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Introduction

European Union (EU) law presently affects to various degrees most, if not all areas falling within the remit of the Environment, Climate Change and Land Reform Committee (ECCLR Committee), most saliently:

- Habitat and species conservation
- Water
- Air quality
- Environmental decision-making
- Environmental law enforcement
- Waste
- Agriculture and fisheries
- Climate change

Brexit has engendered an urgent need to clarify where repatriated regulatory and enforcement competences on all these areas will fall once the UK leaves the EU. As explained in a 2016 report, the impact of Brexit in these areas will vary, depending on the way in which they are presently regulated.¹ The main variables are: the degree of governance presently embedded in EU law and institutions; the degree of devolution within the UK on each of these matters;² and the UK's international law obligations in each of these areas, and the extent to which they are presently implemented by EU law.³

These variables will influence political decisions on whether to adopt UK-wide frameworks on the areas highlighted above, and how these frameworks may look. It is clearly not possible for this note to cover in detail the scope and nature of these frameworks. This note therefore provides examples of how these variables may affect the design of frameworks replacing, and/or supplementing, existing law and policy arrangements after Brexit, and the principles which ought to guide the development of these.

1. Shared frameworks

¹ As outlined in A Cardesa-Salzmann and A Savaresi (eds) *The Implications of Brexit for Environmental Law in Scotland*, Scottish Universities Legal Network on Europe (2016), available at: <<https://sulne.files.wordpress.com/2016/12/environment-paper-sulne-20161214.pdf>>.

² Ibid at 1.

³ See A Savaresi, 'The Impact of Brexit of Environmental Protection in Scotland: Some Early Reflections' *Edinburgh Law Review* (forthcoming, 2018), available at: <<https://ssrn.com/abstract=3052150>>.

For a compendium of UK membership of international environmental law instruments and the implications of Brexit for this, see: UK Environmental Law Association, *Report on Brexit and International Environmental Law* (2017), available at: <<https://www.ukela.org/content/doclib/320.pdf>>.

After Brexit, the desirability of adopting UK-wide frameworks in the areas falling within the remit of the ECCLR Committee depends on considerations that are both political and technical in nature. For example, on matters such as habitat and species conservation, UK-wide frameworks could be needed to address matters that are transboundary in nature, such as migratory species, or shared protected areas. On other issues, the need for UK-wide common frameworks is less apparent. It is nevertheless hard to generalise: there are manifold complex technical questions associated with the way in which various areas of environmental law are framed and enforced, which in turn suggests that each area should be looked at carefully and on its own merit.

To take an example from air quality control, the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer requires its parties to regulate and reduce the use of fluorinated gases (F-gases).⁴ However, the Montreal Protocol only imposes on its parties an ‘obligation of results’ without providing details on *how* they should go about phasing down the use of these gases. These details are presently enshrined in two EU law instruments: the MAC Directive⁵ and the F-gas Regulation.⁶

A recent inquiry by the UK Parliament has revealed that, whilst it would be possible to continue with present arrangements under the MAC Directive (which has been transposed into UK law),⁷ replacing the monitoring and reporting functions currently performed by EU institutions under the F-gas Regulation is rather urgent.⁸ This is because the F-gas Regulation has not been transposed into UK law, but rather is applied in the UK directly, pursuant to the principle of direct effect. Furthermore, implementation of the regulation hinges on a quota system, managed by a centralised EU registry (the HFC Registry), which directly allocates quotas to producers and importers across the EU. After Brexit, the UK will no longer be able to rely on these institutional and regulatory arrangements. The UK will therefore have to devise its own framework to implement obligations under the Montreal Protocol in relation to F-gases, both in terms of substance, as well as in terms of reporting and enforcement. The UK will either need to identify a body performing the same tasks of the EU HFC Registry, thus replicating the status quo, or create an alternative framework altogether. This in

⁴ Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989), 1552 UNTS 3.

⁵ Directive 2006/40/EC Relating to Emissions from Air Conditioning Systems in Motor Vehicles and amending Council Directive 70/156/EEC, OJ L 161, p 12–18.

⁶ Regulation (EU) No 517/2014, OJ L 150, p 195.

⁷ See, however, the points concerning the correct transposition of the Directive in the evidence submitted by UKELA (2017), available at:

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/fgases/written/74090.html>>.

⁸ For further detail, see: A Savaresi, ‘UK Membership of International Environmental Agreements after Brexit – The case of Fluorinated Gases’, Evidence submitted to the UK Parliament Environmental Audit Committee (2017), available at:

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/fgases/written/74991.html>>.

turn gives rise to the question of the allocation of competence between the UK and devolved administrations on this specific matter. The best way forward on this and similar matters would seem to be for the UK and devolved administrations to engage in an open dialogue, and discuss what the best course of action would be. The next section of this paper reflects on the principles that should guide this dialogue.

For the present purposes, it is important to emphasise that the case of F-gases is far from being unique. On climate change, in fact, the matter is even more complex. Various pieces of UK and Scottish legislation presently implement the UK's obligations under international and EU law in relation to climate change. Because EU member states have opted to implement their commitments under international climate treaties jointly,⁹ EU law and international law obligations in this area are closely intertwined, both at the substantive and reporting levels. With Brexit, the implementation of these obligations in UK law needs to be examined afresh. A matter that requires most urgent attention is the future of the EU Emission Trading Scheme (EU ETS). The EU ETS presently covers the largest emitters in the UK. Its continuation or replacement is essential to ensure climate change mitigation after Brexit. There are two main avenues available to the UK in this connection.

The first is that the UK could opt to continue implementing its commitments under international climate treaties jointly with the EU, in a similar fashion to the European Economic Area (EEA) states that are not EU members: namely, Iceland, Lichtenstein and Norway. These states participate in the EU ETS and abide by EU law concerning emission trading. If the UK decides to go down the same route as Iceland, Lichtenstein and Norway, it could draw up a UK-wide common framework on emission trading, which enables the continuation of the status quo.

The second is that the UK would have to devise a wholly new framework which works as an alternative to the EU ETS. This would postulate a decision on when and how to pull out of the EU ETS, avoiding negative impacts on UK installations with EU ETS allowances. The EU Parliament has already adopted measures to prevent UK installations to sell off allowances they will no longer be required to hold after Brexit. If the UK leaves the EU in 2019 without an agreement on how to handle this specific issue, the EU will void all allowances auctioned by the UK since January 2018. This would have the effect of zeroing the value of allowances held by UK installations, engendering non insignificant financial losses. Regardless of how this issue is solved, the UK will also have to devise a framework replacing the EU ETS, for example, by imposing a carbon tax on the largest UK emitters. Whether or not this new framework is UK-wide, it is largely a political decision. What seems clear is that such momentous law- and policy-making decisions ought to be taken with the involvement of the UK Parliament, and in consultation with devolved administrations, rather than by the

⁹ United Nations Framework Convention on Climate Change (adopted 9 May 1992, in force 21 March 1994) Declaration by the EU; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, in force 16 February 2005) Declaration by the EU; Paris Agreement (adopted 12 December 2015, in force 4 November 2016) Declaration by the EU.

exercise of ministerial powers under the European Union Withdrawal Bill (EUW Bill) alone.¹⁰

The EU ETS covers a sizeable share of Scotland's emissions¹¹ and is an important means to achieve the targets enshrined in the Climate Change (Scotland) Act 2009. In principle, Scotland could decide to remain part of the EU ETS, if it so desires. Or at least, the recent initiation of talks to link California's ETS with that of the EU seem to augur well for Scottish endeavours in this direction.¹² Present constitutional arrangements, however, may limit Scotland's powers to remain within the EU ETS. In the context of the ongoing EUW Bill debate, Scotland could therefore demand the explicit devolution of powers to negotiate and conclude international agreements that relate to the exercise of its devolved competences in environmental matters.¹³

More generally, the implementation of international obligations after Brexit raises the question of the role of devolved administrations in determining the scope of the UK's ambition in respect of climate change. The Paris Agreement requires each Party to submit a 'nationally determined contribution' (NDC).¹⁴ NDCs contain the details of action to contribute to keeping the global temperature increase within the two degrees Celsius goal enshrined in the Paris Agreement. Whilst the UK's NDC is presently incorporated in that of the EU, after Brexit the UK will have to prepare and submit its own NDC. The process of drafting an NDC will be a novel experience for the UK, and raises the question of how the devolved administrations should be involved in the exercise of the UK's regained powers on climate law and policy. The next section considers the principles that ought to guide future consultations and law-making on this and similar matters.

2. Principles guiding the development of frameworks

When discussing the principles that ought to guide the development of shared environmental frameworks to be adopted and implemented after Brexit, it is important to distinguish between, on the one hand, general principles of UK administrative and constitutional law, and, on the other, principles that are specific to environmental law as a subject area. The present note only focuses on the latter, and leaves it to other, better qualified, colleagues to discuss the former.

Environmental law is characterised by a set of principles, which have been defined as 'an amorphous group of policy ideas concerning how environmental protection and sustainable development ought to be pursued.'¹⁵ These principles may be found in international, EU, and national law and typically concern how the law is made (such as,

¹⁰ European Union Committee, *Brexit: Environment and Climate Change (2016-17 HL 109)*, para 187.

¹¹ See Scottish Government, *Scottish Greenhouse Gas Emissions 2015*.

¹² EU Press Release 'EU and California in Joint Climate Push, Boost Cooperation' 7 November 2017, available at: <https://ec.europa.eu/clima/news/eu-and-california-joint-climate-push-boost-cooperation_en>.

¹³ As suggested in J Hartmann, 'The Faroe Islands: Possible Lessons for Scotland in a New Post-Brexit Devolution Settlement' (2017), available at: <<https://papers.ssrn.com/abstract=2909543>>.

¹⁴ Paris Agreement (adopted 12 December 2015, in force 4 November 2016), art 4.2.

¹⁵ E Fisher et al, *Environmental Law: Text, Cases and Materials* (Oxford University Press 2012), 402.

for example, public participation or environmental impact assessment), how it is enforced (such as, for example, access to justice, or access to information), and its substantive content (such as, for example, the precautionary principle).

Some of these principles are included in international treaties to which the UK is a party. For example, the precautionary principle is specifically mentioned in the United Nations Framework Convention on Climate Change (UNFCCC).¹⁶ Article 3.3 says:

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.

Even after Brexit, international principles included in international treaties the UK is a party to –such as the UNFCCC – will continue to guide UK law-makers and enforcers. In this connection, Brexit will not significantly alter the status quo.

The matter is different in relation to principles embedded in EU Law. EU environmental law encapsulates principles that build on, and sometimes enhance, principles included in international treaties. The precautionary principle is a case in point. Article 191.2 TFEU says:

Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Therefore, far from being restricted to climate change alone, in EU law the precautionary principle is cross-cutting, and applies to all areas of environmental law and policy, including, for example, legislation concerning food and human, animal and plant health.¹⁷ Furthermore, the EU Commission's interpretation of the precautionary principle¹⁸ has extended significantly beyond the remit of EU law - notably in the Sanitary and Phytosanitary Agreement concluded within the framework of the World Trade Organisation. It is therefore likely that the EU's understanding of the precautionary principle will continue to influence UK law-makers after Brexit, insofar as it

¹⁶ United Nations Framework Convention on Climate Change (adopted 9 May 1992, in force 21 March 1994).

¹⁷ See e.g. Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1, art 220.

¹⁸ Commission, 'Communication from the Commission on the precautionary principle' (Communication) COM (2000) 1 final.

is enshrined in international agreements the UK is party to, or will become a party to, following its departure from the EU.

EU law, however, also includes principles of administrative or constitutional law, which do not relate to the environment specifically, but rather concern how, and by whom, EU law is made. The subsidiarity and the proportionality principles are a case in point. Article 5.3 TEU says:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union 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.

The subsidiarity principle will not apply to the UK after Brexit, unless the UK decides to adopt it as a principle of UK law. The incorporation of the subsidiarity principle in UK law would clearly affect the allocation of powers between central and devolved administrations after Brexit. This would be the result of a political decision, however, and not result automatically from the transposition of EU law into UK law associated with the EUW Bill.

To conclude, principles enshrined in international environmental law instruments which the UK is party to, as well as principles of UK law, will continue to guide UK law-makers and enforcers after Brexit. As far as EU law principles are concerned, a case-by-case evaluation will need to be carried out. More generally, Brexit would seem to call for a constitutional reflection on which institution is best positioned to do what, and how. In this connection Brexit provides an opportunity to establish a *modus operandi* that informs all areas, and not just environmental law and policy.

By its very nature, environmental law is a composite area. No one-size-fits-all solution for all areas is likely to be feasible, or even desirable. Instead, environmental law-makers and enforcers across the UK should look lucidly at present arrangements, area by area, establish how these will be affected by Brexit, and work out what would be the most effective and sensible way to reform those law and governance arrangements which need to be replaced. In some areas, the need for a UK-wide approach seems obvious. For example, if the UK intends to continue to use emission trading to reduce its emissions post-Brexit, it would make sense to establish a UK-wide system. The adoption of such a common framework would follow a political decision on whether or not to develop a framework in the first place, and would then require consideration of how to develop and enforce such a framework. Here, Brexit provides an opportunity to create new sites for collaboration between the UK and devolved administrations that go beyond the status quo and its discontents.