

Cynulliad Cenedlaethol Cymru | National Assembly for Wales
Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change,
Environment and Rural Affairs Committee

Fframweithiau cyffredin y DU ar amaethyddiaeth a'r amgylchedd | UK common
frameworks on agriculture and environment
UK 11

Ymateb gan : RSPB Cymru (Y Gymdeithas Frenhinol er Gwarchol Adar)
Evidence from : RSPH Cymru (The Royal Society for the Protection of Birds)

In which policy areas, within the remot of the Climate Change, Environment and Rural Affairs Committee, are legislative and non-legislative common frameworks needed? Does the provisional assessment published by the UK Government set out an appropriate approach and is it complete? Do you have any specific concerns about the proposed categorisation?

1. Our membership of the European Union has given us a number of common frameworks. This is particularly true for our environmental legislation where common frameworks have allowed for an intra-UK co-ordinated, transboundary approach. This has ensured minimum standards which effectively protect the environment, prevented competitive deregulation, helped to maintain a level playing field, and has underpinned compliance with UK international obligations. RSPB as part of a coalition of NGOs has produced a document outlining the implications of Brexit for our environment and intra-UK environmental governance in more detail¹.

2. The Welsh, UK and Scottish Governments and senior civil servants from Northern Ireland (in the absence of a Northern Ireland government) recognised the importance for cooperation and collaboration on common frameworks, agreeing six principles to underpin where common frameworks would be needed². This included principles to enable the functioning of the UK internal market, but also those to enable the effective management of common resources, to ensure compliance with international obligations, and to administer and provide access to justice.

3. With regards to policy areas that may require legislative and non-legislative common frameworks to be collaboratively developed and agreed by the governments of the UK, there are a number of areas of particular importance to the RSPB where common frameworks currently exist. This includes nature protection and conservation, as well as wider land and marine management policies. Therefore - without prejudicing the need for frameworks in other areas - it is our view that strong consideration should be given to developing frameworks in these. However we have wider views and concerns about the process by which decisions on common framework requirements will be made. It is our view that discussions around common frameworks should be based on the principles set out in the October communique. We understand that the provisional assessment of the areas where common frameworks may be required, and whether they would require legislative or other frameworks, which was subsequently published by the UK Government³ was a working draft based on areas of EU law that intersect with devolved competence, and that it had not been agreed by the devolved administrations. It was "*designed to inform engagement between officials in the UK, Scottish and Welsh Governments and the civil service in Northern Ireland*". It was also prepared without prejudice to the outcome of negotiations with the EU.

¹[Brexid and devolution: implications for intra-UK environmental governance. Greener UK \(Nov 2017\)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf)

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL_Frameworks_analysis_for_publication_on_9_March_2018.pdf

We have a number of concerns and questions about the published assessment. This is particularly true as it has been difficult to understand the judgements made within the assessment as it was published without a methodology or detailed commentary on decision making processes. This makes it difficult to determine why certain assessments have been made, or why specific policy areas have ended up in the categories they have. We are concerned that on the face of it decisions seem to have been made on the basis of a very narrow consideration of internal market and trade issues, without considering the wider importance of transboundary cooperation or coordination to solve shared environmental challenges, to ensure effective transboundary protection, to manage shared resources, and to ensure a regulatory level playing field that limits downward pressure on standards and enables a 'race to the top'.

4. It is unclear how decisions made in the frameworks document are consistent with the principles set out in the October communique and with wider environmental commitments. In particular, we are concerned about the implications of assigning policy as requiring no further action or a non-legislative framework being required. One of the advantages of EU environmental law is its recognition that environmental issues cross borders and can often only be solved by working together, which the results of this provisional analysis would risk undermining.

5. We therefore remain concerned that despite questions around the methodology and some of the decision making within the provisional analysis, this analysis referenced in the "Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks"⁴ document, part of the agreement between Welsh and UK Governments on Clause 11, and appears to form the basis of decision making around the need for common frameworks going forward. Indeed, the text of the agreement stated that 'Deep Dive' sessions between the governments have begun to test and refine the analysis and that these sessions have identified "*that legislative frameworks may not be necessary in all of the 24 areas identified*". As we have a number of questions about the processes and analysis that have led to the provisional assessment, we would urge the governments of the UK to open up this process to enable stakeholder participation as soon as possible (see answers to question 2 for more detail).

6. Specifically with regards to the provisional assessment, we have concerns about what appears to be an inconsistent approach to the division of some policy areas - for example, the categorisation of EIA (Environmental Impact Assessment) and SEA (Strategic Environmental Assessment). Whilst we recognise that these policy areas are devolved and implemented slightly differently in each of the four countries of the UK, current EIA and SEA EU legislation has provided a common framework for UK and devolved action in these areas. The provisional analysis appears to be taking different approaches to common frameworks in respect of different types of EIA, proposing no further action in respect of certain areas e.g. Forestry and Harbours (we note that EIA as a whole is identified as an area where no further action is required), whilst proposing non-legislative common frameworks in other areas (e.g. EIA of energy planning consents – such as generation stations and overhead lines). SEA is also identified as an area where non-legislative common frameworks may be required. It is not clear what methodology has been used to

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf

reach these conclusions or what they would mean in practice. This is a concern more broadly across all the environmental policy areas included within the 'no further action' and 'non-legislative framework' baskets and, more generally, we would like to better understand the reasons why policy areas have ended up in each category.

7. The analysis also raises concerns about the interactions between policy areas. For example, agriculture is listed as an area potentially needing legislative frameworks, but some of the environmental implications of agricultural policy that are very closely linked (for example, nature protection) sit in a different area of the analysis. Specifically, the environment has been identified in England and Wales at least as a key component of future farming policy (legislative framework needed), but itself does not seem to be listed as needing legislative frameworks, or in some cases any frameworks at all. We therefore query how interactions between these policy areas will work in practice. The same applies to fisheries management and support (listed as an area potentially needing legislative frameworks) but those environmental areas closely linked to and impacted by fisheries policies, including nature conservation and seabed integrity, are listed as potentially needing non-legislative frameworks. This could result in a less integrated approach to addressing such issues post-Brexit.

8. Furthermore, there are some notable omissions from the analysis, such as invasive non-native species policy, with no explanation provided as to why this has been excluded.

How should both the legislative and non-legislative frameworks be developed and implemented?

9. The starting point of these conversations should be to look across each policy area where there are existing EU common frameworks, making a robust assessment of the implications and potential risks of divergence caused by failure to maintain these frameworks in the future. This should be an open and transparent assessment of how decisions are made, against the principles agreed in the October communique. Any post-Brexit changes should be jointly agreed and subject to an appropriate level of scrutiny by each of the relevant legislatures, to respect the existing devolution settlements. In particular, as discussions around common frameworks are likely to take some time, consideration of how to maintain existing frameworks should be taken, to avoid unmanaged divergence, until robust assessments on the implications of removing or loosening existing common frameworks are undertaken. Assessments should also be made on the implications of maintaining or creating new common frameworks, or their removal, on other policy areas. For example, negotiations around new trade and other international agreements, of which the UK as a whole will take part, will have implications for common frameworks discussions relating to environmental standards.

10. This view point is supported by a recent Institute for Government (IfG) publication, "*Devolution after Brexit Managing the environment, agriculture and fisheries*"⁵, which identified a number of challenges on how the governments of the UK could forge new UK-wide agreements, with a primary focus on the environment, agriculture and fisheries. The

⁵ <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devolution-After-Brexit-180413-FINAL-WEB.pdf>

report identified the need for new ways of working between the governments and legislatures of the UK, recommending that the four governments urgently review how they work together in the light of Brexit. It also recommended that *'the four legislatures should work together to improve their relations with each other to help support the scrutiny of new agreements, including via joint evidence sessions and inquiries, and interparliamentary forums'*. This chimes with the recommendations of the Constitutional and Legislative Affairs Committee's report "*UK governance post-Brexit*"⁶ which made a number of recommendations about future intergovernmental and inter-parliamentary working.

11. On the arrangements needed to determine where common frameworks are needed the IFG report said:

"Decisions on the scope of new agreements should be based on the principles agreed by the four governments in October 2017" and where new legislative frameworks are needed, it *"should be agreed with the devolved administrations and then passed with the consent of their legislatures.....[which will require] "early, meaningful engagement between the UK Government and the devolved administrations."* To be clear, this agreement between administrations should represent full engagement and effective co-development of the product. Another possible route to securing common legislative frameworks would be for legislation to be put forward by each administration for scrutiny by their respective legislature.

12. We understand there have been a number of roundtables and 'deep dives' into policy areas which have contributed to the provisional assessment published by the UK Government. However, broadly, discussions and (albeit provisional) decision making around common frameworks, including within the Joint Ministerial Committee have not taken place within a transparent process, in particular with very limited information becoming available after the fact. We welcome the statement within the "*Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks*" between the UK and Welsh Government that *"further discussions between the governments are now required to define the precise scope and form of future common frameworks"* and that *"Deep dives in May and June 2018 will refine policy thinking on legislative frameworks and cross-cutting issues in conjunction with a broader review of intergovernmental relations"*. However, we would urge the governments of the UK to ensure the process is as transparent and open as possible, and include broad stakeholder consultation and engagement across the UK.

13. As IFG recommends, it is vital that the UK and devolved governments agree and establish new and improved mechanisms for inter-governmental working at both ministerial and official levels. Wider stakeholder involvement and consultation should also be a core part of this process. The IfG report "*Devolution after Brexit Managing the environment, agriculture and fisheries*" recognised the importance of such engagement stating that *"There is an opportunity for the UK Government and the devolved administrations to involve external stakeholders as they design new policies in these areas after Brexit. But currently, intergovernmental agreements often lack transparency. The four nations should open the JMC process and offer civil society and industry an opportunity to meaningfully engage."*

⁶ <http://www.assembly.wales/laid%20documents/cr-ld11405/cr-ld11405-e.pdf>

14. Consideration should be made of the implications of non-legislative frameworks where legislative frameworks used to exist. Non-legislative frameworks would be potentially less robust as it would be more difficult to hold any country of the UK to account if they fail to meet them. More broadly, the effectiveness of common frameworks will only be as good as the enforcement mechanisms which underpin them. Across the four nations of the UK, there is a need to put in place effective governance mechanism, in particular to replace the role that that EU institutions (including the European Commission and the European Court of Justice) currently play in enforcing and upholding European law (including much of our environmental law). The Welsh Government has committed to legislating to address this governance gap, as well as to enshrine environmental principles in law, at the earliest legislative opportunity. The Scottish Government has made a similar commitment and Defra is currently consulting on proposals for a new environmental governance body with a remit for England and reserved matters. It is imperative that the governments work together, in a transparent way, to develop new arrangements for environmental governance for the whole of the UK.

15. The IfG report (referenced above) identified this as a challenge, and considered the possibility of a single environmental governance body (or watchdog) for the whole UK: *“A four-nation watchdog would be more robust in its monitoring of government as it would be less prone to abolition. It could report to all the devolved legislatures, to reflect different policy objectives. Parliamentary funding would also provide greater guarantee against abolition – but unless this was co-funded by the four legislatures, it could make operation on a four-nation basis more difficult”*. The report is clear that any organisation with a four-country remit would need to be co-designed and co-owned by each government, and accountable to all legislatures.

How prescriptive should the common frameworks be and how much discretion should each administration have within the frameworks?

16. Whilst common frameworks will help to ensure effective protection of our environment, each nation should retain the freedom to develop more ambitious approaches as is currently the case under EU law, whilst recognising the need for more detailed assessments on the makeup of common frameworks and the broader implications of trade and other international agreements.