

Environmental governance arrangements and environmental principles post-Brexit

June 2018

Approach

The Committee received a presentation on environmental governance arrangements and environmental principles post-Brexit on 10 May. The Committee had the chance to ask a panel of experts about their views on potential future arrangements. The panel members were:

Professor Richard Cowell, Cardiff University, School of Geography and Planning; Dr Victoria Jenkins, Swansea University, School of Law; and Professor Maria Lee, University College London, Faculty of Law.

On 16 May the Committee held a stakeholder workshop to discuss this subject. A full list of attendees is included at Annexe A.

1. A post-Brexit “governance gap”

1. There is considerable concern across the environment sector that there will be less of an emphasis after Brexit on the governance functions currently exercised by EU bodies. This risks creating an environmental governance gap. Stakeholders believe that the enforcement and regulatory functions, and the wider, policy development functions must be cemented in the UK’s environmental governance architecture.

Current EU environmental governance functions



2. The European Commission (EC), European Court of Justice (ECJ) and other European bodies play an important role in implementing and enforcing environmental laws across the EU.
3. The EC can take enforcement action against Member States for non-compliance with EU law. Third parties, including citizens and civil society organisations, can bring complaints to the EC. These non-compliance complaints are often addressed through negotiation.
4. The ECJ can hear cases of non-compliance with EU law brought either by the EC or Member States. Failure to comply with an ECJ judgement may result in a fine. The ECJ may also be asked for a ruling on the interpretation of EU law where cases are brought by individuals in national courts that directly apply EU law.
5. In addition to its enforcement functions, the EC also undertakes a wider role in relation to environmental governance, it:
 - evaluates and reports on the effectiveness of the implementation of EU law and policy by Member States.
 - informs the long-term direction of EU policy through road maps, action programmes and sustainable development strategies. This is done by the approximately 500 civil servants working in the EC's environmental department: DG Environment.
6. EC policy development is supported by the work of several European agencies, such as the European Environment Agency, the European Chemicals Agency and the European Food Standards Authority.

2. A successor governance body?

The functions of a successor body

7. It was suggested during the inquiry that Brexit offers an opportunity to look again at the arrangements for environmental governance and to consider how legal and political accountability can be improved.
8. The UK Government's Department of Environment, Food and Rural Affairs (Defra) launched a consultation on these matters in May¹. This is ahead of an Environmental Principles and Governance Draft UK Bill expected in the autumn.

¹ <https://consult.defra.gov.uk/eu/environmental-principles-and-governance/>

Stakeholders were disappointed by the approach set out in the Defra consultation; they believed it to be too weak and a missed opportunity. For example, dispute resolution was not mentioned in the consultation, despite being a subject of considerable importance. They also believed that the proposed use of “advisory notices” was inadequate and lacked “teeth”.

9. It was suggested that the functions to be exercised by a successor body should be -

- Promoting environmental protection among government actors and the wider community;
- Monitoring and reporting on progress in the implementation of environmental laws and providing essential scientific data;
- Taking action where targets or objectives are not met, for example through the imposition of economic sanctions;
- Providing citizens and civil society organisations with access to the complaints and enforcement systems; and
- Adopting a long-term policy strategy transcending political cycles.

10. Stakeholders stressed these functions must be underpinned by transparent and detailed reporting, to ensure that governments can be held to account.

11. Professor Cowell noted that the effectiveness of any future body exercising these functions will be influenced by the nature of environmental law in the UK after Brexit. EC action on monitoring and enforcement has been effective due to measurable targets and clear timelines set out in EU legislation.

12. Stakeholders believed that no domestic bodies, either at the UK or Welsh level, currently have the resources, independent, expertise or powers to exercise the regulatory and wider policy functions in relation to the environment.

13. Stakeholders emphasised that the UK judicial review process is not a suitable replacement for current EU governance arrangements.

What should a successor body look like?

14. Stakeholders were asked to discuss existing bodies which could be tasked with carrying out the governance functions. Professor Cowell gave the UK Committee on Climate Change (UKCCC) as an example of a body involved in the monitoring and enforcement of policy. However, its functions would need to be

fundamentally changed to address the potential governance gap and to cover wider environmental issues.

15. Both Natural Resources Wales (NRW) and the Future Generations Commissioner are examples of Welsh bodies which have previously been put forward as possible options to take this work forward. However, both were discounted because of the fundamental change to their functions that would be required and their lack of resource. It was felt that NRW, as the environmental regulator, does not have sufficient independence and the Future Generations Commissioner currently does not have sufficient environmental focus and expertise

16. Stakeholders were therefore firmly of the view that there is a need for a new body, to:

- monitor government actions in delivering environmental legislation;
- enforce legislation effectively and deliver an accessible complaint system for citizens.

17. However, there were significant concerns that there is not sufficient time to establish such a body before the UK leaves the EU.

18. Defra's consultation relates to England and non-devolved matters only. However, the consultation invites joint working with the devolved administrations to develop joint arrangements for both the environmental governance body and the environmental principles. In response to the Defra consultation, Lesley Griffiths, Cabinet Secretary for Energy, Planning and Rural Affairs, indicated that the Welsh Government was "disappointed" that it had not been "fully engaged" prior to the announcement, but "**stands ready to work in collaboration**". She also stated that she is working with the Welsh Government's Brexit Roundtable on this matter.

19. Stakeholders suggested it would be appropriate for the successor body to be a UK body. However, it is vital that a UK-wide body is co-designed and co-owned by each of the constituent parts of the UK, with full involvement from devolved administrations and legislatures. Professor Cowell said the benefits of this joint approach include:

- efficiency saving through joint working;

- cross-UK collaboration, given that post-Brexit environmental legislation is likely to be subject to various forms of common framework;
- shared expertise;
- greater independence from the politics of individual governments;
- recognition that environmental issues do not respect national borders; and
- improved buy-in and status through collaboration.

20. It was agreed that any new body should be independent of government. To underpin its independence, the body should be funded by Assemblies and Parliaments of the constituent nations. Professor Lee suggested that a range of funding sources will make the body more robust and independent. However, this is a model that has no precedent in the UK and it is difficult to see how the body could be accountable to four Assemblies or Parliaments.

21. Some participants believed that the existence of a body at a UK level should not preclude each constituent part of the UK also having their own body, should they so wish. There was recognition that this could require more resources and could appear to be a more complex arrangement, but there could be benefits from a governance system that operates on both the UK and devolved levels – described as a “four plus one” model.

22. It was recognised that establishing a new body, either at a UK or Welsh level, will have significant cost implications. There was acknowledgement that Wales should make an appropriate financial contribution if the new body is to operate on a UK level. However, concerns were expressed that funding would not be sufficient to adequately resource a new Welsh body should the UK Government determine that funding for the environment should be subject to the Barnett formula.

23. It appears that there is a fear among stakeholders that the UK Government will seek to introduce lower environmental standards for England. They see a UK body, designed by the UK and the devolved administrations, as a way of mitigating that risk. In fact, a UK-wide body was described as a way of “managing England”, should the UK Government have lower aspirations for environmental quality than the devolved administrations.

24. Although stakeholders' preferred approach was a UK level body, Dr Jenkins suggested an alternative - that each constituent nation of the UK could establish its own body. Effective co-ordination between these bodies would be vital. In any event, there would need to be a mechanism to resolve disputes between governments.

25. Professor Cowell suggested that, in addition to an independent body for monitoring and enforcement, the UK or the devolved nations could establish a dedicated arbitration court, such as is the case in New Zealand, to hear environmental cases.

The Committee's view

Through its membership of the EU, the UK benefits from being part of a mature and robust system of environmental governance. Yes, the current system has weaknesses in some areas, but this shared governance system has clearly led to improvements in the environment.

It is this governance system that ensures that Member States comply with agreed environmental standards. For example, ClientEarth recently brought an action in the UK courts under EU law against the UK for breaching legal air quality standards. The UK could ultimately face infringement proceedings from the EC backed by fines in the ECJ.

After the UK leaves the EU, these governance arrangements will need to be replaced. The extent to which the current arrangements are to be replicated is, of course, a decision for politicians. However, there appears to be a consensus in the devolved and UK governments that a successor system is necessary.

Designing new governance arrangements offers the opportunity to address the weaknesses in the current arrangements and to ensure we build on its strengths. A new system will require considerable resources, funding and expertise.

However, time is running out. There is much to do if the UK and Wales is to have a working system in place to fill what stakeholders describe as the "governance gap", even with the additional time accorded by the transition period. Although it is urgently needed, it needs to be established properly. As Professor Cowell told the Committee, there is a risk that the UK and Wales rush to replace the current governance system and become 'locked in' to a solution that is not ideal and is expensive to undo.

Our stakeholders are clear that there are no UK or Welsh bodies, as currently constituted, that could take on the role of regulator and enforcement body in full. They believe that a new body is required to undertake this role. This is a significant undertaking.

Stakeholders believe that an appropriate approach would be the establishment of a UK-wide body. The benefits are set out in paragraph 19 of this report. This approach would most closely replicate the current structure. If it is to be a UK body, it must be: co-designed by all of the different countries of the UK; it must be accountable to legislatures, rather than governments; it must be resourced appropriately; and there must be appropriate mechanisms to resolve disputes.

If these criteria cannot be met, we believe it would be appropriate for the Welsh Government to explore alternative approaches, such as a Wales-only body.

Transition arrangements

Stakeholders have welcomed the Welsh Government's commitment to 'take the first legislative opportunity' to close the governance gap. However greater clarity on how and when is needed. A political and legal commitment is needed to make environmental laws work after the UK leaves the EU.

It is unlikely that a successor body will be in place by the day the UK leaves the EU. We believe the Welsh Government should explore the potential for a transitional arrangement to ensure that regulatory and enforcement functions in relation to environmental law can be exercised in Wales. We accept that a new body will be required to exercise these functions effectively on a permanent basis. These temporary arrangements should be in place until a suitable successor body can be established, either at the Welsh or UK level.

Recommendation 1. The Welsh Government should clarify whether it supports the establishment of a UK-level governance body.

Recommendation 2. The Welsh Government should report back to this Committee as a matter of urgency on discussions that have taken place with the UK Government about the potential for establishing a UK body.

Recommendation 3. The Welsh Government should report back to the Committee as a matter of urgency on any exploratory work it has undertaken to assess the resources that would be required to establish a Welsh body and any discussions with the UK Government on this matter.

Recommendation 4. The Welsh Government should report back to the Committee as a matter of urgency on any work to explore potential transitional arrangements for environmental governance, if no governance body is established before the UK leaves the EU.

Recommendation 5. A UK-level governance body must meet the following criteria:

- it must be co-designed by all of the different countries of the UK;
- it must be accountable to legislatures, rather than governments;
- it must be resourced appropriately; and
- there must be appropriate mechanisms to resolve disputes.

Recommendation 6. . The new environmental governance architecture must include the following functions:

- promoting environmental protection among government actors and the wider community;
- monitoring and reporting on progress in the implementation of environmental laws and providing essential scientific data;
- taking action where targets/objectives are not met, for example through the imposition of economic sanctions;
- providing citizens and civil society organisations with access to the complaints and enforcement systems; and
- adopting a long-term strategy transcending political cycles.

3. EU environmental principles

26. The EU environmental principles are intended to shape the development of EU law and policy to ensure high environmental standards and are used in the interpretation of EU law. Article 191 Treaty on the Functioning of the European Union (TFEU) states that EU environmental policy must be based on the following core principles:

- The prevention principle;
- The principle that environmental damage should as a priority be rectified at source;
- The polluter pays principle; and
- The precautionary principle.

27. These principles also underpin several international environmental treaties to which the UK is a signatory, including the Convention on Biological Diversity and the Convention on Climate Change. Professor Cowell said that other non-environmental EU principles, such as subsidiarity, have implications for environmental governance and warrant consideration.

28. Stakeholders believed that the list of principles should not be considered to be exhaustive. Professor Lee suggested that emerging principles, such as a 'non-regression' principle and 'integration principle', may need to be considered. However, Dr Jenkins warned against making the list too exhaustive to avoid overlap with existing Welsh principles.

How should the principles be retained?

29. The question of how best to retain these environmental principles was considered by stakeholders. The Welsh Government has committed to 'take the first proper legislative opportunity to enshrine the environmental principles into law'.

30. Professor Cowell said that the means by which the principles should be retained should be guided by consideration of how they can influence implementation and enforcement of environmental legislation most effectively.

31. There was broad agreement amongst stakeholders that the core EU environmental principles should be retained in law. This would confer greater status, compared to including them in a policy statement. In their view, the

principles have given EU environmental legislation coherence and provided direction for legal interpretation where there are ambiguities.

32. There was acceptance that the arrangements should be flexible, to ensure that the principles can continue to evolve to reflect legal decisions, societal changes, and respond to international obligations. Nevertheless, for the majority of stakeholders, it was vital to enshrine the principles in legislation.

33. Stakeholders felt it was important that the principles should not only apply to the Welsh Government environment department, but across all government departments and local government.

UK environmental principles or bespoke Welsh principles?

34. Welsh principles, such as ‘the sustainable management of natural resources’ (the Environment (Wales) Act 2016) and sustainable development (the Well-being of Future Generations (Wales) Act 2015), interrelate with the core EU environmental principles. Dr Jenkins said that the Welsh principles support the prevention and precautionary principle approach but there is less focus on the polluter pays principle. This is a point of diversion from the UK Government which has emphasised the latter in its Agriculture Command Paper.

35. There were concerns about the potential impact of differences, such as definitions of specific terms, between UK and Welsh legislation. For example, “sustainable development” is defined differently in Welsh legislation, when compared to the EU definition.

36. Stakeholders raised concerns about the potential conflict arising from powers that had been devolved to the Assembly and those which are reserved at a UK level.

The Committee’s view

In relation to the environmental principles, the question is whether the environmental principles should be enshrined in legislation, or whether an alternative approach, such as their inclusion in a policy statement, is more appropriate. It has also been suggested that the principles could be set out in the terms of reference of any new governance body.

The strong view of our stakeholders is that the four core environmental principles as a minimum should be enshrined in legislation. There must also be flexibility to ensure that the principles can evolve and be added to.

The Committee notes the Welsh Government's commitment to enshrine the principles in legislation at the earliest appropriate opportunity. The Committee welcomes and endorses this commitment in principle.

We are concerned about potential conflict between UK Government decisions on reserved matters and Welsh policies. It will be possible for the UK Government to make decisions relating to reserved matters in Wales that would be in direct conflict with principles or standards adopted by the National Assembly for Wales. In practice, this could mean two sets of standards running in parallel in Wales, with potentially different environmental standards being applied to devolved and reserved matters.

Recommendation 7. The Welsh Government should bring forward legislation at the earliest opportunity that will enshrine the environmental principles in law. The principles should be included on the face of the Bill.

Recommendation 8. The Welsh Government should clarify and report back to this Committee as a matter of urgency about when and how it intends to bring forward legislation to enshrine the environmental principles in law.

Recommendation 9. The Welsh Government should report to this Committee as a matter of urgency on discussions it has had with the UK Government to resolve the issue of the UK potentially making decisions on reserved matters in Wales that conflict with Welsh environmental principles or standards.

4. Annexe A

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| Prof Nicola McEwen | The UK in a Changing Europe |
| Steve Lucas | Bat Conservation Trust |
| Anne Miekke | WWF Cymru |
| Amy Mount | Green Alliance |
| Annie Smith | RSPB |
| Llinos Price | Woodland Trust |
| Dr Andrew Flynn | Cardiff University |
| Haf Elgar | Friends of the Earth |
| Tom West | Client Earth |
| Dr Rupert Read | University of East Anglia |
| Clare Trotman | Marine Conservation Society |
| Maddy Thimont Jack | Institute for Government |
| Rebecca Williams | CLA |
| William Wilson | Wales Working Party, UKELA |
| Prof Robert Lee | Birmingham Law School |
| Huw Thomas | NFU Cymru |
| Charlotte Priddy | FUW |