

# POLICY BRIEF

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# Contribution of the EU Birds and Habitats Directives to Nature Protection in Scotland

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This policy brief identifies risks and opportunities for nature protection in Scotland, post-Brexit, on the basis of key facts and legal considerations in relation to:

- the benefits and costs of nature protection, including of the EU's nature protection framework;
- the effects of EU law on nature protection in the UK;
- the links between nature protection law, agriculture and fisheries;
- other international mechanisms and networks that can support nature conservation in Scotland; and
- key areas (related to human rights) where Scotland could go above EU nature protection legal standards.

## I. Benefits and Costs of Nature Protection

Nature protection provides ecological benefits, as well as social, economic and health benefits. In his 2017 report, the UN Special Rapporteur on human rights and the environment emphasised **the great dependency of the human rights to**

### Key findings:

- The full enjoyment of **human rights** is dependent on healthy ecosystems and biodiversity.
- Biodiversity conservation provides **socio-economic benefits**, and needs to be mainstreamed in agriculture, fisheries and tourism, as well as in the implementation of the Sustainable Development Goals, in light of relevant international environmental and human rights obligations.
- The EU's biodiversity framework has led to the **improved status of protected areas in the UK**, thanks also to an additional layer of strong enforcement mechanisms.
- The EU's biodiversity framework has recently been assessed as **cost-effective**, without creating unnecessary administrative burdens or barriers to sustainable investment.
- Implementation of the Nature 2000 Framework has been **inadequate in the UK** overall, although **Scotland has showed ambition and leadership** in the UK and the EU;
- The **integration** of different laws on nature protection and productive sectors, and **continuous financial support** for mainstreaming biodiversity in the agricultural and fisheries sectors may not be guaranteed post-Brexit.
- Scotland may consider including **higher environmental protection standards** (for instance with regard to ecosystem services and ecosystem restoration) in its nature conservation legislation to compensate for the loss of guidance, oversight and enforcement from the EU level.
- Scotland may consider **strengthening public access to environmental information, decision-making and justice** in its nature conservation legislation to compensate via private enforcement for the loss of oversight and enforcement from the EU level and to show leadership in complying with relevant international environmental and human rights obligations.
- In light of weakened accountability systems post-Brexit and the resulting increased importance of national and local enforcement mechanisms, Scotland may **explore opportunities for its enforcement officers to remain part of relevant EU networks** with a view to enhancing their effectiveness.

**life, health, water and food<sup>1</sup> on biodiversity<sup>2</sup> underpinning healthy and sustainable ecosystems.<sup>3</sup>** In other words, where nature protection fails, the resulting degradation and loss of biodiversity undermine our ability to enjoy fundamental human rights. Biodiversity is especially crucial to the stability and resilience of food sources, including in relation to the resiliency of agriculture and fisheries vis-à-vis climate change. In addition, the UK committed internationally, in 2016, to consider relevant health-biodiversity linkages<sup>4</sup> (biodiversity as a source of nutrition, traditional medicines, biomedical discovery, clean water, clothes, heating and shelter) in developing and updating national policies, programmes, strategies, plans, and accounts.<sup>5</sup>

The discourse on **ecosystem services** (the benefits that people derive from ecosystems) underscores the importance of ecosystems for regulating the climate, water (water quality and floods) and diseases, soil formation, photosynthesis, and nutrient cycling, as well as for providing cultural, aesthetic and recreational value.<sup>6</sup> The 2016 Nation Brands Index also underscored the important economic benefits deriving from natural beauty, whilst being ranked as Scotland's strongest characteristic as a tourist destination.<sup>7</sup> In effect, **biodiversity degradation has also a variety of socio-economic costs:** ecosystem services that are freely available today will cease to be available or become more costly in the near future, resulting in additional costs also for secondary and tertiary industries thereby transforming the operating environment of all businesses.<sup>8</sup> Nature conservation should, therefore, not be seen in isolation,

but as part of a coherent strategy for well-being and sustainable development. For this reason, in 2016 the UK renewed its international commitments to mainstream biodiversity in the agricultural, fisheries, forestry and tourism sectors, as well as in the implementation of the Sustainable Development Goals.<sup>9</sup>

The 2016 'fitness' check of the European Commission, which provided a comprehensive performance evaluation in terms of effectiveness, efficiency, relevance, coherence and EU added value, emphasised the need and rationale for EU action on nature protection through the Birds and Habitats Directives,<sup>10</sup> and their relevance for the environment, people and the economy. The fitness check showed **"a very low cost to benefit ratio which points to the conclusion that investing in Natura 2000 makes good economic sense."**<sup>11</sup> In addition, the fitness check concluded that the Directives presents a "clear and logical framework of rules" and **unnecessary administrative burdens could primarily flow from national or regional implementation approaches.**<sup>12</sup> Furthermore, the fitness check concluded that the **Directives do not create barriers to sustainable investments that are not damaging conservation values.**

## II. Effects of EU Law on Nature Protection in the UK

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<sup>1</sup> Eg. arts. 3 and 25 Universal Declaration of Human Rights (UDHR), UNGA Res 217 A(III) (1948); art. 6 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (1966); art. 11 International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (1966) and art. 2 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

<sup>2</sup> Biodiversity is the variability of living organisms and the ecological complexes of which they are part (Convention on Biological Diversity, 1760 UNTS 79 (CBD), article 2).

<sup>3</sup> UNHRC, 'Thematic Report by Special Rapporteur on Human Rights and the Environment on biodiversity', (2017) UN Doc A/HRC/34/49.

<sup>4</sup> World Health Organization, 'Connecting Global Priorities: Biodiversity and Human Health, a State of Knowledge Review' (WHO 2015).

<sup>5</sup> CBD Decision XIII/6 (2016).

<sup>6</sup> W V Reid et al, *The Millennium Ecosystem Assessment. Ecosystems and Human Well-Being Synthesis: Synthesis* (Island Press 2005).

<sup>7</sup> Scottish Government, 'The Anholt – GfK Roper Nation Brands Index 2016 Report for Scotland' (Scottish Government Social Research 2017) available at <<http://bit.ly/2kYUgK5>>, at 22.

<sup>8</sup> 'Millennium Ecosystem Assessment. Ecosystems and Human Wellbeing: Opportunities and Challenges for Business and Industry' (World Resource Institute 2005).

<sup>9</sup> CBD Decision XIII/3 (2016).

<sup>10</sup> Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7 (Habitats Directive) and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L 103/1 (Birds Directive).

<sup>11</sup> European Commission, 'Fitness Check of the EU Nature Legislation (Birds and Habitats Directives)' SWD(2016) 472, at 8 and 49.

<sup>12</sup> *Ibid*, at 91.

Prior to the adoption of the EU Birds and Habitats Directives, Sites of Special Scientific Interest (SSSIs), i.e. UK national protected areas, “provided limited protection from development and allowed poor practices in agriculture and forestry.”<sup>13</sup> The Birds Directive was instrumental in catalysing the amendment of the Wildlife and Countryside Act 1981, leading to a **marked improvement in the ecological status of protected areas**.<sup>14</sup> However, the protection afforded to SSSIs (only protected under UK law) is still lower than that afforded to Natura 2000 sites.

The European Commission’s most recent report on the implementation of EU environmental legislation in the UK concluded that, by early 2016, only 8.53% of the national land area was covered by Natura 2000 sites – **the second lowest percentage in the EU**.<sup>15</sup> In addition, **only 7% of protected habitats in the UK have favourable status, whereas 18% have unfavourable–inadequate status and 71% have unfavourable-bad status**.<sup>16</sup> The Commission thus called upon the UK to define clearly conservation objectives and put in place measures necessary for their attainment, including as regards the resources required for maintaining or restoring species and habitats of EU interest to a favourable conservation status across their natural range.<sup>17</sup>

The Commission has found **slow progress** towards the completion of the Natura 2000 network **in the marine context**, particularly with regard to the suggestion of sites for the protection of the harbour porpoise as required under the Habitats Directive.<sup>18</sup> This delay has already led the Commission to launch **formal infringement proceedings** against the UK, noting

that “the continued failure to propose and designate sufficient sites leaves the areas where the species occurs in greatest densities without the protection required. This refers in particular to the requirement to carry out adequate assessments of potentially damaging developments or activities, such as from offshore wind farm construction, oil and gas exploration and fishing.”<sup>19</sup> The proceedings hold particular significance for Scotland since, in early 2016, Scottish Ministers retracted their proposal for the designation of four additional Special Areas of Conservation (SACs) aimed at protecting the harbour porpoise, which was heavily criticised by civil society organizations.<sup>20</sup>

Nevertheless, **Scotland has thus far led the way** in implementing the Birds and Habitats Directives in the UK, with Natura 2000 sites covering 15% of its land area – which is almost double the national average.<sup>21</sup> Scotland is also widely seen to have made more progress with the designation of marine protected areas (MPAs) compared to the other constituent parts of the UK.<sup>22</sup>

- Risk: the loss of the legal framework provided by the EU Directives post-Brexit may render protected areas more vulnerable to political considerations, as the UK Government will have more scope to alter the level and type of protection over SSSIs and other natural areas.<sup>23</sup>
- Risk: the potential misalignment of the Devolved Administrations’ ambitions in connection to nature conservation post-Brexit (i.e. without the involvement and oversight of the European Commission) may under-

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<sup>13</sup> Royal Society for the Protection of Birds (RSPB), ‘Defend nature: How the EU nature directives help restore our environment’, available at <<http://bit.ly/2kZQWKK>>, at 16.

<sup>14</sup> Also worth noting is the fact that infringement proceedings brought by the European Commission against the UK before the Court of Justice of the EU served as catalysts towards the amendment of domestic law in a manner that raised environmental standards: see Case C-6/04, *Commission v United Kingdom*, [2005] ECR I-09017. See also Case C-131/05, *Commission v United Kingdom* [2005] ECLI:EU:C:2005:703, where the CJEU ruled that the UK had failed to effectively transpose the Birds and Habitats Directives.

<sup>15</sup> European Commission, ‘The EU Environmental Implementation Review Country Report - UNITED KINGDOM’ SWD/2017/059 (2017), at 9.

<sup>16</sup> *Ibid.*, at 10.

<sup>17</sup> *Ibid.*, at 11.

<sup>18</sup> *Ibid.*, at 9-10.

<sup>19</sup> European Commission, ‘Commission refers the United Kingdom to the Court over its failure to protect marine species, Press Release’ IP/16/3128 (2016), available at <<http://bit.ly/2dF6ikX>>.

<sup>20</sup> I Amos, ‘Scotland under fire for lagging behind UK porpoise plan’ (*The Scotsman*, 20 January 2016), available at <<http://bit.ly/1JZBF7G>>.

<sup>21</sup> European Commission, *supra* n 15, at 9.

<sup>22</sup> R Girling, *Sea Change: Britain’s Coastal Catastrophe* (Random House 2011), where the author notes that more than half of the marine Special Areas of Conservation (SACs) that had been designated in the UK at the time were located in Scotland.

<sup>23</sup> M Barlow and E Hadley, ‘Effects of a Brexit on Environmental laws - Habitats, Waste, Chemicals and Air’ (*Burges Salmon*, April 2016), available at <<http://bit.ly/2kZX5GM>>, at 3.

mine the representativeness and connectivity of protected area networks, prejudicing the success of conservation and management efforts. This is particularly true for MPAs, where conservation efforts have been lagging behind generally, and where there are more challenges because of the need for cooperation between the UK and EU Member States in relation to trans-boundary issues.

In addition, the Birds and Habitats Directives have significantly contributed to the **implementation of relevant international legal obligations**.<sup>24</sup> The European Union Committee of the House of Lords recognises that the Directives have not simply transposed these obligations into EU law, but have enhanced them through the addition of deadlines and timetables.<sup>25</sup> The report further identifies **the European Commission as a “well-resourced, well-informed” body, actively supporting** Member States in meeting the objectives enshrined in EU environmental legislation, including through the sharing of information, the elaboration of guidelines to facilitate implementation and the periodic monitoring of progress.<sup>26</sup>

- **Risk:** Post-Brexit, the European Commission will no longer provide support and exercise oversight through the development of guidance (for instance, on setting conservation objectives for Natura 2000 sites<sup>27</sup> and on strict protection of animal species requiring adoption of species action plans).<sup>28</sup> Such guidance, albeit formally non-legally

binding, has been used by the Court of Justice of the EU as a primary reference to determine whether adequate levels of protection were attained.<sup>29</sup>

- **Opportunity:** Scotland could include the European Commission’s guidance as legally binding requirements in domestic nature protection law,<sup>30</sup> to ensure enforcement at the national level and consistent application with the EU of relevant international standards.

EU law has also been instrumental in furthering the application of the **precautionary principle** in the UK. National courts have drawn on the case law of the Court of Justice of the EU<sup>31</sup> to assert that the precautionary principle is triggered by the mere probability of a plan or project having a significant effect upon a protected site, if such a probability cannot be excluded on the basis of objective information. In case of doubt, national courts have held that the appropriate assessment must be carried out,<sup>32</sup> to ensure “the conservation of natural habitats” and avoid damage.<sup>33</sup> Interestingly, Scots Courts have even gone beyond EU case law, according to which administrative decisions can be contested where the competent authority has exceeded “the margin of discretion”. Scots Courts have held instead that, although the precautionary approach entails making judgments in the absence of conclusive, quantitative data, “too much discretionary decision-making would constitute imperfect

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<sup>24</sup> European Union Committee, ‘Brexit: environment and climate change’ (House of Lords 2017) available at <<http://bit.ly/2kmhrhe>>. The main instruments in this regard are the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), 1284 UNTS 209; the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), 11 ILM 963 (1972); the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), 11 ILM 1358 (1972); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 993 UNTS 243 (1975); the Convention on the Conservation of Migratory Species of Wild Animals (CMS), 19 ILM 15 (1980); and the Convention on Biological Diversity (CBD), 31 ILM 818 (1992). In addition, obligations relating to the sustainable management of marine living resources arise from the legal framework developed under the United Nations Convention on the Law of the Sea (UNCLOS), 21 ILM 1261 (1982).

<sup>25</sup> European Union Committee, *supra* n 24, at 19.

<sup>26</sup> *Ibid.* at 23.

<sup>27</sup> See <<http://bit.ly/2njklaf>>; H Schoukens and K Bastmeijer, ‘Species Protection in The European Union: How Strict is Strict?’ in C Born et al (eds), *The Habitats Directive in its EU Environmental Law Context* (Routledge, 2015) at 136-137.

<sup>28</sup> European Commission, ‘Guidance document on the strict protection of animal species of Community interest under the ‘Habitats’ Directive 92/43/EEC’ (Commission 2007) available at <<http://bit.ly/2ITnnOa>>.

<sup>29</sup> L Stahl, ‘The Concept of “Conservation Objectives” in the Habitats Directive: A Need for a Better Definition?’ in C Born et al (eds), *The Habitats Directive in its EU Environmental Law Context* (Routledge, 2015) at 60.

<sup>30</sup> Stahl, *supra* n 29, at 67.

<sup>31</sup> Case C-127/02, *Waddenvereniging and Vogelsbeschermingvereniging* (2004) ECR I-07405.

<sup>32</sup> The assessment foreseen by Article 6(3) of the Habitats Directive: *Re Sandale Developments Ltd’s Application for Judicial Review* [2010] NIQB 43.

<sup>33</sup> *Alternative A5 Alliance’s Application for Judicial Review* [2013] NIQB 30.



protection of the environment.”<sup>34</sup> The European Parliament recently noted that, in the UK, courts base their decisions on the precautionary principle only if the provisions under consideration derive from European legislation.<sup>35</sup> This concern should be read in light of media reports that the UK Government is considering repealing measures implementing EU nature protection law to speed the approval of development projects.<sup>36</sup>

- Risk: post-Brexit, there is a risk that legal and judicial protection of conservation areas from development projects will not take a precautionary approach.

EU nature protection legislation also allowed for flexibility to balance conservation objectives with opportunities for sustainable development projects. The European Commission has oversight of proposed compensatory measures in case of proposed developments that are motivated by imperative reasons of overriding public interest and that may affect priority protected areas.<sup>37</sup> The Commission, however, has been criticised for its permissive approach in this connection and for the lack of public scrutiny in this procedure, which resulted in compensatory measures being “poor in providing comparable ecological functionality, favouring proponents by underestimating impacts and overestimating positive effects; poorly monitored and of limited enforceability; and prone to improperly or unduly taking into account economic considerations.”<sup>38</sup> The Commission is also to give opinions on proposed derogations to species protection:<sup>39</sup> the UK was the country that was granted the highest

number of derogations (for instance, over 1000 exceptions compared to 1 granted by Denmark in 2007-2008).<sup>40</sup>

- Risk: Post-Brexit, an additional layer of control over the protection of areas and species from unsustainable development will be lost.
- Opportunity: Scotland could adopt stricter rules on compensatory measures,<sup>41</sup> subject to precautionary approach, for projects that are likely to negatively affect protected areas;
- Opportunity: Scotland could make the procedures related to derogations and exceptions open to public scrutiny and third party inputs.<sup>42</sup>

### III. Nature Conservation and Agriculture

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With around 80% of Scotland’s land area being managed by farmers,<sup>43</sup> farm-management decisions can have great impact on Scottish biodiversity.<sup>44</sup> In fact, the Commission identified in 2014 agriculture as the key pressure on nature and biodiversity in the UK.<sup>45</sup> In contrast to, for example, Scotland’s National Nature Reserves, which are primarily, but not exclusively, managed by public and private conservation groups, the Natura 2000 network includes a significant amount of privately owned farmland.<sup>46</sup>

EU law has strengthened and sharpened the protection of designated croplands in comparison to that initially provided under national

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<sup>34</sup> *Royal Society for the Protection of Birds v Scottish Ministers* [2016] CSOH 103.

<sup>35</sup> European Parliamentary Research Service, ‘The precautionary principle: Definitions, applications and governance’ (European Union 2015) available at <<http://bit.ly/2m17er3>>, at 6.

<sup>36</sup> G Parker and G Hammond, “Developers set for Brexit triumph over great crested newt: EU law on natural habitats faces axe to speed building plans” *Financial Times* (10 February 2017).

<sup>37</sup> Art. 6(4) Habitats Directive.

<sup>38</sup> D McGillivray, ‘Compensatory Measures Under Article 6(4) Of The Habitats Directive: No Net Loss For Natura 2000?’ in C Born et al (eds), *The Habitats Directive in its EU Environmental Law Context* (Routledge, 2015), at 106.

<sup>39</sup> Arts. 16 and 12 Habitats Directive.

<sup>40</sup> L Kramer, ‘Implementation and Enforcement of the Habitats Directive 92/43/EEC’ in C Born et al (eds),

*The Habitats Directive in its EU Environmental Law Context* (Routledge, 2015), at 234.

<sup>41</sup> DEFRA, ‘Habitats and Wild Birds Directives: guidance on the application of article 6(4). Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures’ (Crown 2012) available at <<http://bit.ly/2ILzNHx>>.

<sup>42</sup> McGillivray, *supra* n 38, at 114-115; Kramer, *supra* n 40, at 236.

<sup>43</sup> Scottish Government, ‘The Future of Scottish Agriculture. A Discussion Document’ (The Scottish Government 2015), at 14.

<sup>44</sup> Note that rural communities have also been identified as vulnerable when it comes to ecosystem degradation, Report Special Rapporteur, *supra* n 3.

<sup>45</sup> European Commission, *supra* n 15, at 59.

<sup>46</sup> EU-wide agro-ecosystems make up about 38% of the total Natura 2000 surface: C Olmeda et al, ‘Farming for Natura 2000’ (European Commission 2014) available at <<http://bit.ly/2mr9On7>> at 9.

SSSIs.<sup>47</sup> Once an area has been identified as a Natura 2000 site, Member States are thus required to implement measures to ensure agro-environmental management in accordance with the ecological requirements to avoid the deterioration of natural habitats and the disturbance of protected species.<sup>48</sup> It must be noted that the objectives of measures to conserve the many key Natura 2000 agricultural habitats and species do not require to cease all farming activities in the protected area, as these habitats and species are considered to be fully or partly dependent on the continuation of environmental management by farmers.<sup>49</sup> Instead, statutory requirements will need to shape agro-environmental management that serves the particular conservation aims.<sup>50</sup>

EU law provides for an **increasingly integrated legal framework on agriculture**,<sup>51</sup> which provides tools to support Member States in the effective implementation of the Birds and Habitat Directives. Such tools do not only include EU regulations regarding the use of agricultural inputs like the use of pesticides,<sup>52</sup> and fertilisers,<sup>53</sup> which directly or indirectly help to maintain a favourable conservation status of Natura 2000 sites. More importantly, the obligatory cross-compliance rules under the Common Agricultural Policy (CAP) have made **basic, area-based subsidy payments to farmers, contingent on their compliance with legislative standards under the Birds and Habitats Directives**, among others.<sup>54</sup>

Additionally, EU funding for Rural Development Programmes allows Scotland to implement contractual agri-environmental schemes, which support farmers in practices that aim to improve the condition of Natura 2000 sites and increase the proportion of features in favourable condition.<sup>55</sup> Although overreliance on such voluntary measures has also been considered an issue in the UK implementation of the Bird and Habitats Directives,<sup>56</sup> they are largely considered helpful in complementing subsidies, by rewarding farmers that contribute to biodiversity conservation above the levels required. (Note that the overall benefits and shortcomings of the EU agricultural law for Scotland have been discussed at <<http://bit.ly/2IWM0d7>>).<sup>57</sup>

- **Risk:** The integration of different laws on nature protection and agriculture, and continuous financial support may not be guaranteed post-Brexit, thereby undermining voluntary and mandatory ecosystem stewardship by farmers as key mechanisms for mainstreaming biodiversity in the agricultural sector.<sup>58</sup>
- **Opportunity:** Scotland could develop a system of integrated regulation and financial support for ecosystem stewardship by farmers that is more ambitious, from an environmental perspective, than that in the EU. In particular, EU nature protection law does not include protection for ecosystem services, and does not provide a strategic

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<sup>47</sup> *Fisher v English Nature* [2003] EWHC 1599 (Admin) regarding the fact that the Joint National Conservancy Council Guidelines for the Selection of SSSI's did take the status as croplands into account. Note that the prevention of serious damage to crops and livestock may be a reason to divert from the rules regarding the strict protection of species under the Habitats (Article 16) and Birds (Article 9) Directives; see also *R. (on the application of McMorn) v Natural England* [2015] EWHC 3297 (Admin) on the killing of buzzards to protect game birds.

<sup>48</sup> Arts. 6(1) and (2) Habitats Directive.

<sup>49</sup> C Olmeda et al, *supra* n 46, at 12.

<sup>50</sup> Although voluntary agri-environmental measures may also contribute to the achievement of such objectives, such contractual measures are not considered sufficient measures capable of protecting Nature 2000 sites; see Case C-96/98, *Commission v France* [1999] ECR I-08531 regarding art. 4 Birds Directive.

<sup>51</sup> CBD Decision XIII/3 (2016).

<sup>52</sup> In very broad terms, although with specific reference to the Birds and Habitats Directives: art. 12(b) Directive 2009/128/EC establishing a framework for Community action to achieve the sustainable use of pesticides [2009] OJ L 309/71.

<sup>53</sup> See for example the selection of Nitrogen Vulnerable Zones (NVZ) under Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L 375, which designation may rely on site-specific data on vulnerable habitats generated under the Habitat Directive.

<sup>54</sup> Annex II, Statutory Management Requirement (SMR) 2 and 3 Regulation (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy [2013] OJ L 347/549.

<sup>55</sup> European Agricultural Fund for Rural Development, 'Rural Development Programme (Regional) – Scotland' (2014) 2014UK06RDRP003, at 306.

<sup>56</sup> European Commission, *supra* n 15, at 11; note also that voluntary measures are not sufficiently effective to prove compliance with the Birds and Habitats Directive, Case C-96/98, *supra* n 50.

<sup>57</sup> M Geelhoed, 'A Legal Perspective on the Value of Scotland's EU Membership for the Agro Environment' (*SCELG Working Paper No 5*, 2016).

<sup>58</sup> J Tasker, 'I will scrap cross-compliance fines post-Brexit, says Eustice' (*Farmers Weekly*, 13 May 2016) available at <<http://bit.ly/2IIFTZe>>.

framework for ecosystem restoration, despite relevant international obligations and targets.<sup>59</sup>

#### IV. Nature Conservation and Fisheries

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Currently, the conservation of species such as fish, octopuses, crustaceans and mollusks falls within the exclusive competence of the EU.<sup>60</sup> Conversely, aquaculture, the conservation of cetaceans,<sup>61</sup> and the management of freshwater fisheries, including with regard to the freshwater stages of the lifecycle of species that spend part of their lives at sea, constitute matters of shared competence between Member States and the EU.<sup>62</sup> The overall benefits and shortcomings of the EU fisheries law for Scotland have been discussed at <http://bit.ly/2l2zGJb>.<sup>63</sup>

Even though the implementation of the ecosystem-based approach is now an express objective of the Common Fisheries Policy (CFP),<sup>64</sup> the above-described patchwork of competences challenges the coherence of different area-based conservation measures,<sup>65</sup> leading to tensions between EU fisheries and nature conservation policies.<sup>66</sup> The CFP<sup>67</sup> attempts to proactively address potential discrepancies in two principal ways: first, where the European Commission has been granted the power to adopt delegated or implementing acts in respect of a

Union conservation measure applying to a specific geographical area, the CFP allows Member States having a direct management interest affected by this measure to cooperate towards the formulation and submission of joint recommendations.<sup>68</sup> Second, Member States are entitled to take non-discriminatory measures for the conservation and management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems within 12 nautical miles of their baselines, provided that the EU has not already adopted measures to that end.<sup>69</sup> Nevertheless, if the measures under consideration hold the potential of affecting the fishing vessels of other Member States, they are subject to consultation with the Member States concerned, the corresponding Advisory Councils and the Commission.<sup>70</sup> In turn, the Commission can request that the proposal be amended or even repealed.<sup>71</sup>

It follows that, despite the considerable efforts undertaken by the EU towards the regionalisation of fisheries management, the conservation of marine biological resources remains a highly centralised policy area. Since both fisheries and the environment constitute devolved matters, it may reasonably be expected that, post-Brexit, powers relating to the conservation of marine biological resources will be repatriated to the Devolved Administrations.

- **Risk:** Even with all other things being equal, Scotland's marine environment may suffer from the loss of funding opportunities under the European Maritime and Fisheries Fund.

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<sup>59</sup> A Cliquet et al, 'Restoring Nature in the EU: The Only Way is Up?' in C Born et al (eds), *The Habitats Directive in its EU Environmental Law Context* (Routledge, 2015) at 270-271, referring to CBD Article 8(f) and Aichi Target 15, CBD COP, 'Strategic Plan for Biodiversity 2011-2020' (2010) UNEP/CBD/COP/DEC/X/2 (Decision X/2), Annex.

<sup>60</sup> HM Government, 'Review of the Balance of Competences between the United Kingdom and the European Union: Fisheries Report' (Crown 2014) available at <http://bit.ly/1slwFNY>, at 17. Arts. 4(1) and (2) Regulation (EU) No 1380/2013 on the Common Fisheries, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC Policy [2013] OJ L 354/22 (CFP).

<sup>61</sup> HM Government, *supra* 60, at 17.

<sup>62</sup> *Ibid*, at 19. Art. 4(2)(d) and (e) Treaty on the Functioning of the European Union (TFEU).

<sup>63</sup> M Ntona, 'A Legal Perspective on the value of Scotland's EU Membership for Sustainable Fisheries' (SCELG Working Paper No 6, 2016).

<sup>64</sup> Art. 2(3) CFP.

<sup>65</sup> For instance, under Art. 8 CFP, the EU may establish stock recovery areas, while taking into account existing conservation areas. To this end, Member States "shall identify, where possible, suitable areas which may form part of a coherent network."

<sup>66</sup> This refers not only to the Birds and Habitats Directives, but also to Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy [2008] OJ L 164/19 (Marine Strategy Framework Directive).

<sup>67</sup> Recital (25) CFP.

<sup>68</sup> Art. 18 CFP.

<sup>69</sup> Art. 20(1) CFP. If the proposed measures concern the protection of a Natura 2000 site located beyond 12 nautical miles of the baseline, the Member State must address a formal request to the Commission. To this effect, see European Commission, 'Fisheries Measures for Marine Natura 2000 Sites' (Commission) available at <http://bit.ly/2mtOwEJ>, at 3.

<sup>70</sup> Art. 20(2) CFP.

<sup>71</sup> Art. 20(4) CFP.



Currently, funding is available for the purposes of, *inter alia*, designing, developing and monitoring technical and administrative means for the elaboration and implementation of conservation measures; managing, restoring and monitoring of Natura 2000 sites that are affected by fishing activities; and drawing-up, monitoring and updating plans for the management of fishery-related activities with an impact on Natura 2000 sites.<sup>72</sup>

- Opportunity: Scotland could develop a system of integrated regulation and financial support for ecosystem stewardship by fishermen, which is more environmentally ambitious than that of the EU. Future funding arrangements can incorporate the protection of marine ecosystem services and provide a strategic framework for ecosystem restoration, in accordance with relevant international obligations and targets.
- Opportunity: Assuming that ambitions are not lowered and nature conservation laws not weakened as a result of Brexit, Scotland could pursue a marine environmental policy that is not only spatially and substantively more consistent, but also tailored to the specific characteristics of the Scottish fleet,<sup>73</sup> in line with the CBD obligations and commitments on mainstreaming biodiversity into the fisheries sector.<sup>74</sup>

## V. Other international mechanisms and networks

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According to commentators, UK courts are unlikely to strike down unduly restrictive conservation measures “unless they are wholly irrational.”<sup>75</sup> It seems thus necessary to explore which **alternative international mechanisms** are available to promote compliance with nature protection laws in a post-Brexit scenario. One such mechanism is the Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats (**Bern Convention**), which monitors the implementation of the Convention and provides guidance on its further development. The Committee’s so-called “case files procedure”<sup>76</sup> is a direct and flexible arrangement that allows States, environmental interest groups and individuals to refer a complaint relating to a Party’s failure to comply with its obligations under the Convention. These complaints are assessed by the Convention’s Secretariat and, if considered serious enough, are communicated to the Party under scrutiny. If the Party’s response is not satisfactory, the matter is referred to the Standing Committee, which decides if the case should be pursued and publicly issues recommendations.<sup>77</sup>

With regard to the ongoing designation of marine protected areas (MPAs), the Convention for the Protection of the Environment of the North-East Atlantic (**OSPAR Convention**)<sup>78</sup> will provide the overarching legal framework as well as the principal forum for regional cooperation post-Brexit. Following the adoption of Recommendation 2003/3 on the establishment of a ‘Network of Marine Protected Areas’,<sup>79</sup> the OSPAR Commission has issued guidance on designing and managing MPAs and reinforcing the network’s ecological coherence. Accordingly, UK conservation agencies have identified some 267 Natura 2000 sites that meet at least one of the ecological criteria required for an area

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<sup>72</sup> European Maritime and Fisheries Fund (EMFF), ‘The Marine environment and Inland Fishing Guidance’ (Scottish Government 2016) available <<http://bit.ly/2IU-pAJZ>>.

<sup>73</sup> Compared to the fishing fleets of the other parts of the UK, Scotland’s fleet has fewer but larger vessels and lands the most fish in terms of volume. To this effect, see European Union Committee, ‘Brexit: fisheries’ (House of Lords 2016) available at <<http://bit.ly/2mw6HcP>>, at 6.

<sup>74</sup> CBD Decision XIII/3 (2016), para 71.

<sup>75</sup> S Turner, ‘Implementation of the Habitats Directive in the UK’ available at <<http://bit.ly/2IXQ11f>>.

<sup>76</sup> On the relationship between the Bern Convention and the Birds and Habitats Directives, see F Fleurke and A Trouwborst, ‘European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern

Convention and the EU Birds and Habitats Directives’, in L Kotze and T Marauhn (eds), *Transboundary Governance of Biodiversity* (Martinus Nijhoff Publishers 2014), at 128-162.

<sup>77</sup> Similar procedures have been established under the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) and the 1979 Convention on the Conservation of Migratory Species of Wild Animals.

<sup>78</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), 32 ILM 1069 (1993).

<sup>79</sup> OSPAR Recommendation 2003/3 adopted by OSPAR 2003 (OSPAR 03/17/1, Annex 9), amended by OSPAR Recommendation 2010/2 (OSPAR 10/23/1, Annex 7), available at <<http://bit.ly/2IV6bbJ>>.

to qualify as an OSPAR MPA.<sup>80</sup> The value added of the latter is that it encompasses other types of protected sites than Nature 2000 sites, thus encouraging synergies across different regimes.<sup>81</sup> Moreover, the ecological criteria on the basis of which OSPAR MPAs are selected are broader than those foreseen by the Birds and Habitats Directives, covering “all possible sites that can, individually or collectively, contribute to the conservation of species, habitats and ecological processes that have been adversely affected by human activities or that are representative for the region.”<sup>82</sup> Finally, in connection to cross-border cooperation, the OSPAR Commission has already underscored the potential contribution of its work on marine spatial planning to the development of a harmonised approach to trans-frontier MPA management.<sup>83</sup>

Another international mechanism relevant to nature protection law is the Convention on International Trade in Endangered Species of Fauna and Flora (**CITES**), which regulates international trade with specimens of endangered species, as well as parts and derivatives thereof. Maintaining current international wildlife protection standards<sup>84</sup> post-Brexit is crucial for Scotland to engage in global cooperative efforts for wildlife protection. However, although praised for its extraordinary effectiveness, the CITES compliance mechanism has not been able to tackle the global phenomenon of illegal wildlife

traffic comprehensively and effectively.<sup>85</sup> Instead, a broader approach has gradually emerged to prevent and combat transnational wildlife crime under the aegis of the **International Consortium on Combating Wildlife Crime (ICWC)**.<sup>86</sup>

- **Risk:** While post-Brexit there will remain opportunities to use international mechanisms to address shortcomings in the implementation of international biodiversity obligations, these mechanisms face common challenges, particularly the essentially political nature of their modalities.

While Scotland’s current constitutional status as sub-national entity hinders its full participation in international cooperative frameworks, an enhanced engagement in transnational environmental enforcement networks might be beneficial to develop an autonomous strategy towards environmental standard stability in Scotland post-Brexit. Environmental enforcement networks<sup>87</sup> are informal structures that elicit administrative integration and further common approaches to environmental law enforcement, through exchanges of information and best practices, benchmarking and capacity-building.<sup>88</sup> Post-Brexit, an active engagement of the Scottish Environment Protection Agency (SEPA) in these networks might be beneficial for: continued policy alignment with the EU; the exercise of leadership; and the enhancement of environmental regulation.

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<sup>80</sup> See Joint Nature Conservation Committee, ‘The UK OSPAR Marine Protected Area network’ (JNCC) available at <<http://bit.ly/2IGEJ0e>>.

<sup>81</sup> A Trouwborst and H M Dotinga, ‘Comparing European Instruments for Marine Nature Conservation: The OSPAR Convention, the Bern Convention, the Birds and Habitats Directives, and the Added Value of the Marine Strategy Framework Directive’ (2011), 20 *EEELR* 129, at 143.

<sup>82</sup> JNCC, *supra* n 80.

<sup>83</sup> OSPAR Commission ‘The Legal Basis for Managing Transboundary Marine Protected Areas,’ (OSPAR Commission 2007) available at <<http://bit.ly/2llccl2>>, at 15.

<sup>84</sup> As implemented under Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L 61/1 and Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L 328/28.

<sup>85</sup> P H Sand, ‘Enforcing CITES: The Rise and Fall of Trade Sanctions’ (2013) 22 *Review of European, Comparative & International Environmental Law* 251.

<sup>86</sup> CITES Secretariat, INTERPOL, UNODC, World Bank and World Customs Organization, ‘Letter of under-

standing establishing the International Consortium on Combating Wildlife Crime’ (2010), available at <<http://bit.ly/2kZvHNv>>.

<sup>87</sup> These include in particular the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), the Network of Heads of European Environment Protection Agencies/European Protection Agency Network (NHEEPA/EPANet), but also the European Union Forum of Judges for the Environment (EUFJE), the European Network of Prosecutors for the Environment (ENPE) and EnviCrimeNet, the network of police and law enforcement officers involved in countering environmental crime in EU member states: A. Cardesa-Salzman et al, ‘The implications of Brexit for environmental law in Scotland’ (SULNE Report, 2016) available at <<http://bit.ly/2mvgD73>> at 3.

<sup>88</sup> G Pink, ‘Environmental Enforcement Networks: Theory, Practice and Potential’ in M Faure, P De Smet and A Stas (eds), *Environmental Enforcement Networks. Concepts, Implementation and Effectiveness* (Edward Elgar 2015) 13; C Gemmell, S Bingham and N Isarin, ‘Collaboration and Consultancy, Tackling Environmental Crime, and Delivering Environment Protection’ in G Pink and R White (eds), *Environmental Crime and Collaborative State Intervention* (Palgrave Macmillan 2016) 119.

- Opportunity: Post-Brexit, the need for regulatory and enforcement coordination with European counterparts provides a valid argument for maintaining full membership, or at least some degree of association of SEPA in European enforcement networks (IMPEL and NHEEPA/EPANet).

## **VI. Further Opportunities for Scotland to aim at a higher level of protection than EU Law**

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EU nature protection law has not addressed specifically connected human rights. There are therefore opportunities for Scotland to go above current EU standards and show leadership in complying with its international biodiversity and human rights obligations (as discussed in more detail at <<http://bit.ly/2lchsU5>>). In particular,

- EU nature protection law does not explicitly indicate that it can be enforced by members of the public and NGOs under the Aarhus Convention's provisions on access to justice.<sup>89</sup> Scotland should therefore consider clarifying and enhancing the implementation of the right of access to justice in relation to nature protection, with a view to supporting private enforcement of biodiversity legislation. This is particularly important to compensate the loss, post-Brexit, of the additional, strong enforcement layer provided by the European Commission and Court of Justice of the EU;<sup>90</sup>
- EU nature protection law does not incorporate international legal requirements related to the protection of the traditional knowledge of local communities and their customary sustainable use practices.<sup>91</sup> So Scotland could consider developing legislation to protect the traditional knowledge of island and other local communities and support the inclusion in management plans of community knowledge and practices that contribute to conservation and sustainable use.

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<sup>89</sup> Schoukens and Bastmeijer, *supra* n 27, at 131; Kramer, *supra* n 40, at 234.

<sup>90</sup> E Morgera et al, 'Rights protected under EU law concerning the environment' (SULNE 2016) available at <<http://bit.ly/2lchsU5>>.

<sup>91</sup> Arts. 8(j) and 10(c) CBD; see A Garcia-Ureta and I Lazkano, 'Instruments for Sites Active Management of Natura 2000: Balancing Between Stakeholders and Nature Conservation?' in C Born et al (eds), *The Habitats Directive in its EU Environmental Law Context* (Routledge, 2015) at 77.