise a situation in which one (or more) of the devolved nations may seek to develop a differentiated relationship with the EU (e.g. as a means of securing continuing access to the Single Market) while remaining part of the UK. For example, the Scottish Government has put forwards proposals for a differentiated Brexit settlement whereby the country would remain in the EU Single Market in the event of a 'Hard' Brexit. In Northern Ireland, some parties are also calling for some form of 'bespoke arrangement' or 'special status'.[75]

However, as noted by the Institute for Government, *"a special deal could be negotiated only if the UK Government was itself in favour, and whether there is any appetite for this at Westminster remains to be seen".* [76] Similarly, the UCL Constitution Unit has stated that, while there *"...are precedents for different parts of a state having different relationships with the EU...it would be up to the devolved nations to come up with proposals, and then to persuade the UK government and the EU that they could be accommodated without damage to the founding principles of the EU, or the fundamental interests of the UK."* [77]

Two other factors that need to be mentioned briefly are capacity and funding. As regards political and administrative capacity, Professor Reid notes: *"...there must be doubts over the capacity of all the administrations in this continuing age of austerity to take over responsibility for all the work currently undertaken through the EU in developing and maintaining the law across all the sectors where EU law operates."*[78]

Similarly, the Institute for European Environmental Policy noted prior to the EU referendum that: *"If a decision to leave the EU is made, then the policymaking, tactical and strategic demands on Whitehall Departments, and on policymakers in the devolved administrations potentially gaining new flexibility over areas such as agriculture, fisheries and environment policy, will be unprecedented. This will be happening at a time when administrations are coping with significant reductions in manpower and a loss of expertise in key areas..."*[79]

In a Welsh context, Hunt et al. (2016) note that: *"...there are very real questions around Wales's capacity to absorb swathes of additional policymaking responsibility."* [80]

Interestingly, the recent European Commission 'fitness check' of the Birds and Habitats Directives identified limited capacity/expertise as one of the main factors holding back progress in achieving the objectives of these Directives: *"There is evidence that problems have arisen as a result of limited expertise and inconsistent standards...this appears to have been a particular problem where decision-making has been devolved to regional and local administrations, which often lack the expertise and experience to cope with complex nature*

[72] Page, A. (2016). *The implications of EU withdrawal for the devolution settlement.*
[73] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*.
[74] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[75] http://www.bbc.co.uk/news/uk-northern-ireland-politics-38827331; http://ukandeu.ac.uk/northern-ireland-and-brexit-struggling-and-divided-over-what-next-2/
[76] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.
[77] Hazell, R. and Renwick, A. (2016). *Brexit: Its Consequences for Devolution and the Union*. UCL Constitution Unit Briefing Paper.
[78] Reid, C. T. (2016). Brexit and the future of UK environmental law. *Journal of Energy & Natural Resources Law*, *34*(4), 407-415.
[79] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union.* Institute for European Environmental Policy.
[80] Hunt et al. (2016). Winners and Losers: the EU Referendum Vote and its Consequences for Wales. *Journal of Contemporary European Research*, *12*(4).

legislation issues. In contrast, where Member States have invested in providing training, guidance and adequate resources, decision-making was found to be more consistent, effective and efficient."[81]

As regards funding, the UCL Constitution Unit has noted that: *"...if the UK attaches conditions or its own regulatory requirements to replacement funding, there could be less scope for policy differentiation."*[82]

1.4 Politics and inter-governmental relations

As set out in a recent blog by the Centre on Constitutional Change, the devolved governments are "*united in their determination to have a voice, and to exert influence over the Brexit negotiations…they are also united in their desire to see a 'soft' Brexit which embeds the UK within the EU single market, and in their desire to ensure that the repatriation of powers from Brussels doesn't lead to a recentralisation of powers within the UK."* [83]

Of course there are significant differences between each of the four nations when it comes to Brexit, particularly from a political perspective. Each of the devolved parliaments/assemblies, and their respective Governments, are currently controlled by political parties different to that forming the UK Government.[84] These differences are exacerbated by the differential results in the referendum.

In Northern Ireland, the political situation is complicated by the power sharing arrangement and the border with the Republic of Ireland. Common EU membership of the UK and Ireland is also argued to be of key importance to the operation of the Good Friday Agreement.[85] As such, there is cross-party support for avoiding any border barriers that could threaten the peace.

1.4.1 Could any powers be re-reserved by Westminster?

As noted above, any attempt at by Westminster to unilaterally re-reserve powers post-Brexit (i.e. in the absence of devolved consent) would be highly controversial in the current political climate. When questioned in October 2016 on whether or not any powers were likely to be re-reserved following Brexit, the Secretary of State for Scotland stated that: *"It is self-evident that, because the devolution settlements within the United Kingdom are predicated on the basis that the United Kingdom was a member of the European Union, those devolution settlements will be changed by the United Kingdom leaving the EU. Those will be matters that will be subject to debate and discussion...no powers which are currently exercised by the Scottish Parliament will be re-reserved to this Parliament as a result of the United Kingdom leaving the EU."* [86]

In her speech in January 2017, the Prime Minister re-iterated her desire to working closely with the devolved administrations to deliver a Brexit that *"works for the whole of the United Kingdom"*. She stated that this will mean: *"...working very carefully to ensure that – as powers are repatriated from Brussels back to Britain – the right powers are returned to Westminster, and the right powers are passed to the devolved administrations...our guiding principle must be to ensure that...no new barriers to living and doing business within our own Union are created. That means maintaining the necessary common standards and frameworks for our own domestic market, empowering the UK...to strike the best trade deals around the world, and protecting the common resources of our islands."*

Nevertheless, she made it clear that: *"...no decisions currently taken by the devolved administrations will be removed from them."*[87]

However, precisely what this means for those decisions currently taken at EU level remains somewhat unclear. As such, the extent to which competences repatriated form the EU will be given directly to the

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[81] Milieu, IEEP and ICF. (2016). *Evaluation Study to support the Fitness Check of the Birds and Habitats Directives.*
[82] Hazell, R. and Renwick, A. (2016). *Brexit: Its Consequences for Devolution and the Union*. UCL Constitution Unit Briefing Paper.
[83] McEwen, N. (2016). *Negotiating Brexit in a devolved state: The dynamics of intergovernmental relations*. Centre on Constitutional Change.
[84] SNP in Scotland; Labour in Wales; and DUP/SF (power sharing) in Northern Ireland (the latter subject to re-election on 2nd March, 2017).
[85] http://ukandeu.ac.uk/wp-content/uploads/2016/11/Brexit-and-Beyond-how-the-UK-might-leave-the-EU.pdf
[86] http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37633876
[87] https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech

devolved administrations remains unclear, reflecting a *"fundamental disagreement as to what happens when powers come from Brussels onto these shores"* as set out by the Welsh First Minister in November.[88]

The Scottish Government's views on this issue were recently set out in 'Scotland's Place in Europe', which stated clearly that: *"Leaving the EU must not result in greater concentration of powers at Westminster. Powers to be 'repatriated' from Brussels that are already within the current responsibilities of the Scottish Parliament...must remain fully devolved, with decisions on any UK-wide frameworks being for agreement between the UK Government and the Devolved Administrations....more generally, the current division of responsibilities between the Scottish Parliament and Westminster must be reconsidered to ensure that the Parliament is able to protect Scotland's interests and to reflect the change that will be effected to the UK's constitutional settlement by leaving the EU."*[89]

Similarly, in response to an oral question on the effect of Brexit on environmental policy in Wales, the Welsh Cabinet Secretary for Environment and Rural Affairs stated: *"We've been very clear that the powers that have been devolved to this place since 1999 will be here. They may go into the repeal Act initially, but any powers will then come to us for us to have our own environmental policies going forward."*[90]

The First Minister outlined further in a statement on EU transition in November 2016 that: *"When the UK leaves, EU regulation in devolved policy areas will be lifted and the Welsh Government and this National Assembly will exercise full control over policies already devolved to us: agriculture, environment and fisheries, for example. We will resist any attempt—any attempt—by the UK Government to claw back powers to itself....We accept that some issues will be best dealt with on a UK-wide basis, that's true, but this can only be done through intra-governmental agreement, through some pooling of sovereignty, not imposition."*[91]

More recently, the Welsh Government published their Brexit Plan, produced jointly with Plaid Cymru.[92] The Plan makes clear the position of the Welsh Government that: *"Currently a range of powers already devolved to the National Assembly for Wales and the Welsh Government are operated within an EU regulatory framework. These include agriculture, fisheries, environment and economic development. At the point of UK exit from the EU, when EU regulatory and administrative frameworks cease to apply, these powers will continue to be devolved in Wales. Similarly, a number of reserved powers in which Wales has an active interest, and which directly impact on devolved policy areas, such as competition policy, employment law and international trade, will continue to be the function of the UK Government and Parliament, unless and until there is agreement to further change to the devolution settlement, which we regard as a work in progress."*

The situation in Northern Ireland is less clear cut due to the political differences between the two largest parties and the current focus on issues such as what might happen regarding the border with the Republic of Ireland. As such, there is not yet a clear position on what Brexit will mean or what the consequences might or should be for the devolution settlement. In response to an Assembly Question in October 2016, asking them *"…to outline the plans in place to cope with additional devolved competencies when the United Kingdom leaves the European Union*", the then First Minister and deputy First Minister therefore answered simply that: *"Any impact on devolved competencies resulting from the EU referendum result will be considered as part of the negotiation process."*

[88] https://yoursenedd.wales/debates/2016-11-01-2-statement-eu-transition
[89] Scottish Government. (2016). *Scotland's Place in Europe*.
[90] http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=4007&language=en&assembly=5&c=Record%20of%20Proceedings&keyword=Brexit#446292
[91] http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=4000&language=en&assembly=5&c=Record%20of%20Proceedings#433668
[92] https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf

1.4.2 Inter-governmental relations and UK-wide frameworks

1.4.2.1. Brexit Negotiations

"Relations with the European Union are often treated as a matter solely for the Westminster authorities. In the event of a vote for Brexit, however, the process of withdrawal from the EU would be affected by and have strong effects upon the devolved nations and the structure of the Union as a whole." [93]

While it is clear that reaching a consensus on Brexit across the four nations of the UK will not be an easy task, failure to do so could result in *"a serious breakdown in relations between the four governments (and nations) of the UK."* [94]

In particular, any attempt by Westminster to treat this as a simple matter of foreign relations would, according to the Institute for Government *"...run contrary to convention and to the spirit of devolution, which recognises the right of the three devolved nations to determine their own form of government"* and would risk seriously undermining intra-UK inter-governmental relations *"...increasing the chances of Scottish independence and rifts in Northern Ireland's fragile power-sharing arrangements"*.[95]

As such, developing an effective mechanism for intergovernmental cooperation and discussion for all four UK administrations and the successful development of joint positions is more important than ever before. Indeed, as noted by the House of Commons Public Administration and Constitutional Affairs Committee recently, there are a range of longstanding issues with intergovernmental relations in the UK that have been *"brought into sharp focus as a result of the outcome of the EU referendum"*.[96]

Immediately following the referendum, the Prime Minister promised a 'UK approach' to Brexit. However, in her party conference speech in October she made it clear that while the UK Government would *"consult and work with the devolved administrations"*, the negotiations would be *"the responsibility of the [UK] Government and nobody else"*. She concluded: *"We will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom...I will never allow divisive nationalists to undermine the precious Union between the four nations of our United Kingdom."*[97]

Nevertheless, it is clear that the devolved administrations will wish to be closely involved. As noted by The UK in a Changing Europe initiative: *"...after all, foreign policy may fall under the reserved competence of Her Majesty's Government, but its exercise will have significant consequences for policy areas which have been devolved."*[98]

For example, immediately following the EU Referendum result, the First Minister of Wales, Welsh Labour leader Carwyn Jones, delivered a statement outlining the Welsh Government's post-Referendum priorities.[99] In it, he set out that the Welsh Government *"must play a full part in discussions about the timing and terms of UK withdrawal from the EU"*. And, noting the *"far-reaching implications"* of EU withdrawal for the devolution settlement, he called for a reformed relationship between the devolved administrations and the UK Government.

In term of potential mechanisms for achieving this, the Institute for Government has argued that "*The UK Government should take seriously the objective of reaching UK-wide consensus on the terms of Brexit, and be prepared to work in genuine partnership with the three devolved governments to achieve this."*[100] They have

[93] Hazell, R. and Renwick, A. (2016). *Brexit: Its Consequences for Devolution and the Union*. UCL Constitution Unit Briefing Paper.
[94] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*.
[95] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.
[96] House of Commons Public Administration and Constitutional Affairs Committee. (2016). *The Future of the Union, part two: Inter-institutional relations in the UK*. Sixth Report of Session 2016–17.
[97] https://www.politicshome.com/news/uk/political-parties/conservative-party/news/79517/read-full-theresa-mays-conservative
[98] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[99] http://gov.wales/newsroom/firstminister/2016/160624-eu-referendum/?lang=en
[100] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.

recommended that a joint UK approach to Brexit will require political commitment to working together to seek consensus, even if Westminster retains the power to have the final say.

According to their report *'Four-nation Brexit*', whilst the UK Government will lead the Brexit process and therefore must retain the right to have the final say, it is vital that from the outset the devolved governments are treated as *"partners...not as mere consultees"*. They have set out what they believe is needed to enable the four nations to work together effectively on Brexit, including:

- Agreed principles for joint working such as 'parity of esteem'.

  "*...this would not mean the four governments will be equal partners in the process, but it would involve recognition that these are four democratically elected governments working together in good faith to seek a joint approach, even if Westminster retains the power to have the final say"*

- Clarity about what will be agreed, when and how *(e.g. how will the* devolved bodies be involved in determining which areas of EU regulation to retain and at what point(s) in the Brexit process will legislative consent be sought*)*

- Dedicated intergovernmental machinery to discuss and agree upon the UK strategy for exiting the EU.

  "This new ministerial committee could be established within the existing Joint Ministerial Committee framework...but it will need to work in a qualitatively different way from most past approaches to intergovernmental working."

The 1st report published by the new House of Commons Exiting the European Union Committee on 'The process for exiting the European Union and the Government's negotiating objectives' concluded: *"While it is clear that no part of the UK has a veto over the outcome of the negotiations, it is essential that all the devolved governments, and the different regions of England, are duly involved in the process and have their views taken into account.*[101]

Since 1999, a number of mechanisms have been developed to enable joint working between the UK Government and the devolved administrations, most notably the Joint Ministerial Committee (JMC).[102] When it comes to relations with the EU, powers are reserved to the UK Government and as such under its exclusive jurisdiction. However, where there is a devolved country interest relating to such matters there is a specific sub-committee of the JMC – the Joint Ministerial Committee on Europe (JMCE) – that has typically met several times a year to discuss them.

However, as noted recently by the House of Commons Public Administration and Constitutional Affairs Committee, these formal structures of intergovernmental relations in the UK have long been criticised for their ineffectiveness. [103] For example, Welsh First Minister Carwyn Jones has described the JMC model as: *"...basically a Westminster creation that is designed to allow Westminster to discuss issues with the devolved administrations. It is not jointly owned… and it is not a proper forum of four administrations coming together to discuss issues of mutual interest".* [104]

Similarly, in the context of Brexit, former Northern Ireland Deputy First Minister Martin McGuiness has similarly stated: *"...to be honest, when Peter Robinson and I attended previous meetings of the Joint Ministerial Committee...we, along with Wales and Scotland, were underwhelmed by the seriousness with which the British Government took the views expressed by the devolved Administrations. If that is to be the mechanism, there*

[101] House of Commons Exiting the European Union Committee. (2017). The process for exiting the European Union and the Government's negotiating objectives. First Report of Session 2016–17.
[102] Research Service, Legal Service and EU Office – National Assembly for Wales. (2016). *Wales and the EU: What does the vote to leave the EU mean for Wales?*
[103] House of Commons Public Administration and Constitutional Affairs Committee. (2016). *The Future of the Union, part two: Inter-institutional relations in the UK*. Sixth Report of Session 2016–17.
[104] http://www.parliament.uk/documents/lords-committees/constitution/inter-gov-relations/EvidencevolumeIGR.pdf

will have to be a fundamental change of attitude by the British Government, and we will test that in the time ahead."[105]

In the six months since June, a number of structures have been set up to feed the perspectives of the devolved nations into the UK negotiating position. The Prime Minister and the leaders of the devolved governments agreed in October to establish a new Joint Ministerial Committee on EU Negotiations (JMC(EN)) as the central forum for engagement between the UK and devolved governments on the UK's withdrawal from the EU. [106]

In response to a question regarding the transfer of powers to the devolved administrations after the UK leaves the EU, Robin Walker MP (Parliamentary Under-Secretary, Department for Exiting the European Union) explained:

"The UK Government is absolutely committed to working with the Devolved Administrations as we prepare for our negotiations with the EU. This is exactly why we have set up a new Joint Ministerial Committee on EU Negotiations, which brings together constituent parts of the United Kingdom to develop a UK-wide approach to our negotiations and to discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive. Where powers should best sit will be a matter for further consultation and discussion across the United Kingdom."[107]

The House of Commons Public Administration and Constitutional Affairs Committee has welcomed the UK Government's *"...commitment to engage the devolved institutions throughout the process of negotiating the UK's withdrawal from the EU and the agreement...of a new* JMC *on the EU negotiations."* It has highlighted that "*there now exists an ideal opportunity for the formal machinery of intergovernmental relations in the UK to be imbued with a sense of purpose, with a revitalised and reformed JMC".* [108]

However, the Committee noted that *"...this should not preclude further consideration by the four administrations as to how the JMC and its sub-committees can be best structured so as to assist the UK Government to develop a truly UK-wide approach in a range of areas where all four administrations have policy interests in the outcome of the negotiations to leave the EU."*

It has also noted that "*...the JMC cannot, by itself, be expected to resolve issues which remain politically contentious between the four administrations. Instead, the effectiveness of any model…rests on the ability of the four administrations to collectively develop an atmosphere of trust and goodwill. In order to develop such an atmosphere of trust and goodwill, the UK Government must show a genuine receptiveness to the concerns and suggestions put forward by the devolved administrations."*[109]

More recently, the Welsh Assembly's External Affairs and Additional Legislation Committee noted the following: *"…the Welsh Government should engage in the JMC process, however, on the basis of the evidence received, we have reservations about this structure. We believe that there is a need for a more equitable arrangement for facilitating inter-governmental relations within the UK. We believe that there is a case to be made for reform of the JMC so that it may become a UK Council of Ministers based on the principles of partnership and equality.*[110]

[105] http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2016/09/13&docID=270890
[106] https://www.gov.uk/government/news/joint-ministerial-committee-24-october-2016-statement; https://www.gov.uk/government/publications/joint-ministerial-committee-communique-24-october-2016
[107] http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-12-13/57306
[108] House of Commons Public Administration and Constitutional Affairs Committee. (2016). *The Future of the Union, part two: Inter-institutional relations in the UK*. Sixth Report of Session 2016–17.
[109] House of Commons Public Administration and Constitutional Affairs Committee. (2016). *The Future of the Union, part two: Inter-institutional relations in the UK*. Sixth Report of Session 2016–17.
[110] External Affairs and Additional Legislation Committee, National Assembly for Wales. (2017). *Implications for Wales of leaving the European Union*.

1.4.2.2. Agreeing common approaches/policy coordination post-Brexit

Beyond the negotiations, there is also the issue of how the four nations might work together in future. From a purely environmental perspective, if a UK-wide approach to setting common standards was deemed to be desirable (**Section 2**), for example, it would clearly be far from easy to reach agreement under the current arrangements.

Similar to the position of the Scottish Government as set out in 'Scotland's Place in Europe' (see above, for example), the Welsh Government has made it clear that any future UK-wide framework would need to be developed and agreed between the governments of the four nations and not imposed by Westminster. Following his statement on 'EU Transition' in November 2016, for example, the Welsh First Minister was asked the following question: *"...Plaid Cymru, of course, supports the very sensible approach for collaboration between the governments of these islands when it comes to matters where co-operation is essential—on agriculture, farming, and the environment, for example. Can he, therefore, take us a step further and share, perhaps, a vision for how he thinks that can be accommodated once we've left the European Union?"*

In response, the First Minister agreed that: *"...we will need to have a mechanism where we can get agreement across the nations of the UK when it comes to looking to develop common frameworks...this has happened in the past, and there is no reason why this shouldn't happen in the future…we accept that some issues will be best dealt with on a UK-wide basis…but this can only be done through intra-governmental agreement, through some pooling of sovereignty, not imposition."*[111]

More recently, the Welsh Government published their Brexit Plan, jointly with Plaid Cymru.[112] Noting that *"the implications and challenges of EU exit are particularly acute in the field of environment and rural affairs"* and also the potential need for *"a clear UK governance structure that reflects the interdependencies and interests between devolved and non-devolved"*.

The Welsh Government set out proposals for a reformed approach to the UK's governance structures post-Brexit, arguing that the current machinery is no longer fit-for-purpose and that new collaborative ways of working need to be developed: *"…in some areas the Welsh Government may wish to discuss joint decision-making with the UK Government and the other Devolved Administrations on common UK wide frameworks, where we believe that will be in Wales' best interests."*

However, they have been clear that, while it may be essential to develop new UK-wide frameworks in some cases via consensual agreement across the four nations, this will require wholly new inter-governmental machinery. In addition, any such approach will have to be *"subject to several principles"* including:

- The need for common consent and mutual respect;
- The retention of *"at least the current levels of flexibility to implement policies tailored to the specific need of each nation";* and,
- *"Robust, and genuinely independent arbitration mechanisms to resolve any disputes over the compatibility of individual policy measures in one nation with the agreed frameworks"*.

Acknowledging that there may be *"…several areas of policy that might benefit from an agreed UK-wide approach or framework"* post-Brexit such as agricultural and environmental policies, the Welsh Assembly's External Affairs and Additional Legislation Committee has also concluded that at present a suitable mechanism for achieving this via inter-governmental cooperation is lacking.[113]

[111] http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=4000&language=en&assembly=5&c=Record%20of%20Proceedings%20-%20433668#433668
[112] Welsh Government. (2017). *Securing Wales' Future: Transition from the European Union to a new relationship with Europe*
[113] http://www.assembly.wales/laid%20documents/cr-ld10912/cr-ld10912-e.pdf

As noted by the Committee: *"Devolution has taken place in context of the European Union with an EU framework sitting above many key devolved areas. The European Union can be described as a model based on the pooling of sovereignty and shared competence."* As such, it could be argued that a similar *"shared competence"* model might be desirable in the UK post-Brexit, *"…with the principle of subsidiarity used to determine the appropriate level of government at which action is to be taken"*.

Giving evidence to the Committee, Dr Jo Hunt has argued that: *"Shared competence in a UK context would recognize that in certain policy fields, powers to legislate are in principle open to be exercised at both the UK or Welsh level, the determination of the appropriate level on any particular issue to be guided by the principle of subsidiarity. Where the most effective and appropriate level for action is the UK level, appropriate opportunities need to be provided for the devolved nations to feed into law making."*[114]

Similarly, Professor Roger Scully from the Wales Governance Centre stated the following: *"While devolution has advanced quite a lot…we have very little substantial mechanisms and process of any type for what is sometimes termed, 'shared rule', whereby the sub-state units contribute to the formal decision making of the state as a whole, and will have formalised relations with the state-level Government. That remains to this day very primitive in the United Kingdom, compared to many international examples."*

As such, he argued that *"…there's a very strong case for more substantial and more formalised mechanisms of shared ruling and inter-governmental co-operation*." In developing such mechanisms, Dr Rachel Minto from the Wales Governance Centre, suggested that inspiration might be drawn from the operation of the European Union.

1.5. Legislating for Brexit – Article 50 and the Great Repeal Bill

A particularly urgent issue when it comes to the likely impacts of Brexit for the existing devolution settlements is the triggering of Article 50 and the question of the proposed Great Repeal Bill, under which existing EU law will be incorporated into UK law.[115]

The Brexit 'White Paper' published on 2nd February notes that: *"…the Bill will preserve EU law where it stands at the moment before we leave the EU. Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal once we have left the EU. The UK courts will then apply those decisions of Parliament and the devolved legislatures."*[116]

On Article 50, the Supreme Court has unanimously ruled that, from a legal perspective, the UK Government does not require the consent of the devolved legislatures to trigger Article 50.[117] Nevertheless, from a political perspective, the Supreme Court stressed the important role of the Sewel Convention "*in facilitating harmonious relationships between the UK Parliament and the devolved legislatures*". The Secretary of State for Exiting the European Union (David Davis MP) has stated that this ruling *"in no way diminishes our commitment to work closely with the people and administrations of Wales, Scotland and Northern Ireland as we move forward with our withdrawal from the European Union."*[118]

On the Great Repeal Bill, there is a lack of clarity from the UK Government at present regarding what the Bill might mean for the location of former EU powers between UK and devolved governments post-Brexit and whether or not the consent of the devolved administrations will be required. According to Professor Richard Whitman, *"…there is substantial ambiguity regarding who will have policymaking authority in some areas after the enactment of the planned 'Great Repeal Bill'…"*.[119]

The Brexit 'White Paper' published on 2nd February notes that: *"…the Bill will preserve EU law where it stands at the moment before we leave the EU. Parliament (and, where appropriate, the devolved legislatures) will*

[114] http://senedd.assembly.wales/documents/s56778/IOB%2042%20Individual%20response.pdf
[115] http://www.centreonconstitutionalchange.ac.uk/blog/brexit-implications-devolution-settlement
[116] HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union.*
[117] https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf
[118] https://www.gov.uk/government/speeches/statement-on-the-process-for-triggering-article-50
[119] Whitman, R. G. (2017). *Devolved External Affairs: The Impact of Brexit.*

then be able to decide which elements of that law to keep, amend or repeal once we have left the EU. The UK courts will then apply those decisions of Parliament and the devolved legislatures."

However, as set out by Professor Sionaidh Douglas-Scott:*"…a good part of EU law relates to competences that have been devolved...if the 'Great Repeal Bill' translates EU law on matters that have been devolved into UK law this could amount to legislation on devolved areas."*[120]

Given the potential implications of the Bill for the powers held by the devolved administrations their consent may be required, in line with the Sewel Convention under which the UK Government *"does not normally invite the UK Parliament to legislate on devolved matters or on the scope of devolved powers without gaining consent from the relevant devolved legislature"* given as a legislative consent motion.[121] This Convention was reflected in statute in the Scotland Act 2016, and is also reflected in the Wales Act 2017.[122]

Although it does not amount to a *"blanket prohibition"*, according to the UK in a Changing Europe initiative *"...the political fall-out from any of the devolved assemblies not endorsing the UK line may... prove considerable, and provide a further stimulus to a redefinition of the relations between the nations of the UK"*.[123] Without permission from the devolved parliaments of Scotland, Wales and Northern Ireland via the passing of legislative consent motions, unilateral passing of any Brexit-related legislation by the UK government modifying their powers and responsibilities could provoke constitutional difficulties.[124]

The House of Commons Library has explained that if the Great Repeal Bill legislated on matters that currently fall to the EU but which would otherwise be devolved, such as the environment, *"the devolved institutions would likely expect consent motions to be requested by the UK Government*". There would also be issues if any delegated powers in the Bill enabled UK ministers to legislate in regard to devolved matters, given that the Sewel Convention only applies to primary legislation. [125]

On both these issues, questions remain and the debate has yet to be settled.[126] However, what is clear is that if the Great Repeal Bill does make provision for EU law on devolved matters, the devolved parliaments will almost certainly seek to vote on whether to give consent. On the other hand, if the Great Repeal Bill does not make provision for EU law on devolved matters, then it seems inevitable that the devolved legislatures will need to pass legislation of their own to create some kind of basis for the ongoing application of EU law.

The Welsh Government has stated that they agree with the UK Government's view that *"it is essential to provide legislative continuity at the point at which the UK leaves the EU"*. However, they have also made it clear that *"if, after analysis, it is necessary to legislate ourselves, in the National Assembly for Wales, in order to protect our devolved settlement in relation to the Bill, then we will do so."*[127]

Similarly, the Scottish Government has stated that *"any provisions in the UK Government's so-called "Great Repeal Bill" about matters within devolved competence, or altering the competence of the Scottish Parliament or Government, will require the consent of the Scottish Parliament."*[128]

[120] Douglas-Scott, S. (2016). *The "Great Repeal Bill"*. Briefing Paper for Scottish Parliament's European and External Relations Committee.
[121] House of Commons Library. (2017). *Legislating for Brexit: the Great Repeal Bill*. Briefing Paper Number 07793.
[122] Note that the UK House of Lords Select Committee on the Constitution stated, in September 2016, that 'circumstances are not "normal" within the meaning of the convention' with respect to starting the Brexit process by triggering Article 50 of the Treaty on European Union.
[123] The UK in a Changing Europe. (2016). *Brexit and Beyond: How the United Kingdom Might Leave the European Union*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[124] http://www.nortonrosefulbright.com/knowledge/publications/136976/brexit-the-devolution-question
[125] House of Commons Library. (2017). *Legislating for Brexit: the Great Repeal Bill*. Briefing Paper Number 07793.
[126] https://ukconstitutionallaw.org/2016/10/10/sionaidh-douglas-scott-the-great-repeal-bill-constitutional-chaos-and-constitutional-crisis/
[127] Welsh Government. (2017). *Securing Wales' Future: Transition from the European Union to a new relationship with Europe.*
[128] Scottish Government. (2016). *Scotland's Place in Europe*.

Section 2. Environmental implications

As outlined in **Section 1**, environment is largely a devolved policy area in the UK, meaning that the devolved administrations may have more power to develop their own distinct approaches post-Brexit in those policy areas where the requirement to comply with EU standards no longer applies. While the extent to which such requirements continue to apply will depend, to a large degree, on the nature of the post-Brexit trading relationship that the UK develops with the EU, it has become increasingly clear that on-going compliance with some significant elements of the *environmental acquis* (e.g. the Birds and Habitats Directives) is unlikely to be required regardless of the Brexit 'scenario'.[129]

This section focuses on the likely environmental consequences (risks and opportunities) that might arise in the absence of the common framework currently provided by EU law and policy. The transboundary nature of environmental issues will be at the heart of this discussion. For example, a House of Commons Library Briefing has noted that *"a particular challenge following Brexit may be ensuring effective ongoing coordination...as many environmental challenges cannot be tackled in isolation…new mechanisms for coordinating with the EU and between the four nations of the UK might be needed."*[130]

A recent House of Lords EU Committee report on *'Brexit: environment and climate change'* has drawn attention to the *"particular and significant environmental challenges"* that are likely to be posed by the land boundary in the island of Ireland post-Brexit.[131]

The other key context for this discussion will be issue of how the UK 'internal market' might be affected by further policy and legislative divergence, given its knock-on implications for the environment in terms of maintaining a level playing field. For example, as noted by the Institute for Government notes that *"...having left the EU Single Market… steps will need to be taken to ensure that the UK Single Market does not itself fragment. This might therefore require regulatory standardisation, for instance to prevent a race to the bottom or other unintended spillover effects."*[132]

2.1 Potential advantages and disadvantages of a common UK-wide approach

"Effective measures to tackle environmental problems require action to be taken at many different scales. The fumes coming out of a chimney may contribute to global climate change, but they can also present a nuisance to neighbouring residents. It is therefore no surprise that the legal responses to environmental challenges also operate at different levels, but how these fit together can be far from simple."[133]

Although there has been relatively limited analysis of this issue from an exclusively devolved perspective, many of the advantages and disadvantages of coordinated action on environmental matters at EU level arguably remain equally valid when considering the case for coordinated action on a UK-wide basis post-Brexit.

In terms of the background to this, the development of environmental policy in the EU has taken place over several decades. As such, it has revealed some of the strengths and weaknesses of adopting transboundary environmental standards.

Currently, EU environmental action is governed by the principle of subsidiarity, whereby in areas of shared competence like the environment the EU shall act *"only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."*[134] Nevertheless, Member States remain free to maintain or introduce higher standards or more ambitious

[129] Burns et al. (2016). *The EU Referendum and the UK Environment: the Future Under a 'Hard' and a 'Soft' Brexit*.
[130] House of Commons Library. (2016). *Brexit: impact across policy areas*. Briefing Paper Number 07213.
[131] House of Lords European Union Committee. (2017). *Brexit: environment and climate change*. 12th Report of Session 2016–17
[132] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.
[133] Reid, C. (2016). Layers of government. *Journal of the Institution of Environmental Sciences*, November 2016.
[134] HM Government. (2014). *Review of the Balance of Competences between the United Kingdom and the European Union: Environment and Climate Change*.

measures so long as they are compatible with other EU requirements (although in practice such 'gold-plating' rarely occurs).[135]

The main arguments used in favour of coordinated action on environmental matters is that there are environmental benefits to devising common standards as a means of more effectively and efficiently tackling cross-border environmental challenges. Many environmental issues do not respect borders (e.g. air and water pollution, invasive species, migratory and wide-ranging species including seabirds and fish etc.), meaning that joint action is both necessary and more likely to be successful. In addition, working together can also enable more ambitious action to be taken. By providing a 'level playing field' for economic actors, such common standards can also help to facilitate compliance (by avoiding inconsistencies and fragmentation). In their absence, there is a risk of a potential 'race to the bottom' whereby individual administrations lower their standards as a means of securing a competitive advantage. As such, cooperative/coordinated approaches can help to avoid distortions in competition and situations of unfair competition as a result of differing standards.

The Institute for European Environmental Policy (2013) summarise some of the key merits and drawbacks of a coordinated EU-wide approach to environmental policy. [136] They note that some of key merits of collective/joint action at EU-level as follows, namely that it can:

- Provide a more effective means of addressing cross-border environmental issues (e.g. air pollution, fisheries management, conservation of migratory and wide-ranging species) than unilateral action and potentially facilitate a more ambitious approach.

- Help to avoid a diverse mix of (inconsistent/fragmented) standards and procedures, create a 'level playing field' for business (to prevent unfair competition) and avoid a 'race to the bottom' (whereby standards are lowered as a mean of conferring an economic advantage).

- Offer a greater degree of policy stability and certainty as legislation may take longer to amend/change. While this may be disadvantage where there is a need to adapt to changing circumstances, on the other hand it can help to avoid any excessive volatility associated with short-term political cycles and provide the long-term predictability/sense of direction and momentum needed for environmental matters.

- Enable 'economies of scale' through pooling/sharing of resources (including administrative effort), knowledge, and expertise, as well as helping to ensure policy coherence (e.g. the Natura 2000 network of protected sites).

For example, although implementation is largely devolved when it comes existing EU nature protection legislation (e.g. the Birds and Habitats Directives), evidence from the recent European Commission 'fitness check' shows that the common framework provided by EU legislation in this area brings with it a number of considerable benefits. In particular, these laws have has helped to create a level playing field for economic operators and avoid a potential 'race to the bottom' in environmental standards.[137] In addition, they have provided *"a more effective way to achieve…conservation objectives…due to the transnational character of nature and the steps required to conserve it",* for example in terms of the needs of migratory and wide-ranging species and the cross-border threats they face. [138]

Another relevant source is the *Review of the Balance of Competences between the United Kingdom and the European Union'* undertaken by the UK Government between 2012 and 2014, in consultation with the devolved administrations. The '*Environment and Climate Change'* report published in 2014 concluded the following:

"The evidence showed that a large number of organisations representing all sectors considered that it is in the UK's national interest for the EU to have a degree of competence in the broad areas of environment and

[135] Scottish Parliament Information Centre. (2016). *Implications of Leaving the EU – Environment*. SPICe Briefing 16/97.
[136] IEEP. (2013). *Report on the influence of EU policies on the environment*.
[137] Milieu, IEEP and ICF. (2016). *Evaluation Study to support the Fitness Check of the Birds and Habitats Directives*
[138] Milieu, IEEP and ICF. (2016). *Evaluation Study to support the Fitness Check of the Birds and Habitats Directives*

climate change because of ***the advantages that this brings for the Single Market and environmental protection****."*

"The majority of respondents who commented felt that the main justifications for EU action were ***to address environmental issues which are transboundary in nature*** *and* ***to ensure a level playing field for businesses*** *operating in the Single Market."*[139]

Nevertheless, the Balance of Competences report noted that there was considerable debate about "*precisely where the boundaries between national and EU level action should be drawn*". More recently, an Environmental Audit Committee inquiry into 'EU and UK Environmental Policy' concluded:

"The EU has a long history of developing environmental policy to promote the Single Market and to protect the environment. Legal authority to legislate in this area was eventually given to the EU...in the recognition that there were ***significant benefits to solving some environmental problems multilaterally****. The overwhelming majority of witnesses who gave evidence to our inquiry...****stated that these benefits remain****."*[140]

Of course, there is rarely an approach that will represent the ideal outcome for all administrations concerned. In terms of drawbacks/disadvantages, the main one identified by the Institute for European Environmental Policy (2013) is the potential loss of flexibility for individual administrations as regards the approach taken in particular contexts, including the potential loss of ability to lower standards. On the issue of flexibility, for example, there are sometimes complaints that particular pieces of legislation are inflexible or overly prescriptive, failing to allow tailoring to the local context/conditions.

This issue was recognised by both the Balance of Competences report and the recent Environmental Audit Committee report. For example, the Balance of Competences report noted that "*...many respondents highlighted the tension between the desire...to have the flexibility to interpret EU legislation to meet national circumstances and the need for a level playing field."*

Ultimately, achieving the right balance between common frameworks and flexibility in legislative design and implementation is a difficult task. As noted by the RSPB in evidence submitted to the Environmental Audit Committee inquiry prior to the EU Referendum: *"EU environmental policies often manage this, but there are exceptions where greater flexibility or indeed more stringent frameworks would lead to better outcomes for nature"."*[141]

Similarly, in providing evidence to the Environmental Audit Committee, Professor Colin Reid noted that: *"...to allow different people to do things in a different way—the way they think is best...has huge benefits, but if you end up having total fragmentation with everybody doing things in different ways inconsistently, that has problems as well. It is trying to find the balance between them... if different levels of government are given significant powers...you do need to think about the limits on this and by what means you try to make sure that beneficial differences do not become excessive fragmentation."*[142]

As such, there is clearly a balance to be struck between consistent standards and objectives and delivery that is suited to local jurisdictions, particularly when it comes to cross-border environmental issues.

One of the ways in which these tensions between flexibility and common standards can be potentially be resolved is via appropriate policy design. In particular, there are clear differences between those types of legislation that set compulsory objectives but provide a relatively high degree of discretion regarding how to comply and those types that apply directly and provide only limited discretion.[143] For example, the recent Environmental Audit Committee report highlighted that *"in the majority of cases, the UK has considerable*

[139] HM Government. (2014). *Review of the Balance of Competences between the United Kingdom and the European Union: Environment and Climate Change*
[140] House of Commons Environmental Audit Committee. (2016). *EU and UK Environmental Policy*. Third Report of Session 2015–16.
[141] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/assessment-of-euuk-environmental-policy/written/25066.pdf
[142] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/assessment-of-euuk-environmental-policy/written/24036.pdf
[143] Cardesa-Salzmann et al. (2017). *The implications of Brexit for environmental law in Scotland*.

flexibility in implementing the minimum standards set by EU directives" because many of these directives set out the objectives to be achieved but give each Member State the responsibility for determining the means by which those objectives are to be achieved.[144]

For example, the Birds and Habitats Directives set out the results to be achieved without necessarily dictating the precise means of achieving those results, and require Member States to take the necessary measures to safeguard biodiversity without being problem-specific. They thus allow for the specific character of environmental issues in individual Member States to be adequately taken into account via the adoption of distinct national approaches.

As concluded by the Environmental Audit Committee in the context of the devolved nations: *"while many EU directives are flexible in implementation, they also ensure a common approach is adopted...when addressing cross-border environmental problems"* As such, they have successfully provided "*a framework within which the UK's devolved Governments have developed different approaches towards achieving…common environmental objectives."*

Similarly, in considering the impacts of EU policies on different parts of the UK, the Institute for European Environmental Policy (2013) concluded that:

"EU law has...both provided flexibility for sub-national approaches and prevented parts of the UK [Northern Ireland] *from falling behind in achieving contemporary levels of environmental protection. This appears a positive result of EU level action which very likely would not have arisen if there was simply UK competence on these issues."*

Section 3 sets out some of the current thinking on the issue of common standards/UK-wide approaches post-Brexit in a number of policy areas.

However, ultimately, as noted by Professor Reid, there are no simple answers to these questions: *"In terms of what matters are best dealt with at which level...there are no sharp dividing lines between topics, but a spectrum of possibilities with no absolutes – everything will have some purely local impacts and also some (direct or indirect) ones at a wider level (either for the environment or for the single market). Therefore there are not going to be clear-cut answers on what is best done at what level, especially since the nature of the intervention (setting broad targets or detailed regulation) is also significant. There will always be room for disagreement."*[145]

2.2 Political context

Prior to the referendum, an Environmental Audit Committee inquiry noted that *"many witnesses implied that if the UK were free to set its own environmental standards, it would set them at a less stringent level than has been imposed by the EU".*[146] As summarised by a recent House of Commons Library briefing: *"Depending on the terms of Brexit, it may be easier for future UK governments to change environmental standards. Some have raised concerns that as a result some environmental standards could be lowered. There may be fewer incentives for the UK Government to meet environmental standards if EU enforcement mechanisms do not apply to the UK."*[147]

Since the referendum both the Welsh and Scottish administrations have made strong commitments to maintaining environmental standards following the UK's withdrawal from the EU. For example, Lesley Griffiths (Cabinet Secretary for the Environment and Rural Affairs, Welsh Assembly) has stated that: *"EU policies and legislation have delivered clear improvements to our environment...as the UK prepares to leave the EU we will be looking at how these important safeguards can be built upon to meet Welsh needs."*[148]

[144] House of Commons Environmental Audit Committee. (2016). *EU and UK Environmental Policy*. Third Report of Session 2015–16.
[145] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/assessment-of-euuk-environmental-policy/written/26795.pdf
[146] House of Commons Environmental Audit Committee. (2016). *EU and UK Environmental Policy*. Third Report of Session 2015–16.
[147] House of Commons Library. (2016). *Brexit: impact across policy areas*. Briefing Paper Number 07213.
[148] http://gov.wales/newsroom/environmentandcountryside/2016/160926-cabinet-secretary-in-brussels-for-agriculture-and-environment-talks/?lang=en

Similarly, in their recently published Brexit plan produced jointly with Plaid Cymru, the Welsh Government has stated the following: *"The UK has been part of the EU for more than 40 years and a substantial body of legislation has been developed which protects Wales' environment and social well-being...in leaving the EU, we need to be vigilant and insistent that protections and standards which benefit our citizens and the wellbeing of society as a whole are not eroded…we are committed…at a minimum, to maintaining current standards in respect of air and water quality, emissions and environmental protection".*[149]

In Scotland, Roseanna Cunningham (Cabinet Secretary for Environment, Climate Change and Land Reform) has stated that the Scottish Government has no plans to amend or revoke any environmental legislation as a result of the EU referendum:

"I want to maintain the Government's commitment to our environment and to our natural assets...our membership of the EU has ensured progress on a range of important issues. It has enabled us to apply high standards in vital environmental protections, to the benefit of our most precious natural assets."

"Although environmental arguments were not at the heart of the EU referendum debate, there is widespread acceptance that the EU has been a catalyst for driving up environmental standards...we can be proud of our successes in seeking to protect our environment. The EU referendum result does not affect our commitment to build on those successes."

"If we end up in a hard Brexit, our ambitions for Scotland's environment will remain high. We continue to commit to maintaining, protecting and enhancing our environment, and it is crucial that the environment and climate change are part of the consideration of future trade arrangements...we will continue to seek to protect the environment regardless of what the outcomes may be."[150]

In terms of the position of the Westminster Government, firm statements of ambition have been less forthcoming, other than repeated mantra that this Government will be *"the first generation to leave our environment in a better place than we found it"*.[151] At the same time, there have been a number of rather concerning statements. For example, the Minister of State for Agriculture, Fisheries and Food at Defra (George Eustice MP) has previously stated that in leaving the EU, the UK would be able to develop a more flexible approach to environmental protection free of *"spirit-crushing"* EU laws.[152]

As such, there are understandable concerns amongst some in Scotland and Wales that, if devolved powers were to be re-reserved there could be a Westminster-led lowering of standards. The Scottish Environment Minister has made clear her concerns in this regard, stating that: *"We cannot trust the Tories to protect the interests of Scotland's environment."* [153]

Similarly, Scotland's Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell MSP, has stated:

"It is already clear to me from the discussions that I have had that the UK Government is not really interested in the issue of the environment – it is low down its list of priorities."[154]

In a Scottish Parliament debate on the environment, climate change and the European Union referendum on 27 October 2016, Graeme Dey MSP questioned whether it could be a challenge for Scotland to maintain higher standards than those set by other parts of the UK: *"Stakeholders who gave evidence to the UK Environmental Audit Committee were of the view that the EU has provided a necessary enforcement mechanism, which has incentivised the UK Government to take action that it might not otherwise have taken...The deregulatory tone of the UK Government's rhetoric...might easily be regarded as a sign that the flexibility that Brexit offers is more likely to be used to reduce than to strengthen environmental protections when they conflict with other*

[149] Welsh Government. (2017). *Securing Wales' Future: Transition from the European Union to a new relationship with Europe*.
[150] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10582&i=97390&c=1940816&s=environment
[151] HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union.*
[152] https://www.theguardian.com/politics/2016/may/30/brexit-spirit-crushing-green-directives-minister-george-eustice
[153] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10582&i=97390&c=1940816&s=environment
[154] Scottish Parliament Information Centre. (2016). *Implications of Leaving the EU – Environment*. SPICe Briefing 16/97

goals...is it conceivable that a UK Government will appoint itself as overseer of environmental compliance and a consistent approach across these islands and their devolved administrations?...One can certainly imagine a situation in which, where Scotland's environmental standards were higher than standards over the border, powerful lobbying forces would demand to compete on a level playing field."[155]

In Wales, Plaid Cyrmu have similarly raised concerns regarding a lowering of *"...the standards we value, like environmental protections"* and suggested a Welsh EU Continuity Bill as a potential mechanism for ensuring that these standards continue to apply in Wales post-Brexit.[156]

In the recently published Brexit plan produced jointly by Plaid Cymru and the Welsh Government, Leanne Wood (Leader of Plaid Cyrmu) made it clear in her foreword that: *"On the issue of environmental, social and workplace regulations, a strong message is sent to the UK Government that these must not be eroded or discarded in the name of deregulation or ideology."*[157]

In Northern Ireland, a paper produced by the Ulster Unionist Party ('A Vision for Northern Ireland outside the EU') in September 2016 has identified ten asks "*for the Northern Ireland Executive to deliver, working as appropriate with HM Government*". On the issue of the natural environment, the paper states: "*How will the NI Executive protect our natural environment and biodiversity? While the UK may have the opportunity to adjust, reform or reject EU obligations, it is essential that this does not lead to an unregulated situation where there are no longer stringent obligations regarding matters such as water quality*".[158]

[155] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10582&mode=html#iob_97390
[156] http://www.bbc.co.uk/news/uk-wales-politics-37907845
[157] Welsh Government. (2017). *Securing Wales' Future: Transition from the European Union to a new relationship with Europe.*
[158] Ulster Unionist Party. (2016). *A Vision for Northern Ireland outside the EU*.

Section 3. Spotlight on individual policy areas

3.1 Agriculture

For agricultural policy, one of the key impacts of Brexit is likely to be the UK's departure from the Common Agricultural Policy (CAP). While leaving the EU will probably mean that the UK will no longer be part of the CAP, a degree of policy alignment may still be necessary if the UK wishes to continuing exporting to the EU[159] given that a common policy was first established *"to introduce a reasonably consistent approach inside the single market and avoid disruptive differences in policy and levels of subsidy in farming between countries"*.[160] Similarly, there will be a need to ensure that agricultural support across the four nations fits within the UK's WTO commitments.[161]

For now, the UK's future trading relations with the EU and the rest of the world remain unknown. So, setting aside international trade considerations (and hence the likely requirement for similar standards and levels of policy support to prevent unfair competition), below we outline the key issues purely from a UK devolution perspective.

The UK in a Changing Europe initiative notes:

"Under current arrangements, agricultural support policy will be the exclusive competence of the devolved governments post-Brexit, but there is no indication of how it would be funded. International agricultural trade will remain a competence of the UK government, but this is in practice intimately linked to agricultural support...the way in which moneys returning to the UK for former EU competences – such as agriculture – will be distributed is not yet known."[162]

At present, policies affecting agriculture in the devolved nations are determined largely by the EU through the CAP, although implementation is a largely devolved matter. Under all of the scenarios that have been discussed in relation to withdrawal, the UK would not continue to participate in the CAP.[163] Under current arrangements, agricultural policy would then become the exclusive competence of the devolved administrations, although the UK Government will remain responsible for negotiating international trade agreements and providing financial support.

There are no doubt benefits to a degree of flexibility, for example, due to the very different types of agriculture in Wales, Scotland, Northern Ireland and England. However, as stated by Gravey (2016), *"...the fact that all four nations are implementing the same common European policy has provided a sort of 'dampening effect' to divergence."*[164]

According to the Institute for European Environmental Policy, *"Post exit, variations in policy could widen – although not very far before intra-UK trade is affected".*[165] Yet, as stated in a briefing from the House of Commons Library, "*...it is not clear how the UK would approach farming policy without common EU rules as the overall working framework for the UK Government and the Devolved Administrations."*[166]

An immediate question that arises is therefore the issue of what sort of framework might be need to be put in place within the UK to replace the CAP in order to maintain a single UK market (without advantaging farmers in one part of the UK) and how such a framework might be established (i.e. imposed top-down or agreed cooperatively). This is particularly relevant when it comes to the issue of replacing the existing body of EU

[159] Matthews, A. (2015). *Agricultural implications of British EU withdrawal for rest of the EU*.
[160] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.
[161] Swinbank, A. (2017). *World Trade Rules and the Policy Options for British Agriculture Post-Brexit*. UK Trade Policy Observatory, Briefing Paper 7.
[162] The UK in a Changing Europe. (2017). *Brexit: Six months on*. A report by the UK in a Changing Europe for the Political Studies Association of the UK.
[163] Research Service, Legal Service and EU Office – National Assembly for Wales. (2016). *Wales and the EU: What does the vote to leave the EU mean for Wales?*
[164] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/the-future-of-the-natural-environment-after-the-eu-referendum/written/35891.pdf
[165] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.
[166] House of Commons Library. (2016). *EU Referendum: Impact on UK Agriculture Policy*. Briefing Paper Number 07602.

legislation in this area and establishing new funding arrangements. As highlighted by the Institute for Government, there may be a concern that, in the absence of such a framework, the UK 'single market' itself might fragment."[167]

As regards funding, in particular, a key concern in the devolved nations is that a financial settlement based on the Barnett formula would result in substantially less funding for agriculture than the amounts currently provided.

Under the CAP, each Member State currently receives an annual allocation. In the UK this allocation is then divided between the UK Government and devolved administrations following negotiations. Each administration is directly responsible for implementing the CAP and is required to comply with the various EU Regulations which set the legal framework for the policy.[168]

In this context, it is worth considering the findings of the '*Review of the Balance of Competences between the United Kingdom and the European Union – Agriculture'*, which looked at the issue of the most appropriate level at which action should be taken in this area. Although these findings are not directly applicable in a devolved context, they do at least clearly set out some of the potential benefits of a common approach. Some of the key conclusions included the following:[169]

- *"The majority of respondents...argued that access to the Single Market was of significant benefit for the UK economy. There was also widespread support among respondents for* ***common EU standards*** *across the EU's agriculture policies."*

- *"In the main, respondents thought that EU-level action was appropriate for agriculture. They cited the benefits which the UK gets* ***from harmonised Single Market rules, a broadly level playing field and avoidance of subsidy competition****..."*

- *"There was a large amount of evidence on* ***the advantages and disadvantages for Member States in having flexibility to implement EU legislation****. Respondents highlighted the need for* ***sufficient recognition of local and regional circumstances on the basis that one size does not fit all*** *but also emphasised* ***the desirability of maintaining a level playing field****."*

In terms of the potential environmental implications, a key risk would be that the absence of such a framework could result in *"a race to the bottom or other unintended spillover effects"*.[170] In contrast, a common approach could help to ensure that regulatory standards were maintained rather than weakened, although the prime political battle would undoubtedly be over funding.

A recent report by the Environmental Audit Committee considering the implications of Brexit for the future of land management and environmental protections in the UK noted the role currently played by EU policy in this area in providing "*a framework with common standards for the four nations, which then devise and implement their own policies".* The report went on to recommend that post-Brexit the UK Government should:

"...ensure there is sufficient coordination within and between the devolved nations to ensure a common, high level approach to environmental protection, within which framework the devolved nations can determine their own priorities and implementation approach."

Noting the issue of funding, the report recommended that the UK Government:

[167] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.
[168] Research Service, Legal Service and EU Office – National Assembly for Wales. (2016). *Wales and the EU: What does the vote to leave the EU mean for Wales?*
[169] HM Government. (2014). *Review of the Balance of Competences between the United Kingdom and the European Union: Agriculture*.
[170] Paun, A. and Miller, G. (2016). *Four-nation Brexit: How the UK and devolved governments should work together on leaving the EU*. Institute for Government.

"...ensure fairness and transparency in the allocation of funds, and allow the devolved nations to develop their own funding mechanisms and priorities, as they currently do under the CAP rural development programme, subject to the maintenance of a UK-wide 'level playing field' of minimum environmental standards."[171]

3.1.1 What is the position of the UK Government?

In terms of the UK Government's position, from an environmental perspective real uncertainties remain regarding how much funding is likely to be provided in the long-term (in spite of short-term guarantees). In addition, the Secretary of State has made clear that she will retain the strong focus of her predecessor on cutting unnecessary *"red tape"*.[172]

On the issue of devolved competence, Minister of State for Agriculture, Fisheries and Food (George Eustice) has stated on several occasions that a 'UK framework' will be needed to replace the loss of the CAP in order to retain a level playing field for farmers across the UK/the integrity of the market and avoid large distortions. For example, in response to a question in October 2016 regarding the devolution of agriculture and fisheries powers to the Scottish Parliament post-Brexit, he stated: *"...we will work very closely with all the devolved administrations...as we devise a policy for after we have left the European Union. Some elements are already devolved, but the general consensus is that there will have to be some kind of UK-wide framework. We have made no decisions on this yet and will work very closely with all the devolved administrations."*[173]

More recently, at the Oxford Farming Conference (January 2017), he stated: *"The devolution settlement was in an era when everything was decided in Brussels...We need to work in cooperation with the devolved administrations to work out what kind of UK framework we need to make sure there's as much discretion as possible to create policies that work for them. We need a UK framework to replace what's decided at an EU level now."*[174]

This chimes with the position of a number of farming and landowner bodies who are calling for *"a UK-wide policy to be developed with all of the UK devolved administrations."*[175]

For example, the CLA have called for a "*coherent food, farming and environment policy framework at the UK level*", arguing that *"there is a need for a level of consistency across the UK, so that farmers, landowners and rural businesses are not disadvantaged by geography: we must avoid internal trade barriers whilst allowing devolved nations flexibility of policy implementation."* According to the CLA, without an overarching UK-wide framework there is a risk that farmers and land managers across the four nations *"...could be disadvantaged through unequal approaches to trade, support and regulation."*[176]

As regards the mechanisms for achieving this, the CLA have suggested *"a formal, ministerial level grouping from across the devolved administrations tasked with agreeing on the overarching priorities of the policy. Individual administrations will be able to design detailed policies as best suits their situation. This would respect the Devolution Settlement while providing multi-annual funding to tackle problems in the rural economy – something that is not possible through the Barnett Formula."*[177]

3.1.2 What about the position of devolved administrations?

A Welsh Senedd inquiry into the Future of Agricultural and Rural Development Policies in Wales is also on-going.[178] On 8th November 2016, the Chair of the Committee made a statement in Plenary in order to seek two

[171] House of Commons Environmental Audit Committee. (2017). The Future of the Natural Environment after the EU Referendum. Sixth Report of Session 2016–17.
[172] https://www.gov.uk/government/speeches/environment-secretary-sets-out-ambition-for-food-and-farming-industry
[173] https://hansard.parliament.uk/Commons/2016-10-13/debates/AFD9F924-5E81-4F8E-A1C1-180B57EE08B1/OralAnswersToQuestions#contribution-FA94EB30-BD30-45D8-B7A4-534DC0676073
[174] https://www.ofc.org.uk/insights/farm-subsidy-system-to-be-overhauled-post-brexit-says-eustice
[175] House of Commons Library. (2016). *Brexit: impact across policy areas*. Briefing Paper Number 07213.
[176] CLA. (2016). New Opportunities: *The Impact of Brexit on Rural Businesses in Wales and Scotland*.
[177] http://www.cla.org.uk/latest/news/all-news/rural-business-2030-cla-vision-future-natural-capital
[178] http://senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=15876

commitments from the UK Government and send a *"clear message...about what Wales wants at the outset of the exit process".*[179]

As well as seeking a commitment to an equivalent level of funding for agriculture, environment, and rural development post-Brexit as that currently provided via the EU, the Committee also sought a commitment to future policy freedom for Wales: *"Decisions on future agriculture, environment and rural development policies should be taken in Wales....should the case be made for some level of UK-wide policy framework then this should be done on the basis of agreement between the devolved administrations and the UK government. We also support bilateral discussion between the Welsh and UK governments. Agreement on any over-arching policy framework should be subject to scrutiny by the devolved parliaments and assemblies and require their consent."*[180]

Subsequent comments by both the Cabinet Secretary[181] and the First Minister[182] would suggest broad agreement with these asks. For example, the First Minister stated that:

"I've said this from the very beginning, of course, that agriculture is devolved. This is not an opportunity to take away powers from the people of Wales; not at all. There may be a case for considering for some issues...having a pan-Britain policy, but only through agreement, and not by Westminster imposing it... So, it's consensus that is important here and nothing else. It may be worth talking about some kind of loose and general framework, but it is discussion and agreement that are all important. This is not an opportunity to take away powers from the farmers of Wales, the Government of Wales or the people of Wales."

"There's no sense in having three different systems...across Great Britain. And the reality is that, to me, it makes sense to have an agreement between the three Governments, with a common system—that clearly makes sense. There may be an argument of having a common framework for agriculture, so that there are no barriers erected within the UK to trade within the UK. That I can see as being something that would have merit."[183]

Similarly, speaking during a panel discussion at the Oxford Farming Conference on 4 January 2017, the Cabinet Secretary for Environment and Rural Affairs acknowledged that a UK framework which respected devolution may be needed in certain areas.[184]

The response to the consultation submitted by Wales Environment Link also noted the importance of developing a flexible post-CAP policy that *"fully meets the distinctive challenges and opportunities of the Welsh context"* given the differences between farming in Wales and the rest of the UK. At the same time, however, it also noted the need for cooperation: *"While providing the flexibility to accommodate the needs of devolution, we will also require cooperation across the UK, including a level playing field for all nations with high environmental baseline standards. Where appropriate, measures will need to be able to work effectively together across borders and catchments in a way that sufficiently deals with a variety of transboundary environmental issues."*[185]

Responses from both NFU Cymru and CLA Cymru similarly recognised the need for a common overarching agricultural framework jointly agreed by the four nations that respects the existing devolution settlement. In order to achieve this, CLA Cymru called for a *"formal platform"* to be established whereby the *"component parts of the UK...have equal status in developing a holistic UK policy framework"*.

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[179] http://www.senedd.assembly.wales/documents/s55766/Statement%20by%20the%20Chair%20of%20the%20Committee%20-%208%20November%202016.pdf

[180] http://www.senedd.assembly.wales/documents/s55766/Statement%20by%20the%20Chair%20of%20the%20Committee%20-%208%20November%202016.pdf

[181] http://senedd.assembly.wales/documents/s57802/Letter%20from%20Cabinet%20Secretary%20for%20Environment%20and%20Rural%20Affairs%20on%20the%20inquiry%20into%20the%20future%20of%20ag.pdf

[182] http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=4010&language=en&assembly=5&c=Record%20of%20Proceedings&startDt=06/12/2016

[183] http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=4000&language=en&assembly=5&c=Record%20of%20Proceedings%20-%20433668

[184] External Affairs and Additional Legislation Committee, National Assembly for Wales. (2017). *Implications for Wales of leaving the European Union*.

[185] http://senedd.assembly.wales/documents/s500003240/AAB%2015%20Wales%20Environment%20Link.pdf

From a Scottish perspective, the First Minister has stated the following: *"I hope that all members will agree unreservedly that those powers must remain firmly and unambiguously within devolved competence. If there is a need to agree UK-wide arrangements on any matter, such as animal welfare, it must be done by agreement and not by imposition. Brexit must not become an excuse for a Westminster power grab."*[186]

In Northern Ireland, Minister for Agriculture, Environment and Rural Affairs Michelle McIlveen has stated that: *"...we, as a region, must be closely and directly involved in the domestic agricultural, environmental and fisheries policy and trade agendas as they unfold in order to maximise the opportunities that will come with leaving the European Union. I intend to make sure that our unique circumstances in many areas, including cross-border trade and wider agri-food exports, are fully recognised as we move forward."*[187]

"A significant amount of work is under way to progress my priorities which are to ensure we replace the Common Agricultural Policy and Common Fisheries Policy with appropriate [UK] frameworks that underpin the sustainable growth and competitiveness of our sectors and to safeguard our continued ability to trade effectively."[188]

3.2 Fisheries

"In whichever relationships the UK would resurface following Brexit...the CFP would likely have to be replaced...it is safe to say that this process would involve extensive negotiations, both regarding the practicalities of leaving the EU institutions and schemes related to the CFP, as well as trying to establish a new domestic system in collaboration with the devolved British jurisdictions. Political tension between central and devolved administrations is likely, especially reflecting the large differences in the relative importance of the fishing industry between the devolved nations. Scotland...is critical in this regard."[189]

Withdrawing from the EU will mean withdrawing from the Common Fisheries Policy (CFP). As highlighted by the House of Lords EU Energy and Environment Sub-Committee in their recent report on this topic, to date the CFP has *"provided the legislative framework within which responsibility for fisheries has been devolved within the United Kingdom."* In the absence of this common framework, four different UK fisheries management regimes could potentially emerge. This provides the UK with an opportunity *"to review current fisheries management practices and replace them where appropriate, bearing in mind the obligation to manage fish sustainably"*[190]*.*

While there are substantial differences between the fishing industries in the devolved nations and hence the need for a regime that is appropriately tailored, it is also the case that *"fish know nothing of political borders"*.[191] As such, they represent a shared resource for which a cooperative/shared approach to management is likely to be necessary to prevent over-exploitation and a 'tragedy of the commons'.

In addition, the UK is party to a number of international agreements relevant to fisheries management, and for the purpose of international negotiations (both in the context of Brexit and beyond) the UK must act as a single coastal state.

As stated in the 2013 *'Review of the Balance of Competences between the United Kingdom and the European Union: Fisheries Report*':

"The Government in Westminster retains responsibility for acting as the Member State on behalf of the UK in the EU, reflecting the needs of all parts of the UK in negotiations. Devolved Administrations have a significant

[186] http://news.gov.scot/speeches-and-briefings/first-ministers-statement-on-scotlands-place-in-europe
[187] https://www.daera-ni.gov.uk/news/mcilveen-discusses-eu-exit-cabinet-ministers
[188] https://www.northernireland.gov.uk/news/mcilveen-welcomes-cabinet-minister-andrea-leadsom-northern-ireland
[189] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.
[190] House of Lords European Union Committee. (2016). *Brexit: fisheries*. 8th Report of Session 2016–17
[191] http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf

interest in fisheries and therefore an important role in developing the UK position for EU negotiations so as to represent the interests of the UK as a whole in fisheries policy...

...While the Westminster Government represents the UK in EU negotiations, fisheries management itself is a devolved matter. Each Devolved Administration has control over the management of their own commercial fishing fleets, within a UK wide system. This arrangement is detailed in a Concordat between the UK administrations."[192]

On this latter point, for example, the Institute for European Environmental Policy noted in their evidence to the Committee that "*it is in the best interest of the UK to cooperate with states with which it shares stocks and/or has bordering EEZs...some stocks important to UK fishermen either migrate across borders over the course of their life stages or simply roam habitats stretching across more than one nation's EEZ. Coordinated management of fishing pressure is therefore essential.*" However, when it comes to the devolution of fisheries policy, *"this situation potentially affects the UK's credibility and reliability as a negotiator in bilateral fisheries discussions."*[193]

As such, the Committee has recommended that "*it is vital that the UK Government develops a unified negotiating position that represents the interests of the Devolved Administrations and industries prior to engaging in international fisheries negotiations, both in the context of Brexit and beyond*."

The Committee has made it clear that the devolved administrations should be *"...taken into account from the outset to ensure that a unified UK negotiation position on fisheries and Brexit is formed, based on co-operation with the four devolved nations and their fishing industries."* The Committee concludes that *"...developing an effective and sustainable policy that is appropriate for UK waters and that respects the devolution settlement will require a process based on consultation and evidence*".

In terms of the environmental risks and opportunities, successful fisheries management is vital to the health of the wider marine environment. Maintaining progress in this regard may well benefit from a co-ordinated approach across the four nations given the highly mobile nature of the main species fished commercially by UK fleets.[194] It will also clearly interact with other policies linked to the conservation of species in the marine environment.

Given this, it is unsurprising that the majority of respondents to the UK Government's 2014 Balance of Competences Review supported some form of supranational fisheries management.[195] One of the advantages of working together is that it makes it possible to *"raise standards...over a wider geographic area"* than if individual countries or regions are acting alone.

According to the final report, respondents had *"differing views on where competence should lie for fisheries management"*, but there was nevertheless:

"...a widespread view that for fisheries management to be effective it requires some form of supranational approach...fish by their very nature are transboundary, migrating through a number of countries waters...to secure a healthy marine environment and productive fish stocks, some form of co-ordinated action is needed 'by all countries that share an interest' in order to effectively manage the fishery..."

Moreover, it was also the case that:

"Many respondents considered it essential there is a central coordinator to set conservation objectives for all countries with an interest in a fishery."

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[192] HM Government. (2014). *Review of the Balance of Competences between the United Kingdom and the European Union: Fisheries Report*.
[193] http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf
[194] Burns et al. (2016). *The EU Referendum and the UK Environment: An Expert Review. How has EU membership affected the UK and what might change in the event of a vote to Remain or Leave?*
[195] HM Government. (2014). *Review of the Balance of Competences between the United Kingdom and the European Union: Fisheries Report*

The issue of a level playing field was also a recurring theme in responses.

3.2.1 What is the position of the UK Government?

In giving evidence to the inquiry, George Eustice (Minister of State for Agriculture, Fisheries and Food at Defra) stated that it will be necessary to *"work out … how we put in place a UK-wide framework of some sorts"* to replace the CFP, but agreed that this should *"respect the existing principles of the devolution settlement"* and provide "*as much discretion and control as possible to the Devolved Administrations to manage fisheries in a way that works for them"*. He made it clear that when it comes to international negotiations there will have to be a UK position, but recognised that the fishing industry was *"incredibly important"* to Scotland and that the Government will make sure that it engages *"very closely"* with the devolved administrations.[196]

3.2.2 What about the devolved administrations?

Written evidence submitted to the inquiry by Fergus Ewing MSP (Cabinet Secretary for Rural Economy and Connectivity) emphasised that *"the Scottish Government must be involved directly in shaping the UK position as well as with any discussions with other countries"*. He also added that *"we will rightly demand and expect that we have the lead negotiating role for issues in which Scotland has the majority interest."*[197]

In Northern Ireland, in response to an Assembly Question in October 2016, asking her to "...outline her plans to (i) protecting fishing stocks; and (ii) stop overfishing if fishing quotas and the Common Fisheries Policy are replaced following the referendum result to leave the European Union", the Minister answered that: *"...new arrangements will need to be negotiated between the UK, the EU and other coastal states to manage fishing opportunities and access to resources. The trading and support framework that will apply to the fisheries sector following a UK withdrawal from the European Union will be the subject of negotiation. I have already held a series of meetings with both Ministers from the UK government and Devolved Administrations as well as with our own stakeholders to consider the potential implications of Brexit. The meetings included discussions on the need to ensure that future trade and policy frameworks take account of the importance of Northern Ireland's agri-food and fishing industries, rural communities and environment sector. I intend to be closely and directly involved in the domestic agricultural, environmental, fisheries, and trade policy agendas as they unfold in order to maximise the opportunities that will come from leaving the European Union."*[198]

In Wales, the recently published 'Brexit Plan' states that: *"In order to ensure that the Welsh Government can continue to manage Welsh fisheries once the UK leaves the EU, changes are needed to the devolution settlement…to provide full executive and legislative competence to enable continued management of fisheries across the Welsh Zone, and Welsh fishing businesses wherever they are. In addition, a fairer rebalancing of UK fishing quotas is needed.*[199]

In terms of other key stakeholders, the chief executive of the Scottish Fisheries Federation recognised that "*you would expect the Scots to be consulted"* and for a joint UK position *"to be formed with that in mind"*. He stated that:

"There is no reason why the Administrations cannot work together to resolve any differences or mutual advantages internally. For Brexit, and most especially for the UK acting as a coastal state after Brexit, the size of the area creates a critical mass that gives you a very powerful negotiating position, which we would wish to retain and not have diluted by any—what you might call arm wrestling north and south. That can all be done internally if any of that exists. The size of the prize is large enough to mean that with the critical mass of UK waters we can do better for all aspects of the industry."

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[196] http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf

[197] http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf

[198] https://www.theyworkforyou.com/ni/?id=2016-09-20.5.28#g5.30

[199] Welsh Government. (2017). *Securing Wales' Future: Transition from the European Union to a new relationship with Europe*.

Similarly, the chief executive of the National Federation of Fishermen's Organisations (the representative body for fishermen in England, Wales and Northern Ireland) stated that: *Devolved administration is an internal arrangement for how we manage our fisheries internally—quota management, licensing, that sort of thing—and that is governed by a fisheries concordat. It is important that we understand that the UK must take the lead in all international negotiations...we think it is very important that the UK in all aspects of the transition and post-transition takes the lead."*

3.3 Nature protection

Implementation of EU legislation relating to nature protection is largely devolved. For example, as noted by the Report of the Habitats and Wild Birds Directives Implementation Review (2012): *"Responsibility for the implementation of the Habitats Directive in terrestrial or inshore areas in Scotland, Wales and Northern Ireland is largely a matter for the Devolved Administrations. The UK Government is responsible for the implementation of the Directive in UK offshore waters (those beyond 12 nautical miles), other than offshore waters adjacent to Scotland where executive responsibility has been devolved to Scotland (except for certain reserved matters)."*[200] It is widely acknowledged that EU legislation in this area has *"significantly benefited both terrestrial and marine wildlife in the UK by requiring wide-ranging action that otherwise probably would not have been required"*.[201] In addition, it has played a key role in underpinning action to deliver against the UK's international commitments.

Brexit therefore poses significant risks for nature as *"regardless of the departure scenario, the Birds and Habitats Directives – policies that are the backbone of conservation in the EU and both of which have generated significant improvement for species and habitats – would no longer apply. Instead, the UK government would be at liberty to change this legislation and the processes in place to deliver it".*[202] Indeed, an expert review conducted prior to the EU referendum concluded that protections for species and habitats would be particularly at risk of deregulation if there were to be a vote to leave.[203]

Similarly, a recent paper by the Scottish Universities Legal Network on Europe (SULNE) noted that if the UK Government re-reserved powers in this area there could be *"a lowering of standards regarding the designation of protected areas."* [204]

Although there has been limited political discussion of this issue from a devolution perspective to date, the recent 'fitness check' of these laws by the European Commission has resulted in a considerable amount of scrutiny of the measures and their implementation and given rise to a greater volume of evidence and stakeholder views than is usually available for an environmental policy of this type.

For example, when it comes to the issue of creating a level playing field for economic operators, the 'fitness check' concluded the following:

*"A large number of respondents...felt that the **equal standards for conservation** applied as a result of the Directives were **vital for the functioning of the internal market**. The introduction of **a minimum level of protection** for the environment meant that **a potential 'race to the bottom' in environmental protection had been avoided**...some of the same respondents, as well as others from the tourism and construction industries, also felt that the Directives had provided **some level of assurance and predictability to business**, supporting trans-boundary activity and encouraging investment."*

[200] HM Government. (2012). *Report of the Habitats and Wild Birds Directives Implementation Review*.
[201] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.
[202] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.
[203] Burns et al. (2016). *The EU Referendum and the UK Environment: An Expert Review. How has EU membership affected the UK and what might change in the event of a vote to Remain or Leave?*
[204] Cardesa-Salzmann et al. (2017). *The implications of Brexit for environmental law in Scotland*.

*"...many stakeholders felt that **the introduction of a common standard** for designation and management of protected areas and approaches to conservation of key habitats and species, has created an enabling environment for business through **the creation of a more level playing field**..."*

*"...many stakeholders, particularly those from civil society, but also from Member State authorities, found the introduction of **a common approach** through the Nature Directives **vital for the functioning of the internal market** more generally, **removing the potential for a 'race to the bottom'** in environmental protection standards, and giving businesses **a level of certainty** that would otherwise not have been available."* [205]

For example, the consultation response submitted by Defra (*"jointly drafted by representatives of the relevant national administrations"*), stated that: *"...one of the key added values in the Directives is the ability to ensure that a coordinated approach is achieved and maintained...noting in particular the needs of migratory and widely dispersed species and habitats and action to control invasive species."*[206]

In terms of the question of the *"added value"* of a transboundary approach and of *"whether or not the EU would have been better off without the Nature Directives, in comparison to the alternative patchwork of national legislation and standards",* the report was clear in concluding that coordinated action has been *"...a more effective way to achieve the conservation objective of the Nature Directives, due to the transnational character of nature and the steps required to conserve it."*

In particular, these Directives have led to the establishment of a coherent pan-EU network of protected sites based on a common scientific methodology, criteria and set of ecological features. The unprecedented increase in protected area coverage brought about through this legislation – and the focus on transboundary connectivity – simply would not have been possible without this coordinated approach. This coordination has also provided valuable opportunities to share knowledge, expertise, and best-practice.

According to the report: *"**Wildlife does not abide by national borders** and its protection, therefore, **requires transboundary cooperation**. This will not change, making a continued EU wide approach likely to be more effective in addressing this challenge than actions undertaken by individual Member States. This is particularly relevant for migratory birds and other mobile species (i.e. in the marine environment). The protection provided by EU legislation to species across the whole of their migratory route goes beyond the protection that would be possible for these species at national level"*

It also concluded that:

"The Directives have generated major transformational change in the legal framework of Member States...the higher levels of protection provide more effective means to ensure the conservation of habitats and species in the EU, and would not have been achieved by Member States acting individually."

"...an alternative approach based on different nature protection rules across the EU Member States could compromise the achievement of a single market, and that different legal and procedural rules for business and planning would lead to increased legal, administrative and compliance costs."

And that their absence could lead to national authorities: *"...using deregulation to gain a competitive advantage, thus negatively impacting the level playing field for businesses....while some business have traditionally argued the strictness in the implementation of those measures in some Member States, the fact of having harmonised rules applied to all operators in all Member States is generally welcome by the business sector."*

[205] Milieu, IEEP and ICF. (2016). *Evaluation Study to support the Fitness Check of the Birds and Habitats Directives.*
[206] http://ec.europa.eu/environment/nature/legislation/fitness_check/evidence_gathering/index_en.htm

According to the Institute for European Environmental Policy, transboundary cooperation in this area is likely to continue to be particularly important given, for example, *"cross-border threats to biodiversity, such as invasive alien species and climate change".*[207]

Environment Links UK and Greener UK March 2017.

[207] Baldock et al. (2016). *The potential policy and environmental consequences for the UK of a departure from the European Union*. Institute for European Environmental Policy.