



RESPONSE

Post Brexit Environmental Principles and Governance in Scotland

Overview

The Convention of Scottish Local Authorities (COSLA) is the national and international voice of the 32 Scottish Councils.

Our politically agreed position, as expressed in various politically agreed statements and submissions described below is that the return of EU legislation concerns local government, hence any discussion about the apportionment of EU returned powers, the creation of Scottish and UK regulatory and enforcement bodies as well as the reporting and commitments to be made in the future to the EU and other international bodies necessarily needs the contribution and ownership of Scottish Local Government.

EU environmental legislation and its enforcement is one of the areas that has a more direct impact in Councils, hence COSLA is keen to actively contribute to this consultation, building upon politically agreed lines by the COSLA Environment and Economy Board, Leaders and Convention and of previous submissions to the UK and Scottish Parliament inquiries on Common Frameworks and EU returned powers.

Section 1:

Environmental principles

Question 1: Do you agree with the introduction of a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers?

Question 2: Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?

Question 3: Do you agree that a new duty should be focused on the four EU environmental principles? If not, which other principles should be included and why?

Question 4: Do you agree there should be an associated requirement for a policy statement which would guide the interpretation and application of a duty, were one to be created?

(Joint answer to Q1 to Q4)

COSLA is keen to ensure that there is not a gap and legal uncertainty about environmental principles enshrined in the EU Treaties and that they continue to inform and be binding upon present and future environmental legislation and policy and in all public, private and civil society organisations as at present.

COSLA also agrees with the position expressed in the UK Withdrawal Act 2018 and the Scottish Continuity Bill 2018 that existing legal frameworks for environmental protection and enforcement continue as at present but from now on as a domestic framework. In that respect the UK Supreme Court ruling on the Continuity Bill last December is helpful in setting broad principles to delineate Scottish and UK responsibilities in EU returned powers. This is particularly important as regards to environmental law given the transboundary and cross-border nature of some environmental matters (air pollution, waste shipments, etc.).

What remains unclear is the role of Local Government in this new context, including local government's role in EU returned powers and the so-called "common frameworks" currently being negotiated between central and devolved governments.

Local Government is not a stakeholder but a public institution whose statutory powers intersect with EU environmental legislation. The UK (alongside other seven Member States) has been repeatedly brought to the European Court of Justice by the Commission for lack of compliance at local level across the UK to the 2008 EU Air Quality Legislation. Under the terms of the UK Localism Act 2011 any eventual fine will be passed down to Councils. As a result, a Policy Statement was agreed with COSLA and our counterparts in 2012 to ensure that local government is fully engaged by the UK Government in determining UK negotiating positions on draft EU environmental law and its implementation.

We are keen that this framework for consultation and enforcement with Local Government is replicated post Brexit in a legally binding fashion at UK and Devolved levels.

EU returned powers/Common Frameworks

The UK and Devolved governments have been negotiating how to apportion EU returned powers for two years, including the need to establish UK-wide "common frameworks". This raises the requirement for new UK-wide bodies to deal with state aid subsidies or environmental protection, for example

COSLA understands that the Scottish and UK Governments have identified between 111 and 153 powers to be returned from the EU – 24 of those the UK Government seeks to retain at UK level as opposed to being "Devolved by default". Last December a UK Supreme Court ruling set the boundaries between the Scottish and UK Withdrawal legislation. We also understand that in the meantime, as the Cabinet Secretary for Government Business and Constitutional Relations said last month at the Finance and Constitution Committee, a number of templates to deal with those powers have been identified.

COSLA's assessment shows that 64 out of these EU returned powers concern local Government. 18 of those will have a high impact, 16 a medium impact and 36 a lower impact. Many of those indeed are local government powers and a significant proportion of those concern environmental matters.

Just to highlight the EU returned areas that are listed, of these 153 powers that refer to the environment our assessment shows that the below environmental areas will have a significant impact in Councils current powers, services and finances (using the numbering from the UK Government list):

28. Energy Performance of Buildings Directive; 29. Environmental Impact Assessment (EIA) Directive; 30. Environmental law concerning energy planning consents; 24. Efficiency in energy use; 37. Environmental quality – Natural Environment and Biodiversity; 41. Environmental quality – Waste Packaging & Product Regulations; 42. Environmental quality – Waste Producer Responsibility Regulations; 43. Environmental quality – Water Quality; 44. Environmental quality – Water Resources; 45. Environmental quality – Biodiversity – access and benefit sharing of genetic resources; 102. Renewable Energy Directive; 105. State Aid (including the environmental aid guidelines, regional aid, etc.); 107. Strategic Environmental Assessment (SEA) Directive; as well as Eco-design and Energy Labelling.

Absent among the list of these is Waste Management & Shipments of Waste– these and in particular the former will have a high impact in Councils given the new Directives approved in 2018 and due to be transposed in the UK by 5 July 2020.

The EU circular and energy legislative packages agreed in 2018 and 2019 are major developments in the EU environmental acquis. Under the terms of the **European Union (Withdrawal) Act 2018** to be transposed in the UK these will continue to have force as if the UK remained an EU Member State.

Our position is that these new common frameworks need to be jointly developed by local/Devolved and UK levels. However, so far this is not the case. We regret that neither the UK nor the Scottish Government have engaged (so far) with Local Government in a detailed way on how to deal with these EU returned powers.

Policy Formulation and Enforcement

In terms of policy formulation as COSLA's various submissions have shown¹, there are tried and tested alternative models – the Italian and Austrian cases being perhaps the most promising, as they are constructive, incremental and mainly non-political ways of central-devolved-local intergovernmental negotiation.² There is also merit in exploring further the Welsh Government proposal for the creation of a UK Council of Ministers³ - which like the EU council should have specific formations such as Environmental JMC. We hope that the ongoing intergovernmental review of the JMC mechanisms would consider this option.

¹ COSLA Leaders Item 6 UK Withdrawal from the European Union – Governance and Update, 27 October 2017. [http://www.cosla.gov.uk/sites/default/files/documents/17-10-27 item 06 withdrawal from the european union.pdf](http://www.cosla.gov.uk/sites/default/files/documents/17-10-27%20item%2006%20withdrawal%20from%20the%20european%20union.pdf)

² COSLA submission. Scottish Parliament Finance & Constitution Committee call for Evidence. Impact of the European Union (Withdrawal) Bill on the Devolution Settlement, October 2017. http://www.parliament.scot/S5_Finance/Meeting_Papers/25_Oct_public_papers.pdf

³ Welsh Government "Brexit and Devolution", 2017 [https://beta.gov.wales/sites/default/files/2017-06/170615-brexit and devolution %28en%29.pdf](https://beta.gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20en%29.pdf)

Given the transboundary nature of many environmental issues and the asymmetric nature of Devolution we should see the new body taking over or complementing some of the existing joint bodies between the UK Government and the devolved administrations such as the Joint Nature Conservation Committee (JNCC) or the Committee on Climate Change and Adaptation Sub-Committee (CCC).

COSLA's view has consistently been that we are in favour of UK-wide arrangements where they are appropriate; however, we think that it would be contrary to the constitutional Devolution settlements that such a UK-wide body is an UK-Government body. Given the asymmetric nature of UK Devolution where the central government deals with issues for the whole of the UK and for the non-Devolved part of the UK (England), this is particularly of concern if any such UK governmental body is put in the position of being both jury and party. In short:

- Any new UK (regulatory) body should be truly have the ownership of all governments including local governments (this is specifically discussed below) so that they can jointly develop approaches for better environmental protection, develop new shared outcomes, new guidance (e.g. shipments of waste) or implement instruments (e.g. Environmental impact Assessments)
- Any new UK (enforcement) body should be truly independent from all concerned governments including the UK Government.

Lastly, it seems logical that in keeping with the Devolution settlement the new UK-wide body or bodies is replicated in Scotland as regards to environmental matters that do not have a UK transboundary effect. In that case there should be coordination between the Devolved and UK-wide bodies not unlike the mechanisms that exist between the different Environmental Agencies across the UK and Devolved areas.

Consultation to Local Government

COSLA has previously highlighted to the recently reported Finance and Constitution inquiry on Common Frameworks that it is our view that regardless of the final outcome of the ongoing political and legal discussions over the common frameworks there is a great likelihood that dealing with them will now require a degree of discussion and negotiation between Local Governments, Scottish and UK Government that is unprecedented in the Scottish local and devolved experience.

We welcomed last year's UK Government announcement (following the active campaigning by COSLA and our counterparts from the rest of the UK) to create a consultative mechanism between the UK and Local Government to deal with the powers returned from the EU.

Indeed, the UK Government indicated its intention⁴ to find another way forward. It confirmed its goal⁵ of a *flexible, non-statutory mechanism that, in essence, replicates the kind of engagement local government has on EU policy through the Committee of the Regions, but in a lighter-touch arrangement.*

However, other than the Brexit Delivery Group which mostly deals with preparedness matters these new consultative arrangements have not taken place – neither to deal with EU returned powers not to inform the UK position ahead of the eventual negotiations for a long-term UK-EU Association Agreement.

The COSLA position is that similar agreements should exist at Scottish level.

Constitutional Issues

Brexit will change the Devolution settlement. The European Union (Withdrawal Act) 2018 will make the powers of the UK, Scottish and local levels more intertwined than ever before. We need to consider where some EU powers (environment, state aid, spatial planning procurement) will sit post Brexit. We call for a comprehensive review of the power structures across the UK in line with the recommendations of the Commission on Strengthening Local Democracy in Scotland and the ongoing Local Governance Review.

In that respect, neither the UK nor the Scottish Parliaments have transposed the European Charter of Local Self Government, an international treaty under the Council of Europe (where the UK will remain a member). In fact, the UK, and Scotland, are the only jurisdictions of all the 47 Members of the Council of Europe, that have not transposed the Charter.

Thus, we welcome the Proposed European Charter of Local Self-Government (Incorporation) (Scotland) Bill that is currently lodged at the Scottish Parliament awaiting introduction by Andy Wightman MSP. We see this as a crucial way of ensuring the new proposed duty on environmental protection reflects and respects the powers of local government in these matters.

Part I – Monitoring, measuring and reporting

Question 5: What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?

We welcome that both the Withdrawal Agreement and the Political Declaration that should inform the drafting of the longer-term UK-EU Association Agreement do contain provisions

⁴ Letter Secretary of State MHCLG Sajid David MP to Clive Betts MP, Chair Commons Communities and Local Government Committee 15 January
<https://www.parliament.uk/documents/commons-committees/communities-and-local-government/Correspondence/Letter-from-the-SoS-for-Housing-Communities-and-Local-Government-relating-to-Brexit-and-local-government-15-January-2018.pdf>

⁵ [https://hansard.parliament.uk/lords/2018-03-19/debates/47210FF1-A5B4-4CC6-895D-8F4C1838316D/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/lords/2018-03-19/debates/47210FF1-A5B4-4CC6-895D-8F4C1838316D/EuropeanUnion(Withdrawal)Bill)

to ensure that there is a degree of alignment with the continuing EU policy and legislation on environmental matters. COSLA welcomes repeated Scottish ministerial statements, and commitments in various Scottish environmental strategies also commit to this. What is currently being discussed at UK level is how the extent of such dynamic alignment with respect to the continuing EU body of environmental law ('acquis') existing situation will evolve through time, and the extent to which future EU targets will be transposed into UK and Scottish ones.

Therefore, a crucial factor that will determine the viability of the continued relationship with the EU is that of engagement. COSLA strongly supports that the UK opts into a range of environmental and cooperation programmes, namely LIFE, and INTERREG, but also various schemes that both Local Authorities are involved in such as the Covenant of Mayors (of which COSLA is the official supporting organisation for Scotland), Smart Cities and Communities Initiatives, Urban Innovative Actions, European Network of Rural Development, INTERACT, and URBACT. This is entirely possible, and several pieces of legislation for the EU 2021-2027 budget period explicitly allow for this (COSLA has been very involved in lobbying for this) should the UK Treasury agree to make a financial contribution.

All these programmes and frameworks do benefit from substantive Scottish input now, and it is in the interests of both the EU and UK side to ensure that this policy dialogue and cooperation continues in the future. We also note the interest in the EU Committee of the Regions from the Scottish Government team scoping future engagement with the EU post Brexit on environmental matters.

Scotland is officially represented in this EU body through four councillors (nominated and supported by COSLA) and four MSPs. COSLA has been working with CoR and our counterparts from the rest of the UK to scope a new UK-CoR Joint Committee that will ensure political dialogue between the UK and the continuing EU regardless of the eventual shape of UK withdrawal.

COSLA welcomes that the Withdrawal Agreement and the Political Declaration include the possibility of UK (and its subdivisions, as appropriate) to participate in a range of preparatory bodies that exist to develop and monitor EU legislation, under certain conditions. In that respect the proposed Joint Committee will be the most formal part of this new governance arrangement and will be important in the resolution of disputes or differences of interpretation of the Withdrawal Agreement and the eventual Association Agreement.

Finally, while EU legislation has already been amended to take out the UK share in the calculation of EU progress towards renewable energy or energy efficiency we believe that the UK should continue sharing that information with the EU. We believe that the continued sharing of information and the development of shared targets is beneficial given the closeness of the UK and EU regulatory framework. In that respect they would add value to other reporting arrangements that exist within OECD or via the United Nations such as this year's Voluntary National Review of UK/Scottish progress towards the Sustainable Development Goals (SDGs).

Question 6: What key issues would you wish a review of reporting and monitoring requirements to cover?

Reporting obligations:

Currently Local Authorities are subject to specific reporting obligations to meet various EU Directives. Often these double up existing domestic reporting duties and require re-engineering existing information just to comply with these EU directives.

The European Union (Withdrawal) Act 2018 already confirmed that the reporting obligations currently enshrined in EU legislation (sustainable procurement, retrofitting of houses, waste, etc.) will continue to be collected and reported to Scottish and UK Ministers.

We are keen that such reporting obligations upon Councils are simplified, as some of the EU reporting duties effectively doubled up national reporting requirements (e.g. EU Energy Efficiency Directives) which in turn resulted in additional red tape for Councils and, critically, risk of EU sanctions for underreporting.

Thus, there is a clear case for any future reporting of EU derived legislation or their replacement to rely exclusively on domestic reporting obligations. In so doing the new Scottish or UK body or bodies should work with local government in identifying the opportunities for simplified reporting.

That said and coming back to the above question on continued engagement towards the EU, given that this data will continue to be collected it should be entirely possible that the UK decides to continue to voluntarily report to (or more specifically, share with) the EU the National Climate and Energy Plans that are currently being developed.

EU guidance and soft law

Many EU rules including those on EU environmental matters are 'soft law' or guidance (e.g. the 7th Environmental Action Programme, the EU 2030 and 2050 environmental, energy and climate programmes). These are not included in the Withdrawal Act (or the Continuity Acts). While they will remain in force during the transition/implementation period it would be useful to have an early indication whether the UK and Devolved administrations will continue adhering to those as well, and whether they are included in the sort of issues that the UK will seek to continue to align with the EU policy framework.

Part II: Scrutiny of government performance

Question 7: Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?

Question 8: How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?

Question 9: Which policy areas should be included within the scope of any scrutiny arrangements?

(Joint Answer Q7 to 9)

As discussed in Q5 and Q6 it should be entirely possible for the UK to continue to pool its existing environmental performance data with the continued EU. The Withdrawal Agreement already foresees this for the transition period and the Political Declaration does not rule that out. This is both a form of continuous engagement but also a key way of ensuring international benchmarking for domestic performance, over and above various frameworks that exist at OECD and United Nations levels.

The UK has committed to continue working with the EU, aligning and where possible going beyond the EU climate and energy ambitions. This is why, in spite of Brexit, the UK is preparing a National Energy and Climate Plans (NECP) which stems from EU Legislation- the Governance of the Energy Union Regulation. COSLA had successfully helped in the inclusion of a provision whereby such plans would be drafted with the input of Local Government. The draft proposal has been released recently, but only a passing mention is given to Local Government in general or Scottish Local Government in particular.

However, when it comes holding the UK or Scottish Government into account we believe that a separation of regulatory and enforcement roles is necessary , as discussed further below.

Part III: Considering complaints

Question 10: What do you think will be the impact in Scotland of the loss of EU complaint mechanisms?

Question 11: Will a new function be required to replace the current role of the European Commission in receiving complaints from individuals and organisations about compliance with environmental law?

(Joint Answer Q10 to Q11)

Most enforcement of EU environmental legislation is done by way of the supervisory powers of the European Commission, and the means of legal redress including sanctions for non or under compliance with EU Law provided by the European Court of Justice (ECJ). Though the enforcement of EU law in the UK has been much better than in similarly sized Member States (e.g. Germany) for quite some time, the UK is often at the receiving end of non-compliance procedures for lack or non-implementation of EU law, potentially leading to sanctions by the ECJ.

We believe that to ensure legal certainty similar complaints and legal redress mechanisms to those of the EU should be reproduced domestically. While we can count on the autonomy of the Courts to handle such cases, the crucial issue will be to ensure that supervision, complaints and enforcement powers are kept separate from those of the government of the day. While such a clear separation does not exist in the case of the Commission (as it is both a political and an enforcement body) the scale and diversity of the EU gives the commission a modicum of independence that will be more difficult to ensure in a much more close-knit context of Scotland or even the UK. Hence the need to insist, in the UK/Scotland post Brexit, on a harder separation between political/policy roles and enforcement and sanction roles.

Specifically, for local government under the terms of Part 2 of the Localism Act 2011 any EU infringement fine will be passed on to the concerned Councils. Given that the Scottish and UK Environment bills will aim to recreate domestically these EU frameworks for environmental justice, COSLA is seeking confirmation whether the provisions of Part 2 of the aforementioned act concerning the passing of EU fines would be phased out (as we prefer), replicated, or absorbed by this new domestic body or bodies.

Part IV: Enforcing action

Question 12: What do you think the impact will be in Scotland of the loss of EU enforcement powers?

Question 13: What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed?

(Joint answer Q12 to Q13)

Most enforcement of EU environmental legislation is done by way of the supervisory powers on the European Commission and the means of legal redress including sanctions for non or under compliance with EU Law provided by the European Court of Justice. We welcome that the Scottish and UK Governments are now preparing legislation to replicate this arrangement post Brexit.

We recognise that environmental matters do not know about boundaries and we do support that the UK remains broadly aligned with EU environmental legislation. COSLA would welcome the creation of a robust independent body to ensure high environmental standards that carries on the tasks currently carried out by the European Commission. However, we think that it would be contrary to the constitutional Devolution settlements that such a UK-wide body is an UK-Government body. At very least it should be within the ownership of the UK, Devolved and Local Governments. This shared multilevel governance should also be replicated within Scotland for Scottish only environmental matters that do not require an UK-wide arrangement.

COSLA would welcome the creation of an independent body to ensure high environmental standards that carries on the tasks currently carried out by the European Commission. Such a body should be independent of Government. Its structure should clearly separate policy and guidance making from enforcement. In fact, it could be argued would be preferable that these tasks are entrusted to **two separate bodies**:

- one dealing with policy/regulatory matters;
- and another dealing with enforcement.

On regulatory matters the tendency appears to be for UK-wide bodies that though formally independent from the UK Government are in fact a sub-set of the Westminster institutional framework. The UK Government's draft Environment (Principles and Governance) Bill, published in December 2018, establishes an Office for Environmental Protection (OEP), to take up the roles post Brexit currently exercised by the European Commission and Court of Justice of the European Union to hold countries, regions and Local Authorities to account.

This Office appears not to replicate the UK and Devolved partnership bodies that exist at present to deal with UK-wide EU environmental issues, such as the Joint Nature Conservation Committee and the UK Committee on Climate Change. The creation of this office appears to reproduce the same pattern of the UK Competition and Markets Authority (CMA) being designated as the post Brexit state aid regulator. Our concern is that unlike the European Commission these new bodies that are being created to deal with EU returned powers will not be seen as independent from Government. This will be particularly sensitive if the Scottish Government and the UK Government have conflicting points of view on a given case.

Only last week the House of Commons Environmental Audit Committee's pre-legislative scrutiny of the draft UK Environment (Governance and Principles) Bill identified serious concerns with proposed legislation to protect the environment if the UK leaves the European Union. The new UK regulator to replace the European Commission powers as enforcer of EU environmental legislation, the Office of Environmental Protection (OEP) has been identified by the Commons as weak. Furthermore, the relationship between the Scottish and UK environmental protection arrangements is not sufficiently robust and does not reflect partnership working. COSLA agrees with this assessment by the House of Commons, which has also been hinted by other Scottish Parliament Committees.

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COSLA