

# Environmental Governance Island of Ireland Network

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# The NI Protocol & the Environment

## *The implications for Northern Ireland, Ireland and the UK.*

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### Executive summary

- Brexit affects Northern Ireland differently. For the environment, this means Northern Ireland will have one foot in EU law and EU governance mechanisms (Commission, Court of Justice), and one foot in UK and NI law, with a new Office for Environmental Protection still to be established. This puts pressure on stakeholders to follow developments in Belfast, London and Brussels.
- Northern Ireland's unique arrangement creates opportunities for cooperation, on a North/South basis with the Republic of Ireland, within the UK through the ongoing establishment of Common Frameworks and via UK-EU committees set up by both the Withdrawal Agreement and Trade and Cooperation Agreement.
- In the absence of cross-cutting intra-UK and UK-EU commitments on non-regression, whether divergence or alignment develops in practice will vary on a policy case by case basis.

### Introduction

The Protocol on Ireland and Northern Ireland attached to the UK-EU Withdrawal Agreement (hereafter, the Protocol) is redrawing relations on, and within, these Islands. It has wide ranging implications for both policy and governance across a wide range of sectors. While some of the effects of the Protocol are already

highly visible (as disruption to GB/NI trade flows show) in other areas it may take months, if not years, for the effects of the Protocol to be felt. This delayed impact is compounded by the dynamic nature of the arrangement: for example the UK and EU meeting in the Joint Committee created by the Withdrawal Agreement can add legislation to the list of EU laws (in particular under Annex II of the Protocol) that will continue to apply to Northern Ireland. Moreover, under the mechanism for democratic consent (Article 18), the Northern Ireland Assembly will have to vote in 2024 on the continuation of Articles 5 to 10 of the Protocol.

This brief discusses what the Protocol means for the environment – in Northern Ireland, as well as in Great Britain and across the island of Ireland. It introduces the ‘new normal’ for the environment after Brexit framed by the implementation of the Protocol and, the new UK-EU Trade and Cooperation Agreement (TCA) and domestic UK legislation. It then explains how these new rules impact the environment, both in terms of policy and governance. As the new arrangements are dynamic and liable to change, the brief concludes by discussing case studies, highlighting opportunities and challenges for pursuing environmental action under the Protocol.

## The ‘new normal’?

### *The Protocol, Common Frameworks & the Trade and Cooperation Agreement*

EU membership has profoundly shaped environmental policy across the UK and Ireland. Both countries joined the European Economic Community in 1973 just as the EEC started developing environmental policies, from rules on air pollution to tackle forest dieback from acid rains, to water quality and birds protection. Over the last fifty years, the EU developed the largest and most ambitious body of environmental law in the world, with the UK acting both as a driver – in pushing for Climate action – and a stumbling block (notably when it came to agreeing a Soils Directive, or EU-wide Carbon Tax).

Environment has been a devolved competence since the late 1990s. This means that not only were the three devolved administrations of the UK (Scotland, Wales and Northern Ireland) in charge of implementing EU environmental rules, they have also been able to develop their own complementary approaches, such as Wales adopting its Wellbeing of Future Generations Act in 2015. Furthermore, as the environment is one of the six areas for North/South cooperation in the Belfast ‘Good Friday’ Agreement (GFA), a number of cross-border and all-island initiatives, both government and society-led, developed on the island of Ireland over the last twenty years.

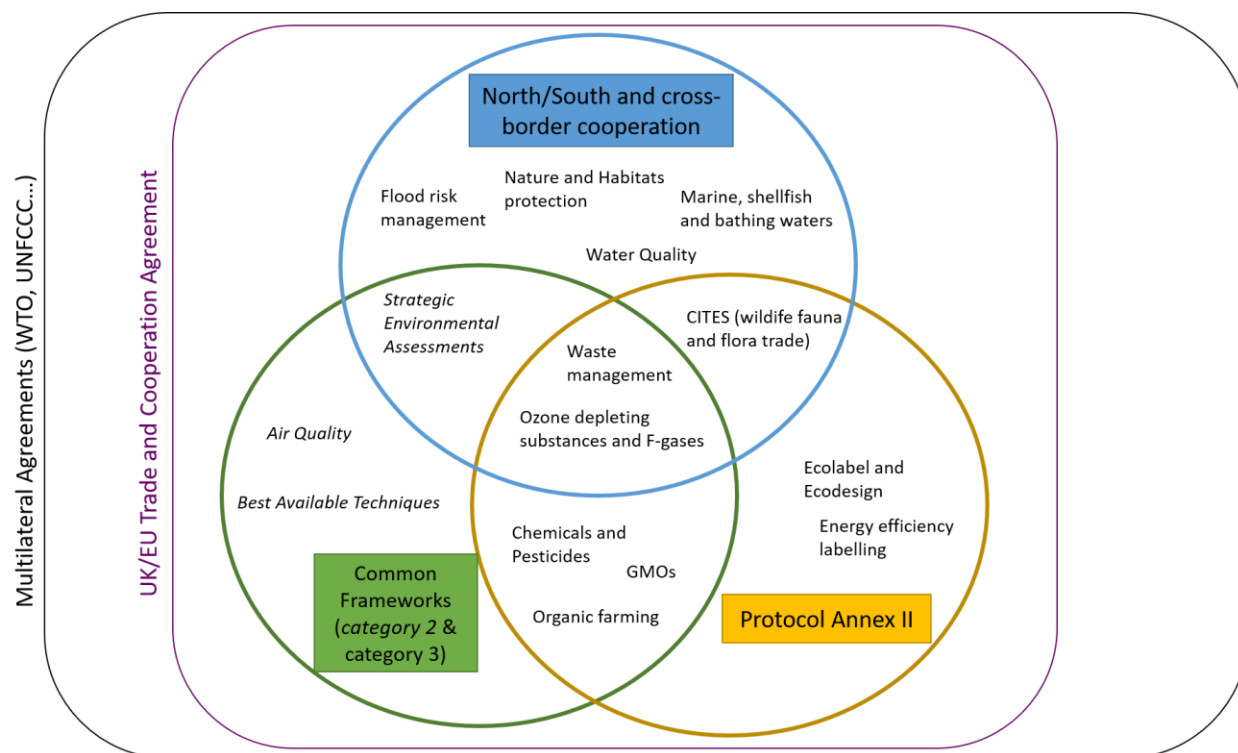
Brexit therefore raised fundamental questions for environmental action:

- Who would ‘take back control’ and be in charge of regulating the environment?
- How would cooperation – critical to tackling environmental problems which do not recognize national borders – continue both within the UK and between the UK and the EU?

After years of uncertainty and negotiations, the Transition Period is over and the new UK-EU relationship is in place. Together with new UK domestic developments (e.g. Common Frameworks, Internal Market Act), we can now find (some) answers to these questions. Within the UK, each of the four administrations will be allowed to pursue divergent environmental policies. But this licence to diverge is constrained by both international law (such as the UK’s pledges under the Paris Climate Agreement), the new UK-EU relationship, and domestic UK legislation. These constraints vary between different environmental policy areas, and affect parts of the UK differently (Figure 1).

The new UK-EU relationship is made up of the UK-EU 2019 Withdrawal Agreement (and its Protocol on Ireland/Northern Ireland) and of the UK-EU 2020 TCA, supplemented by decisions made jointly by both parties to implement the two documents. This new relationship goes further than standard EU Trade Agreements on the environment – by listing, for example, environmental principles and creating a mechanism for ensuring a Level Playing Field if divergence in environmental rules lead to a demonstrable negative effect on trade or investment. But it [falls far short of EU membership](#) in terms of requirements for governance and maintaining standards, and will offer only limited constraints on divergence – at least for Great Britain. Northern Ireland remains *de facto* in the EU Internal Market for goods and has to continue to apply EU rules in that domain, and is still under the supervision of EU institutions for compliance with these specific rules listed in Annex II of the Protocol.

**Figure 1: The Environment in the ‘new normal’ – constraints for policy making in different policy areas**



(Source: [UK-EU mapping of North South cooperation](#), Protocol [Annex II](#) and [Annex IV](#) and UK Government 2020 [Frameworks Analysis](#) – \*Frameworks in italics are non-legislative, category 2 frameworks and the rest are category 3, legislative frameworks, list of Annex II and IV non-exhaustive).

Whereas Northern Ireland *has to* keep pace with EU developments in narrow categories of EU law and cannot diverge from EU standards in these areas, the Scottish Government *wants to* keep pace. The [Scottish 2021 Continuity Act](#) gives power to the Scottish Government to continue to align voluntarily with the EU. Other relevant environmental rules can be found in Annex IV of the Protocol (on the Single Electricity Market) – but these only ‘apply to and in the United Kingdom in respect of Northern Ireland insofar as they apply to the generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity’.

Domestic legislation adds further constraints. Common Frameworks are currently being developed to foster reciprocal engagement and consider the impact of divergence in one administration on the others. The content of the few Common Frameworks that have been made public appears to focus mostly on duties to inform each other, and dispute resolution mechanisms, and are unlikely to prove an insurmountable barrier to policy divergence. Conversely the UK Internal Market Act, and in particular the two principles for Market Access it defines (mutual recognition and non-discrimination) will limit the effectiveness of divergence, making local rules only applicable to local products, not products coming from the rest of the UK or from partners in trade agreements. As the [Institute for Government](#) argues, this ‘could create a “chilling effect” on [devolved administration’s] legislating in areas of their competence that would prevent fruitful divergence being tried and then adopted by other parts of the UK’.

With each of these constraints come opportunities to cooperate. The establishment of Common Frameworks will make frequent contact between officials working on shared topics in the four UK administrations more common. The Protocol supports the development of new areas of cooperation, and the Taoiseach’s Shared Island initiative seeks to expand environmental cooperation in areas such as climate change mitigation. The UK-EU TCA goes further than standard EU Trade Agreements in offering opportunities for regulatory cooperation and collaboration in multilateral environmental negotiations. But these require political will to cooperate from all sides – which is far from certain.

## Changing rules, changing governance?

### *Three categories of environmental law in Northern Ireland*

Environmental policy in Northern Ireland now falls under three distinct categories (see Figure 2). As with the rest of the UK, it has its own domestic rules (either UK-wide or devolved) and ‘Retained EU law’, EU directives and regulations which have been kept on the statute book but are no longer underpinned by EU governance mechanisms. The Protocol creates a third category, EU Protocol Law: all the EU rules that Northern Ireland has to continue to comply with, under the supervision of EU governance mechanisms. For the environment, this concerns e.g. waste, chemicals, pesticides, GMOs or eco-design (see Figure 1).

For environmental actors, this governance arrangements means following policy developments in multiple arenas, and becoming familiar with very different compliance mechanisms depending on the environmental issue at hand. For EU Protocol Law rules can change in two different ways. First, EU directives and regulations already listed in Annex II can be revised at EU level requiring NI provisions implementing them to be updated as well – a recent example is the EU ban on [lead shot in wetlands](#) which was agreed under the REACH regulation on chemicals, which is listed in Annex II. Second, UK and EU representatives meeting in the Withdrawal Agreement Joint Committee can decide jointly to add new legislation to Annex II, or to other Protocol Annexes although these are less likely to apply to environmental policy. In December 2020, for example, both parties agreed to add the new Directive (EU) 2019/904 on single use plastics to Annex II.

When it comes to EU Protocol law, the NI Assembly has no power to modify it. Thus, pathways to influence decision-making for EU Protocol law – both in terms of revisions to existing Annex II rules, and additions to this Annex – will mostly be informal. A NI voice in Brussels, both the NI Executive Office in Brussels, and continued engagement from business and civil society with their respective umbrella groups will be critical in making sure NI concerns are heard at an early stage. Another avenue for influence will be the

institutions set up in both the Withdrawal Agreement (such as the Specialised Committee or Joint Consultative Working Group) and the Trade and Cooperation Agreement (such as the Civil Society Forum) – the latter two have not yet begun operating and who will be nominated to them remains uncertain.

**Figure 2: Three categories of environmental law in Northern Ireland post January 2021**

	EU Protocol Law 333 EU regs & directives 13 Articles TFEU 37 EC guidelines & notices	UK Law Common Frameworks UKIM Act 2020 (s11, s55 & part5)   Agriculture Act 2020 (s48 & Sch6)   Environmental Bill	'Retained EU Law' s6(7) of EU (Withdrawal) Act 2018
Who decides new policy?	<ul style="list-style-type: none"> <li>UK-EU Joint Committee</li> <li>Specialized Committee on IRE/NI Protocol</li> <li>Joint Consultative Working Group</li> </ul> NI Assembly no power to modify	UK government & parliament conventional power to legislate  NI Assembly power to modify subject to devolved competency constraints [s6 & Sch 2&3 of NI Act 1998]	UK government & government conventional power to legislate [s7 of EU(W) Act 2018]  NI Assembly power to modify subject to devolved competency constraints [s6A & s24(3) of NI Act 1998]
Who ensures compliance?	Legal cases heard under EU (Withdrawal) Act 2018 s7A  EU supremacy principle applies, Charter of Fundamental Rights applies; Article 267 TFEU references to CJEU possible; Francovich damages claims possible	Conventional UK law provisions apply	Legal cases heard under EU (Withdrawal) Act 2018 s2-6 & Sch1  EU law supremacy principle does not apply, narrow scope of general EU law principles [s6 of EU(W) Act 2018]
	<i>New environmental regulators</i> <ul style="list-style-type: none"> <li>Office for Environmental Protection (England, Northern Ireland), pending Environment Bill</li> <li>Environment Standard Scotland</li> <li>Welsh regulator to be established after May 2021 elections</li> </ul>		

### *Governance mechanisms, new and old*

Whereas EU Protocol law requires new avenues to influence policy-making, its compliance mechanisms, and what can be done to hold government accountable to its environmental commitments are well known. Conversely, while influencing policy-making for domestic and retained EU law will be familiar to stakeholders, environmental governance across the UK is in flux. Brexit challenged environmental governance – when EU institutions (especially the Commission, the Court of Justice and the European Environment Agency) exercised a governance function (e.g. policy formulation, monitoring, coordination or enforcement), the UK’s departure from the EU fuelled concerns: would these institutions be replaced and these functions maintained, and how? The four administrations have failed to agree a UK-wide regulator. Instead, Scotland has already established [Environment Standards Scotland](#) (currently on a non-statutory basis), Wales is waiting on the May 2021 elections before setting up a Commission for the Environment, as outlined by its [Environmental Governance Stakeholder Task Group](#) in 2020. Both the Scottish regulator and the Welsh plans were developed in reaction to perceived limitations of the English plans for an Office for Environmental Protection (OEP), which Northern Ireland opted to join. The OEP has been repeatedly delayed and will only be established in non-statutory form in July.

If the Environment Bill (expected to return to the Commons in the Autumn) passes as is, the OEP will be less independent than its Scottish (and most likely, Welsh) counterpart. A further concern with the OEP is the status of environmental principles – which risk being undermined as public authorities will not have to comply with the principles directly, but with a statement on principles written by the Secretary of State for the Environment. In Scotland, the principles are granted legal status, and the [Welsh government](#) accepted the recommendation that “there should be a duty on the Welsh Ministers to apply the principles in the development of policy and legislation rather than the publication of a policy statement on principles.” Thus, while the Internal Market Act may curtail divergence in policy, we are already seeing (further) divergence in environmental governance – and Northern Ireland, the only part of the UK which did not develop a regulator, nor has an independent environmental agency, opted to join what is likely to be the least ambitious of the UK regulators.

The establishment of different regulators within the UK raises questions for data sharing and general cooperation between regulators, from tackling cross-border issues to sharing best enforcement practices. For Northern Ireland, these questions are compounded by both the Protocol – and thus a much greater role for the European Commission and Court of Justice of the EU on governance of *some* environmental issues – as well as cross-border and all-island challenges which will require North/South cooperation to address. The [mapping of North-South cooperation](#) produced during the UK-EU negotiations (see Figure 1) highlighted a wide range of bottom-up and top-down forms of cooperation – and the most recent Communiqué of the [North/South Environment ministerial council](#) in October 2020 shows that further work is needed on areas such as developing a ‘joint programme of enforcement and collaboration on tackling environmental crime’ or ‘encouraging cooperation and knowledge sharing in relation to the environmental impact of agricultural activities and related issues’. But the health of North/South cooperation depends on political goodwill on both sides – which is increasingly frayed over the troublesome implementation of the Protocol.

## Case studies: policy challenges and opportunities

### **ISSUE: Safe Management of Spent Fuel & Radioactive Waste**

**PROTOCOL LAW:** applies EU directive [206/117/Euratom](#) that sets out rules for the transport and control of shipments with **radioactive waste and spent fuel**

**DOMESTIC LAW:** the 206/117 directive was revoked in Great Britain (SI [2019/156](#)) but continues to have effect in Northern Ireland (SI [2020/1115](#)) as EU Protocol law.

**COMMON FRAMEWORKS:** this policy is classified as a ‘category 2’ area where common rules ought to be agreed between the UK government and devolved administrations but short of primary legislation

#### *What Does This Mean?*

Northern Ireland will continue to recognise safety checks and certifications on relevant shipments coming from other EU Member States to NI or travelling through NI; Great Britain will not recognise EU checks and certifications for relevant shipments seeking to travel to or through GB. Any relevant shipments from EU Member States, including the Republic of Ireland, can therefore travel more freely in NI than in GB; however, this presents a potential challenge for relevant shipments moving from GB to NI *if* a common framework is not agreed.

## ISSUE: Lead Shot in Wetlands

**PROTOCOL LAW:** applies EU regulation 1907/2006/EC on the **Registration, Evaluation, Authorisation and Restriction of Chemicals** which established the European Chemicals Agency. A new ban on the use of lead shot in Wetlands in the EU came into force on 25 January, as a revision to an annex of the REACH regulation.

**DOMESTIC LAW:** While Northern Ireland remains under REACH, chemicals in Great Britain are now regulated via UK Reach ([SI 2019/78](#)). Partial bans on the use of lead shot in wetlands already exist in Scotland (SSI 2004/358) and Northern Ireland (S.R.2009/168) but are more limited in scope (narrower definition of wetland). England and Wales followed a different approach, banning the use of lead shot against certain species, not in certain habitats.

**COMMON FRAMEWORKS:** regulation and policies covering chemicals are classified as a 'category 3' area where primary legislation may be required to implement common rules and ways of working

### *What Does This Mean?*

Lead shot in wetlands is both an example of pre-Brexit intra-UK divergence and one where Northern Ireland has been more ambitious than the Republic, which had no ban in place. It's also an example of potential dynamic alignment between the UK and the EU after Brexit and very much a live issue on both sides of the channel. In late March the EU announced a consultation on broadening the ban beyond wetlands while the UK government announced it would also consult the public on a ban of lead ammunition to protect wildlife and nature as part of new plans under UK REACH.

## ISSUE: Regulating Plastic Waste

**PROTOCOL LAW:** applies EU directive [94/62/EC](#) on **packaging and packaging waste** that sets targets for recovery and recycling of packaging waste AND EU directive [2019/904](#) on the reduction of the impact of **certain plastic products on the environment** which introduces reporting requirements on measures taken to reduce single-use plastics

**DOMESTIC LAW:** domestic regulations made in 2019 (SI [2019/271](#)) that would have disapplied the relevant (previously) EU law were revised in 2020 (SI [2020/345](#)) to reflect the requirements of the Protocol and, later, an update to Annex II.

**COMMON FRAMEWORKS:** regulation and policies covering landfill waste/recycling are classified as a 'category 3' area where primary legislation may be required to implement common rules.

### *What Does This Mean?*

Northern Ireland producers will follow different regulations in respect to single-use plastics and packaging of products. Due to provisions in the UK Internal Market Act 2020 this may put NI producers at a disadvantage *if* GB reduce environmental targets in respects to packaging, recycling and single-use plastics. That said, the [Scottish Government](#) and the [Welsh government](#) have both indicated a desire to align with EU directive 2019/904 which suggests NI will not be an outlier in implementing the EU standards on single-use plastics. The UK-wide picture is still uncertain as while the English (UK) earlier but narrower ban is now in place, Scotland and Wales have yet to bring in the necessary legislation they *want* to enact. From an NI perspective, this means NI authorities *must* develop a strategy to reduce consumption of plastic waste (by 1 January 2022) – this fits with the NI Executive [Programme for Government](#) target outcome “to live and work [more] sustainably” ...

## Conclusions

The post-Brexit framework for governance of Northern Ireland in particular, but also in Great Britain and on the island of Ireland, is complex. Managing the various ‘moving parts’ of governance – the development of the UK internal market; the dynamic alignment of Northern Ireland to the EU Single Market in goods under the Protocol; and the cross-border, North-South element, including in those areas covered by the Protocol – raises significant challenges and questions as regards scrutiny, transparency and monitoring.

While the complexity raises challenges, there is also the potential for more ambitious environmental policies to be developed in the post-Brexit era, across and between jurisdictions in the UK and Ireland. Some early signs of alignment in policy *aims* are to be welcomed but delivering on these will require new legislative solutions, innovative institutional cooperation (using both GFA and EU-UK channels) and the political desire to do so at the local, regional, national and international levels.

Opportunities for stakeholders to input directly to policy processes exist (via e.g. the Specialised Committee, JCWG, North-South Implementation Bodies and TCA oversight committees) but these are, as yet, largely untested; making full use of future opportunities for civic engagement will, however, be essential to ensuring rational, progressive policy solutions emerge for all-island environmental governance after Brexit.

*The Environmental Governance Island of Ireland network is an academic network (funded by an ESRC/IRC network grant) which brings together academics from Queen’s University Belfast and University College Dublin, together with NI Environment Link and the Irish Environmental Network to map existing cooperation, challenges and opportunities for all-island environmental governance after Brexit. Find out more about this network, and the broader Brexit & Environment initiative on <https://www.brexitenvironment.co.uk/research-projects/egii/>*

