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A Legal Perspective on the Value of Scotland's EU Membership for the Agro Environment

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A Legal Perspective on the Value of Scotland's EU Membership for the Agro Environment

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1 Introduction

This submission provides legal evidence in support of a positive evaluation of Scotland's EU membership, in the form of an assessment of the EU's regime for sustainable agriculture and an assessment of the possible impacts of 'Brexit' on the agro environment. Agriculture-focussed Brexit-discussions have emphasised the social and economic worth of the UK and Scotland's EU membership for the countryside. However, with farmers acting as custodians to around 80% of Scotland's land surface,² their management decisions are of great significance to the state and future of Scotland's natural heritage. **Questions regarding the role of law in fostering and impeding agro environmental stewardship should thus be a part of Scotland's debates on Brexit and its impacts.**

This submission provides a brief outline of the main features of the EU's legal regime on crop production, including Common Agricultural Policy (CAP) payments and relevant risk and environmental regulations. It considers their positive and negative impacts on the Scottish agro environment, taking into account ongoing evolutions in the field like movements towards an integrated, ecosystem-based approach to environmental governance, to allow for an informed appraisal of EU cooperation (§2). It will then discuss the possible implications of the UK leaving the EU on the Scottish environment, taking into consideration commonalities and divergences in interests and priorities between

¹ Member of Scottish Universities Legal Network on Europe (SULNE).

Key findings:

- Questions regarding the role of law in fostering and impeding agro environmental stewardship should be a part of Scotland's Brexit debates.
- EU law provides for a broad and increasingly integrated regulatory framework in support of environmentally-friendly farming practices.
- The implications of Brexit for the **level of protection** of the Scottish agro environment are **uncertain**.
- There are no legal obstacles that prevent Scotland from maintaining high, EU-levels of protection, with the possible exception of the levels currently set by EU risk regulations.
- Yet, market factors may determine equal (and likely lowered) levels of agro environmental protection across the UK, if farmers were put at a competitive disadvantage compared to their EU counterparts by cuts in public funding.
- Whether EU levels of environmental protection can be upheld will thus likely depend on the UK's willingness to provide sufficient financial support to do so. The implications of **foreseen budget reforms** are perceived as **negative**.
- The UK is expected to reduce direct payments and cross-compliance rules, which could lead to enforcement problems.
- The expected focus of the UK on the funding of targeted, voluntary rural development schemes may be more supportive of short-term projects than structural agro ecological practices.
- Prospects of **administrative and institutional reform** are considered **positive**, although an exit from the EU is not an easy or guaranteed solution to bureaucratic inefficiencies.
- A participatory and progressive regulatory approach to the integrated management of the agro environment, emphasises the importance of **a seat at the EU decision-making table** as a means to influence **ongoing and future 'greening' reforms** and to benefit from a high-level legal basis (11 TFEU) for the integration of environmental concerns into agricultural law.

² Scottish Government, *The Future of Scottish Agriculture. A Discussion Document* (Edinburgh: The Scottish Government, 2015), 14.

the EU, the UK and Scotland (§3). It recognises the many unpredictabilities involved, yet, dares to draw preliminary observations. It thus finds that Scotland may see that the impacts of the exercise of its devolved powers in the environmental field will be constrained by UK policies after Brexit. The expected funding cuts, notably with regard to direct payments, may inhibit an ambitious, EU-inspired agro environmental strategy, in absence of parallel CAP reforms to level the playing field. Although recognising the benefits to be gained from a withdrawal from the EU's cumbersome administrative apparatus, this submission's overall conclusion is that a progressive, participatory and sustainable approach to the management and regulation of the agro environment speaks in favour of Scotland's continued membership of the EU (§4).

2 The EU's Regulatory Regime

A. The CAP Pillars I and II: Green Funding

The EU's post-war Common Agricultural Policy was primarily aimed at increasing agricultural productivity, to be achieved through incentives to foster intensified and specialised farming. Its historical environmental record is poor as it is held to be a driving force for biodiversity loss and increased agricultural pollution.³ However, historical credentials provide poor indicators for the CAP's current and future value for the Scottish agro environment.⁴ With CAP payments nowadays having been largely decoupled from production levels, **the current**

³ C Burns et al, *The Eu Referendum and the Uk Environment: An Expert Review* (2016).

⁴ Also, it is uncertain if these developments would have occurred also under national policy regimes, D Baldock et al, *The Potential Policy and Environmental Consequences for the Uk of a Departure from the European Union* (Institute European Environmental Policy, 2016), 71.

⁵ Regulation (EU) No 1307/2013.

⁶ Cross-compliance covers two elements, which aim to link direct payments to environmental requirements: Statutory Management Requirements (SMRs) and Good Agricultural and Environmental Conditions (GAECs). The legislative framework for cross-compliance is laid down in Regulation (EU) No 1306/2013.

⁷ Referred to as 'Payments for agricultural practices beneficial for the climate and the environment', artt. 43-47 Regulation (EU) No 1307/2013.

CAP 2014-2020's offers various financial instruments to support environmentally conscious farming practices.

The CAP's Pillar I Basic Payments Scheme, financed through part of the EU's general budget - the European Agricultural Guarantee Fund -, is primarily linked to farmed land coverage.⁵ Yet, basic payment is conditioned on various **cross-compliance** obligations, for example compliance with legislative environmental standards like the Nitrates Directive and conservation directives.⁶ Moreover, the 2013 CAP reform introduced mandatory **greening payments** that account for 30% of the EU's Pillar I budget, linking direct payments to environmentally beneficial practices such as crop diversification.⁷

The CAP's Pillar II **Rural Development Programmes**, moreover, seek to contribute to environmentally balanced and climate-friendly development of rural economies.⁸ Co-financed through the European Agricultural Fund for Rural Development, the EU's framework leaves Member States considerable leeway to cater to local needs and to employ tools to encourage practices that go the extra environmental mile. Within the Scottish context the programme, for example, recognises the high nature value of farmland on the islands, bringing together both EU and local aspirations for further protection of these areas through financial support.⁹

Although the current CAP framework has been criticised for not being ambitious enough,¹⁰ its impact is **under continuous review and the next reform (2021) may benefit from the input of ongoing research for a more integrated – ecosystem-based – approach to the development of sustainable food systems.**¹¹

⁸ Artt. 2-3 Regulation (EU) No 1305/2013. The regulation sets out the general framework for agri-environmental payment schemes, which may, for example, be directed at the identification, support and maintenance of high nature value farming.

⁹ European Parliament, 'Special situation of islands' (Resolution 2015/3014), Scottish Government 'Empowering our islands. Islands Bill announced' (*News Scottish Government*, 23 August 2016).

¹⁰ See for example the analyses by the European Environmental Bureau and Birdlife regarding the lack of a green nature of Rural Development Programs in different Member States (not including Scotland): <http://www.eeb.org/index.cfm/news-events/news/new-rural-development-plans-and-the-environment-the-hidden-truth/>.

¹¹ For example the following research projects: iPES, 'Towards a Common Food Policy for the EU' (2016-2018) and European Commission/Horizon 2020, 'A strategic

B. Environmental Laws applied to Agriculture

The regulation of the environment is an area of shared EU-Member State competence. Yet, the growing body of EU environmental laws has led to a situation where most issues are nowadays addressed by laws of EU origin that have been integrated into the UK's legislative framework.¹² Many of these laws which, for example, aim to combat diffuse pollution and conserve biodiversity, apply to the agriculture. Examples include the Birds and Habitat Directives (NATURA 2000), Waste and Water Framework Directives and the Nitrate Directive,¹³ as well as more general EU implementation tools like the Environmental Impact Assessment.¹⁴

In this connection, cross-compliance mechanisms and financial incentives in the CAP are the primary **means to ensure compliance with environmental laws which apply to the agricultural sector**. Yet, those specific tools only complement the enforcement measures set out in general EU environmental law. They follow the requirement of environmental integration in different policy sectors, that is established at the highest level of EU law (Article 11 TFEU).

C. Risk Regulations and the Single Market

In addition to the adoption of environmental standards for agricultural practices, **the EU has approximated laws to – in principle – ensure a harmonised level of protection against the environmental risks of various agro products**.¹⁵ EU risk regulations regarding genetically modified organisms (GMO) and plant protection products (PPP) require EU approval before GMOs for cultivation and the active ingredients of PPP can be circulated within the single market.¹⁶ A precautionary approach to risk-management is taken when scientific data is insufficient or contradictory.¹⁷ GMOs and active substances that fail to receive an EU green light may thus not be used by farmers within Member

approach to EU agricultural research & innovation' (2015-2017).

¹² Environmental Audit Committee, *Eu and Uk Environmental Policy* (London: House of Commons, 2015-2016), 12.

¹³ For a complete overview of relevant laws: A Buckwell, *Agricultural Implications of Brexit* (Worshipful Company of Farmers, 2016), 41. W Grant et al, *The Implications of 'Brexit' for Uk Agriculture* (Yorkshire Agricultural Society, 2016).

¹⁴ Directive (EU) No 2011/92.

¹⁵ These product risk regulations are adopted on the basis of art. 114 TFEU and not on the basis for environmental competence in art. 192 TFEU.

States. If, however, an EU authorisation for placing on the market is granted, farmers room for manoeuvre may still be restricted by national authorities, who may prohibit the use of GM crops or a particular plant protection product.¹⁸

D. Recognition of Quality Produce

A field of EU law that lastly requires brief consideration for its impacts on the agricultural environment is the labelling regime for quality produce. EU laws on organic certification set out the principles and production standards for organic farming, such as restrictions on the use of external inputs and crop rotation obligations. The rules establish a system for sustainable agricultural management which respects nature's systems and contributes to a high level of biodiversity.¹⁹ Likewise, the EU's quality schemes for agricultural produce (PDO/PGI),²⁰ provide recognition for the value of particular farming methods and the production within an agro environment that is characterised by certain natural factors.²¹ **By granting labelling rights to quality producers (often linked to CAP subsidies),²² the EU seeks to promote and encourage diverse farming practices and sustainable farm management.**

3 The Potential Impacts of Brexit

It follows from the previous paragraph that EU law provides carrots (agricultural subsidies and certification schemes) and sticks (enforceable standards and product bans) to foster agro environmental stewardship. It should also be noted that the boundaries of this framework within which farmers operate are not fixed by EU

¹⁶ Regulation (EC) No 1107/2009; Directive (EC) No 2001/18.

¹⁷ Art. 191 TFEU.

¹⁸ Art. 28 Reg 1107/2009; 26b Dir 2001/18.

¹⁹ Art. 3 Regulation (EC) No 834/2007.

²⁰ Protected designations of origin and protected geographical indications, art. 5 Regulation (EU) No 1151/2012.

²¹ Examples include Ayrshire Dunlop and Orkney and Scotch Beef and Lamb.

²² For example, payments for organic farmers under the CAP's green direct payment scheme and payments under the Scottish Rural Development Programme's Suckler Beef Support Scheme.

laws, as Member States and regions²³ enjoy a considerable amount of discretion to cater to local environmental and societal needs.²⁴ The question is thus whether the UK can and will provide a regulatory framework within which Scotland may exercise its devolved powers, which is equally or more beneficial to the Scottish agro environment.

A. Uncertain: Level of Environmental Protection

A pertinent question in this regard is whether the level of environmental protection, provided by the EU legislation currently in place, is expected to be lowered, maintained or raised. The answer is ultimately dependent on political will and priorities and thus troubled by uncertainties. However, a few observations can be made at this stage.

Firstly, speaking in favour of similar levels of protection, is the fact that the UK has been held to be very influential in the shaping of the present EU legislation.²⁵ The UK pioneered the first agri-environmental scheme, the Environmentally Sensitive Areas program,²⁶ and was home to the first trials for the use of cross-compliance measures.²⁷ It must be noted, however, that the political landscape has drastically changed as apparent from the deregulatory tone of the Brexit campaign and the UK's conservative government. **The fact that agriculture and the environment fall within Scotland's devolved powers allows for the setting of a Scottish strategy in favour of maintaining a high level of protection,**

²³ See on the recognition of devolved powers within the CAPs regime notably Case C-428/07 *Horvath* [2009] ECLI:EU:C:2009:458.

²⁴ Possibly increasingly so, as the recent reform of the EU's GMO regime shows increased sensitivity towards national particularities, M Geelhoed, 'Divided in Diversity: Reforming the Eu's Gmo Regime' (2016) Cambridge Yearbook of European Legal Studies .

²⁵ See more generally on the UK's influence in the development of EU environmental policy: Environmental Audit Committee 2015-2016, 12.

²⁶ T L Dobbs and J Pretty, 'Case Study of Agri-Environmental Payments: The United Kingdom' (2008) 65 *Ecological Economics* .

²⁷ Burns et al 2016, 38.

²⁸ 'Environment Secretary affirms commitment following referendum result' (*News. The Scottish Government*, 24 July 2016) <http://news.scotland.gov.uk/News/EU-environment-pledge-2766.aspx>.

²⁹ D Baldock et al 2016, 12. See also Peter Kendall, former president of the NFU, at

against a wider UK policy. Indeed, the Scottish Cabinet Secretary for the environment already pledged not to weaken EU environmental laws.²⁸ Yet, stark divergent environmental policies within the British Isles will neglect the transboundary nature of environmental issues, such as diffuse pollution.²⁹

Similar divergences in attitudes can, moreover, be observed with regard to the regulation of environmental risks, which is currently harmonised at EU level. Like farmer unions,³⁰ the UK government has firmly criticised the EU's precautionary approach to the authorisation of pesticides and GMOs.³¹ Prior to the referendum DEFRA Minister Eustice had called for reform to mirror US-style risk-based, fast tracked approvals.³² The Scottish government has, contrarily, generally been supportive of the EU's precautionary approach to risk management. **The question would be whether the new regulatory regime that needs to be installed, would allow for the adoption of dissimilar approaches to risk-management** (on the basis of an EU or UK risk assessment),³³ leading to distortions within the British market for agro products.

Market arguments may, moreover, call for a harmonised approach to environmental governance of the agricultural sector within a UK outside the EU. Concerns have been raised regarding the fact that it is unlikely that governmental bodies will impose strict environmental regulations on an industry that is faced with big budget cuts and the competitive advantages of subsidised EU farmers.³⁴

http://www.strongerin.co.uk/farmers_for_in_launched#eLrPPjff1wT5IBdj.97.

³⁰ See for example the Brexit commitments by NFU Scotland: 'All decisions relating to the use of pesticides, herbicides and new technologies must be based on science. A risk, rather than a hazard or precautionary-based approach, is needed.'

<http://www.nfus.org.uk/news/2016/july/nfu-scotland-sets-out-its-brexite-commitments>

³¹ E Ares et al, *Brexit: Impact across Policy Areas* (House of Commons 2016), 60-61.

³² A Nelsen, 'Brexit would free UK from 'spirit-crushing' green directives', says minister' (*The Guardian*, 30 May 2016).

³³ The UK could rely on the Chemicals Regulation Directorate to conduct risk-assessments or it could follow the Norwegian model of linking risk-assessment to the EU's assessment by EFSA, but applying a different risk-management regime.

³⁴ Ares et al 2016, 54.

Maintaining EU standards, without similar levels of funding, will put Scottish farmers in a difficult and possibly unsustainable position. **Indeed, the question whether the level of protection for the Scottish agro environment will be upheld will depend on the UK's willingness to provide sufficient financial support to do so.**³⁵

B. Overall Negative: Funding under the BAP

The availability of financial resources is a major factor to be taken into consideration in predictions on the future of UK farming and the management of the agro environment.³⁶

The CAP's Pillar I and II structure accounts for 40% of the EU budget. Over 2014-2020 the UK's receives €25.1 billion in direct payments and €2.6 billion in pillar 2 funds.³⁷ Within this budget Scotland is allocated £3.3 billion for direct payments,³⁸ and approximately £700 million for rural development programmes, to be supplemented by over £400 in national co-funding.³⁹ The Treasury has committed to continued CAP Pillar I support until 2020 and similar financing of agri-environmental schemes that are currently in place.

However, significant subsidy reforms are expected under a future national British agricultural policy, which (like the current EU CAP) would set the financial framework for devolved agricultural action. **In contrast to Scotland, the UK government has spoken out against direct payments for farmers.**⁴⁰ If the foreseen radical funding cuts are combined with a shift in focus towards agri-environmental schemes, the future policy may, arguably, be understood to provide for better targeted mechanisms and incentives for farmers to move towards more efficient, precision farming which relies less on external outputs like fertilisers and pesticides. However, and regardless of the question whether this would be feasible for farmers, **the foreseen structures may be**

better equipped to support short-term environmental projects than long-term commitments to agro ecological practices, like transitions to organic farming, that (due to environmental market failures) require structural public support. This ties in with the fact that agri-environmental schemes rely on farmer's voluntary commitment; a bottom-up-approach which may see public environmental interests be trumped by the private interests of the financially restricted farmers and rural societies. Although strict environmental standards will, naturally, continue to have a position within the UK's and Scotland's legal framework, **the enforcement of such laws will be problematic in absence of direct payments and related cross-compliance legislation** (described by the UK as 'bureaucratic and unnecessary').⁴¹

C. Overall Positive: Administrative Reform

In terms of the institutional and administrative reform, although depending on the closeness of the UK's chosen relationship with the EU, there are environmental benefits to be gained from downscaling to a British agricultural policy. Although EU environmental competence allows for the addressing of transboundary issues on a supra-national level, **EU upscaling also has led to slow, inefficient decision-making and bureaucratic administrative processes.**

Examples of this can be found across the board of environmental laws discussed above. The EU's approval procedure for active pesticide substances has, for example, been held to "reduce incentives to develop and register new products, particularly biologicals, which may serve as substitutes."⁴² And the EU's organic labelling scheme has been held to be so complicated that it prevents participation.⁴³

However, an exit from the EU should not be considered to be a simple or guaranteed solution to these problems. Criticism of the English Countryside

³⁵ See in this regard notably the comparisons drawn with members of the European Economic Area like Norway, which follow EU environmental standards without CAP support, but with large national funds to support the sector (e.g. over 60% of total farm income in Norway is subsidised).

³⁶ D Baldock et al 2016, 11; Buckwell 2016, 7.

³⁷ <https://www.gov.uk/government/news/uk-cap-allocations-announced>; see also Annex II to Regulation (EU) No 1307/2013.

³⁸ Direct payments guide, available via (p. 3): <http://www.gov.scot/Resource/0045/00453518.pdf>.

³⁹ Factsheet on 2014-2020 Rural Development Programme for Scotland (UK):

http://ec.europa.eu/agriculture/rural-development-2014-2020/country-files/uk/factsheet-scotland_en.pdf.

⁴⁰ See notably Buckwell 2016, 33 Ares et al 2016, 52; A Swinbank, 'Brexit or Bremain? Future Options for UK Agricultural Policy and the Cap' (2016) 15 EuroChoices 5.

⁴¹ J Tasker, 'I will scrap cross-compliance fines post-Brexit, says Eustice' (*Farmers Weekly*, 13 May 2006).

⁴² Grant et al 2016, 20.

⁴³ Commission, 'Proposal for a Regulation on organic production and labelling of organic products. Explanatory Memorandum' COM (2014) 180, 2.

Stewardship Scheme being too complex,⁴⁴ exemplifies that administrative burdens are also created at the national level. Also, the UK and Scotland may find themselves to be continuously (and possibly involuntary) linked to EU procedures and developments. Public opinion is likely to oppose the authorisation of pesticides that lack EU approval,⁴⁵ and even if UK/Scottish certification is less cumbersome, such national labels lack the reputational and spatial benefits of their EU-wide counterparts.

D. Negative: Future Reforms and R&D

Reading between the lines, it follows from the above that an argument in favour of Scotland's continued membership of the EU is its ability to best address current defaults in the EU system from within that very system. Even if the UK outside the EU would not formally be bound by the EU's legislative framework for the agro environment (as would be the case with regard to environmental laws if it would choose to operate within the EEA framework), it would still be very much influenced by those laws and policies through its market ties with the EU.

Guaranteeing a continued active role in future EU talks on reforms of the regulatory framework, guided by research on integrated food and regulatory systems,⁴⁶ does not only allow Scotland to contribute to a more sustainable European agriculture landscape, but also recognises that EU laws will inevitably shape the Scottish agro environment. Moreover, Scottish research

regarding agroecological sustainable farming practices, to inform regulators and help shape effective national and supra-national legislation, is also greatly benefited by continued EU funding and EU-wide research cooperation and exchange.⁴⁷

4 Recommendations

This submission of evidence has sought to bring a Scottish environment focus to rural-minded Brexit-debates. It thus provides an appraisal of Scotland's EU membership in light of its value for the agro environment. It finds that although the level of environmental protection post-Brexit is uncertain, the influence of the UK government and Treasury may restrain the impacts of the exercise of devolved powers in this regard. Moreover, and recognising law as a 'work in progress', it is in Scotland's best interest to remain an active participant in EU agro environmental law-making and inter-disciplinary research.⁴⁸ Finally, it should also be borne in mind that a thorough analysis of all legal aspects involved in the value of Scotland's EU membership for the agro environment should include considerations related to international trade and environmental regimes, which are beyond the scope of this submission. SCELG holds expertise to contribute to these dimensions of the debate and remains available to submit further evidence.

⁴⁴ E.g. 'CS scheme 'too complex' - survey reveals' (*NFU News*, 3 November 2015).

⁴⁵ In a similar sense to public opposition against a temporary lift of the EU ban on neonicotinoids within the UK. A recent survey would show that 81% of the British population supports the EU-wide ban, against the UK position, 'Public backs EU environment rules' (*The Scottish Farmer*, 26 August 2016).

⁴⁶ See above note 11.

⁴⁷ See for statistics on EU Horizon 2020 funding for Scotland notably Ares et al 2016, 168.

⁴⁸ See on the possibilities, for example, N Skoutaris, 'From Britain and Ireland to Cyprus: Accommodating 'Divided Islands' in the Eu Political and Legal Order' (2016) EUI Working Papers . SCELG holds expertise on constitutional EU law to contribute to these debates.