The accountability gap: Scottish environmental protections post-Brexit, October 2019

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Summary

Scotland's environmental protections have developed and improved during the 45 years of the UK's membership of the European Union. These improvements have been driven in part by the regulatory role of the European Commission and the European Court of Justice, which have the authority to hold national governments and their agencies to account – a function that will disappear post-Brexit. This paper reviews examples of how this supra-national accountability has obliged governments to improve protections for the environment over and above their domestic agendas. We also canvassed a representative sample of the Scottish public and found strong support for a replacement independent body to ensure government accountability post-Brexit.

Introduction

Environmental management is a shared competence between the European Union and Member States, meaning they will work jointly to pursue the objectives of preserving, protecting and improving the quality of the environment; protecting human health; the prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Over the 45 years of our membership, we have seen many significant environmental improvements, for example reductions in many air pollutants[1], greenhouse gas emissions[2], and the designation of Marine Protected Areas[3]. However, performance on issues such as protecting biodiversity[4] or water quality[5] has been comparatively poorer.

Key findings

The European Commission and European Court of Justice have played an important role in driving up environmental standards in Europe.

The European Commission helps enforce environmental obligations through monitoring and through taking infringement actions, which can potentially escalate to the European Court of Justice.

Often the nudging effect of opening infringement proceedings is sufficient for a Member State to undertake corrective actions and come into compliance.

Case studies show that government agencies alone may not always effectively implement environmental protections, and that it has taken a body independent of domestic government to encourage compliance.

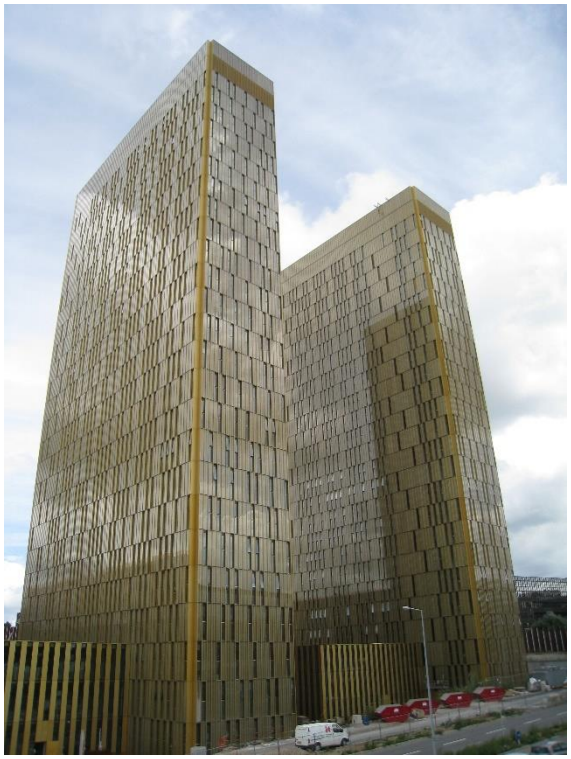
When a representative sample of the public was asked, we found 81% of respondents supported the creation on an independent body to replace the current oversight role of the European Commission.

We found support for a replacement body was high across the political spectrum, and supported by a majority of both Leave and Remain voters.

The European Union primarily regulates the environment through the passing of Directives – EU-level

[1] For example, across the EU, sulphur oxides reduced by 90% between 1990 and 2016, non-methane volatile organic compounds by 62%, and nitrogen oxides by 58% (Source: Eurostat)
[2] Greenhouse gas emissions across the EU reduced by 20% between 1990 and 2016 (Source: European Environment Agency)
[3] Between 2013 and 2018, the surface area covered by Marine Protected Areas in the EU increased from 251,566 km^2 to 551, 899 km^2
[4] For example, measured by bird species, which are particularly sensitive to changes to habitats, common farmland birds in the EU declined by 36% between 1990 and 2016, common forest birds by 10.8%, and all common birds by 13.2% (Source: Eurostat)
[5] In 2019, the European Environment Agency concluded that chemical pollution impacted most EU surface water bodies (49%), followed by changes to the river structure and flow (40 %) and nutrient pollution (28 %).

legislation[6]. The European Commission, the Union's executive body, is charged with ensuring that Member States comply with their obligations under EU Law



The European Court of Justice, source: Wikicommons

through the correct transposition of Directives into national law. Where the Commission considers a Member State has not effectively discharged its duties, it can raise a case with the European Court of Justice. The Commission therefore plays a key supervisory role in the implementation of, and compliance with, environmental Directives.

For Scotland, environment is a devolved matter and it is the Scottish Parliament which is responsible for the implementation and application of environmental measures. In the following sections, we outline how the combination of the European Commission and the European Court of Justice has worked to secure stronger environmental protections by challenging national governments. We conclude by asking how Scotland can ensure a similar level of environmental protection post-Brexit, and with the removal of European Commission and European Court of Justice oversight.

Reporting obligations

A number of EU Directives contain reporting obligations, with Member States required to report to the European Commission on how they are implementing the substantive requirements of the Directive.

For example, Article 12 of the Birds Directive (Directive 2009/147/EC) provides that every three years Member States must report to the Commission on the implementation of national measures taken under the Directive. The Commission then prepares a report of its own, on the basis of this data, evaluating the effectiveness of the national measures taken in achieving the objectives of the Directive.

Article 8 of the Birds Directive also makes provision for reporting in cases where a Member State seeks to make a derogation from the Directive. On the basis of this information the Commission will investigate to ensure that the consequences of the derogation are not incompatible with the Directive. If the derogation is of a nature not permitted by the Directive, the Commission may begin its infringement procedure.

Post-Brexit, Scottish environmental law could contain similar reporting obligations to be submitted to a newly established environmental body to help monitor the implementation of the law to ensure the achievement of environmental objectives.

Infringement procedures

The European Commission also has the power to commence infringement proceedings against a Member State in one of three circumstances where it believes there is:

1. Non-Communication[7] – the Member State has not transposed a Directive in time or where the Member State has not communicated the details of the transposition to the Commission correctly.

2. Incorrect Implementation –the Member State has not implemented the Directive fully or correctly.

3. Incorrect Application – the Member State is not in compliance with the Directive despite having correctly transposed it into national law.

There are two "steps" to the Infringement Procedure process, as set out below.

"Soft" enforcement

Article 258 of the Treaty on the Functioning of the European Union (TFEU) provides that where the Member State is not in compliance with its EU obligations, the European Commission may commence its infringement procedure. The process begins with the Commission sending a formal letter of notice to the Member State concerned requesting further information in respect of

[6] Directives such as the Birds (1979), Habitats (1992), or Water Framework (2000) are among the fundamental building blocks of our environmental protections.

[7] Non-Communication is an EU-specific situation and therefore not entirely relevant for the purposes of this discussion about the establishment of a new oversight body and therefore will not be considered for the purposes of this paper.

the suspected breach of EU law. The Member State is given a specified period in which to reply – usually two months. In some instances the issuance of formal notice by the Commission is enough to alert the Member State to the fact they are not in compliance with EU Law and for them to rectify the deficiencies. However, if after having received the reply from the Member State, the Commission concludes that the Member State is not in compliance with EU law it can then send a reasoned opinion. A reasoned opinion is a formal request to comply with EU law, and sets out why the Commission believes the Member State is in breach of its obligations. The Member State is given two months to rectify the issue and inform the Commission of the corrective measures taken. In most instances the issuance of a reasoned opinion is enough to bring the Member State into compliance with EU Law.

Member States do not wish to be found to be out of compliance with EU law. The Commission, in issuing a reasoned opinion, can often effectively "focus the mind" of a national government to motivate them to bring their legalisation and actions into compliance.

"Hard" enforcement: referral to the ECJ

Where the Member State does not comply with the Opinion of the European Commission within the prescribed period, the Commission may bring the matter to the European Court of Justice (ECJ) for adjudication. Where the ECJ finds that the Member State has failed to fulfil its obligation, Article 260 of the TFEU provides that the Member State concerned must take the necessary measures to comply with the judgment of the Court. Where the Member State does not take all necessary steps to comply with the judgment the Commission may bring the case back to the ECJ for the imposition of financial penalties.

Harbour porpoise, source: Wikicommons

A new, independent Scottish environmental body could, where a government agency, or similar, is not in compliance with national legislation, as a last resort refer the case to domestic courts to hold such an agency to account. Such an enforcement mechanism is not only effective in instances where the Court makes a finding that a government agency, or similar, is not in compliance with its environmental obligations, but also has a potentially deterrent effect, operating as a "stick" and incentivising compliance under the soft enforcement mechanism.

EXAMPLES OF EUROPEAN COMMISSION OVERSIGHT AND THE LESSONS TO BE DRAWN

These then are the roles and powers of the European Commission and the European Court of Justice, but what do these this mean in practice? Below we set out a number of real-life cases which better illustrate these points.

IMPLEMENTATION

Firstly, we look at an example of failing to effectively implement legislation.

Case C-669/16 *European Commission v United Kingdom of Great Britain and Northern Ireland*

This case concerns Directive 92/43/EEC, more commonly known as the Habitats Directive. The European Commission received a complaint from the World Wide Fund for Nature alleging that the UK had failed to designate Special Areas of Conservation (SAC) for Harbour Porpoise as required by the Habitats Directive. In October 2012 the European Commission sent formal notice to the UK, seeking clarification in a number of respects. In August 2013, ten months later, the UK replied indicating it was continuing its investigation into areas suitable for designation. However by October 2014 the UK had not designated any further SACs. The Commission decided to commence infringement proceedings and issued a reasoned opinion to the UK in respect of its obligation under the Habitats Directive to protect Harbour Porpoise. The UK replied in December 2014 outlining the steps it had taken to identify SACs for Harbour Porpoise and suggested a timetable for completion of the necessary steps, including the holding of a public consultation.

Six months later the UK submitted to the Commission eight potential SACs. Public consultation on these sites commenced in January 2016 in respect of those located in England and Wales, and March 2016 for those in Scotland. In September 2016 the UK formally submitted to the Commission the site in the Inner Hebrides and Minches as a SAC. The Commission however was of the view that this was insufficient, and the UK had not taken the measures necessary to fulfil its obligations under the Habitats Directive, and in December 2016 brought the matter to the ECJ. In its judgment dated 18 October 2018 the Court held that the UK had failed to propose a list of sites with potential for designation as SACs within the prescribed period and as a result failed in its obligations under the Habitats Directive.

This case is interesting in a number of respects:

1. It began with a complaint from a non-governmental organisation – should a new Scottish body should be able to receive complaints from the public, including NGOs? Often NGOs have more time and expertise to monitor the implementation of laws in a way that individual citizens may not be able to.
2. It shows the interaction between the Commission and the Member State to try and

resolve the issue before turning to the Court in the last instance.

3. It illustrates the divide that exists between legislating to protect the environment and actually taking measures to protect the environment. The Scottish Parliament, with the best of intentions, legislated for some aspects of environmental protection but it took external oversight and prompting for the Scottish Government and its agencies to make progress.

APPLICATION

Secondly, we look at examples of incorrect application. Here the law has been implemented correctly into domestic legislation, but there has been an error in how it has been applied, or an incorrect decision has been made.

Case C-301/10 Commission v United Kingdom of Great Britain and Northern Ireland

This case concerns the application of Directive 91/271/EEC to, amongst others, Whitburn Pumping Station in Sunderland. The Directive relates to the collection, treatment and discharge of urban waste water. The European Commission launched infringement proceedings in April 2003 against the UK in respect of Whitburn Pumping Station and a number of other locations in London for failing in its obligation under the Directive to prevent storm water overflow. It was the contention of the Commission that the Directive be interpreted as providing an absolute obligation on Member States to avoid spills from storm water overflows except in exceptional circumstances. The UK argued however that the Directive provided discretion to Member States to determine how urban waste water should be collected and treated provided that it reached the objectives of the Directive: to protect the environment from the adverse effects of waste water discharge. Extensive correspondence was exchanged between the Commission and the UK from April 2003 and June 2010, at which time the Commission decided to bring the case before the ECJ for adjudication as it remained unsatisfied with the response from the UK. The ECJ found in favour of the European Commission, holding that the system in place at Whitburn Pumping Station did not meet the standards required by Directive 91/271. The UK was given until December 2017 to resolve the issue. In September 2017, two months before the expiry of the term, a large investment project commenced at Whitburn Pumping Station to bring the water treatment system into compliance with Directive 91/271. However the European Commission was of the view that these upgrades had not sufficiently reduced waste water spills and in January 2019 issued its final reminder to the UK to comply with the Directive within two months or it would refer the case back to the ECJ requesting financial sanctions.

In this instance, even where the Commission had gone to the ECJ seeking a judgment requiring the UK to comply with their obligations the UK did not comply to the satisfaction of the Commission. Oversight therefore does not stop once judgment has been handed down. In a domestic context, if the new national environmental body brought a public authority, or similar, to Court they would still need to maintain oversight over the action taken to comply with the judgment.

In respect of the establishment of a new national environmental body, incorrect application may be particularly relevant and effective in overseeing the decisions of public bodies (who would traditionally be subject to judicial review) in a quick and cost-effective manner, as well as ensuring more general compliance by public bodies with their legal obligations.

Case C-346/08 Commission v United Kingdom of Great Britain and Northern Ireland

This case relates to Directive 2001/80/EC which limits the emission of certain pollutants into the air from large combustion plants. The Directive provides for Member States to report to the European Commission with the results of their programs implementing the Directive. In November 2003 the UK submitted its report to the Commission in respect of, amongst others, Lynemouth power plant which this case concerns.

Lynemouth power station, source: Wikicommons

Lynemouth power plant was producing emissions of the type concerned by the Directive accounting for 4% of the total amount of that pollutant emitted by the UK. In April 2005 the UK submitted its next report which included Lynemouth, but in its third report in February 2006 failed to include reference to Lynemouth. In September 2006 the Commission began infringement proceedings requesting information from the UK as to why Lynemouth was not included. In their reply of February 2007 the UK stated that it believed the Lynemouth power plant qualified for an exception under the Directive. The Commission was not of the opinion that Lynemouth was the type of plant which qualified for the derogation and

in December 2007 referred the case to the ECJ for adjudication.

On 28 April 2005 the UK submitted updated plans which included the Lynemouth power plant, but a second revision submitted on 28 February 2006 did not include reference to Lynemouth. On 4 September 2006 the Commission wrote to the UK to inform them that the omission of Lynemouth from the plans was not in compliance with the Directive. In their reply dated 2 February 2007 the UK stated that the Lynemouth power plan qualified for an exception under the Directive. The Commission on 21 December 2007 referred the case to the ECJ. The Court found that the Lynemouth power plant did not fall within the exceptions set out in the Directive as it does not make direct use of the products of combustion in its manufacturing processes.

It is worth noting that the UK argued in its submission that if the Lynemouth plant was subject to the restrictions that were set out in the Directive this would place financial hardship on the owners/operators of the plant and they would have to cease trading thus having a negative economic effect on the wider area. In the event, the ECJ did not even deal with this point in its decision, arguably not willing to consider the economic argument as a justification to set aside environmental or human health considerations.

INTERNATIONAL OBLIGATIONS

Finally, we can see the contrast between the executive and legal oversight provided by the European Commission and European Court of Justice, and a more loosely structured system where compliance is voluntary.

Case C-530/11 European Commission v United Kingdom of Great Britain and Northern Ireland
Better known as the Aarhus Convention, the United Nations Economic Commission for Europe's (UNECE) 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was ratified by the European Union on 17 February 2005 and the UK on 23 February 2005. The European Union implemented the provisions of the Aarhus Convention in Directive 2003/35/EC (amending a previous Directive). As a result the UK had obligations not only under the Aarhus Convention itself, which it had ratified as a member of the UNECE, but also an obligation to transpose Directive 2003/35/EC concerning the Aarhus Convention. In October 2007, the European Commission sent a formal letter of notice to the UK. Unsatisfied with the reply received in March 2010 the Commission issued the UK with a reasoned opinion that it had infringed upon the requirement in Directive 2003/35 that judicial proceedings not be prohibitively expensive. After a further unsatisfactory response from the UK in July 2010 the Commission referred the case to the ECJ. The ECJ held that, even taking account of the nature of common law, the UK had not imposed, with enough clarity or precision, on its national courts the requirement that judicial proceedings should not be prohibitively expensive. The Court found that the UK had failed to transpose its obligations in respect of Directive 20003/35.

The UK had ratified the Aarhus Convention in its own capacity as a state separate to the ratification by the EU. The European Commission only has competency to begin infringement proceedings in respect of a Member State's failure to transpose/implement/apply Directives. In this case, the EU Directive was transposing an international/regional obligation. As a result the infringement procedure of the European Commission de facto operated to hold the UK accountable for its international/regional obligations. Article 15 of the Aarhus Convention itself contains provision for reviewing compliance of the parties under the Convention however this body is non-confrontational, non-judicial and consultative in nature and as such relatively weak in comparison to the European Commission infringement procedure.

WHAT DOES THE PUBLIC THINK?

To test these issues in the court of public opinion, in September 2019 the National Trust for Scotland commissioned market research company Survation to poll 1,000 people, constituting a representative sample of the Scottish population. Our polling found that there was strong support for a new body to replace the functions of the European Commission/European Court of Justice.

When asked whether:

> *"The European Commission and the European Court of Justice currently help to monitor and maintain environmental laws in EU member states, covering issues such as air and water quality, and the protection of wildlife. These bodies are independent of government, and have resources and expertise to launch investigations and, if necessary, to fine governments. After the UK has left the EU, would you support or oppose the creation of an environmental protection body to ensure that Scotland upholds similar levels of environmental protections as currently?"*

We found that 81% of respondents supported the creation of such a body, 1% were opposed, 10% were neither supportive nor opposed, and 8% did not know.

We found majority support across all age groups, and all regions, and regardless of whether respondents were in rural or in urban areas. There was more variation by political party support, based on how respondents had voted in the 2016 Scottish Parliament elections, with SNP voters highest at 90%, followed by Liberal Democrat (89%), Labour (87%), and Conservative (79%), with "Others" at 65%.

Interestingly, support for a new, independent body to replace European Union protections was high regardless of how respondents had voted in the 2016 EU referendum. We found that 81% of Leave voters, and 90% of Remain voters, supported the creation of a replacement environmental protection body.
We asked the same group a follow-up question as to what specific functions, if any, it should have. Again, there was majority support for all functions to be incorporated in the new body, though preferences varied somewhat:

Able to accept complaints from the public	71%
Able to initiate investigations	70%
Able to require the Scottish government to report on progress on protections	69%
Independent of government	67%
Able to take enforcement actions against the Scottish government	60%
Don't know	5%
Other	2%

There was more demographic and regional variation in response to this question. Younger cohorts were less likely to identify a need for specific functions than older cohorts – though in every case support was above 50%. Respondents from different regions also varied in their support, for example support for independence from government was highest in the South of Scotland at 79%, and lowest in the Highlands & Islands at 55%. Again, support for each function was above 50% in each region.

Finally, there was some difference by whether respondents were in urban or rural areas. Rural residents were more likely to support independence from government than urban residents (70% compared to 63%), to require the Scottish Government to report on progress (73% to 63%), and to be able to take enforcement actions against the government (61% to 51%).

Conclusions

The Scottish Government has previously made commitments to sustain the same levels of environmental protections in Scotland after it has exited the European Union[8]. The European Commission and European Court of Justice have held national governments to account in a way not possible for domestic institutions under the immediate control of those governments, presenting a challenge for Scotland to maintain the same level of protections without institutional change. When asked through a representative survey, the Scottish public strongly supports the principle of an independent environmental protection body to replace the EC/ECJ role - whether respondents were Leave or Remain voters. There is also majority support for such a replacement body to have many of the features of the existing oversight regime – including monitoring, receiving complaints from the public, and able to initiate investigations.

Recommendations

Consideration should be given to establishing an environmental protection body independent of government and its agencies, and able to monitor, prompt, and ultimately hold these bodies to account for the effectiveness of their environmental protections.

Independence from government, but with accountability to the public, is probably most readily secured by having the new body report directly to the Scottish Parliament. Whichever the preferred method of ensuring independence from government, the new body should at a minimum have the authority and resources to obtain monitoring data, and to undertake investigations.

To fully replicate current levels of environmental protection, the new body should also be able to accept complaints from the public, and to take enforcement actions.

[8] For example, in the Scottish Government's 2019 *Consultation on Environmental Principles and Governance in Scotland* document: "The Scottish Government has committed to maintain or exceed EU environmental standards", and "We need to ensure we have robust arrangements for a future where there is no longer oversight from Europe. In addition, we must prepare to fulfil any new obligations to demonstrate compliance with environmental standards."