

Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change, Environment and Rural Affairs Committee

Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry into environmental principles and governance post-Brexit

PG11

Ymateb gan : Undeb Cenedlaethol Amaethwry Cymru

Evidence from : National Farmers Union Cymru

1. Introduction and overview

NFU Cymru welcomes the opportunity to respond to the CCERA Committee's call for evidence into environmental governance and principles.

1.1 Farming is the backbone of Wales' rural economy, providing employment for 55,000 people and supplying the raw ingredients for our food and drink sector, worth almost £6.8bn and providing work for almost 217,000 people¹

1.2 Wales' farmers manage over 80% of our land and have a daily interest in managing and protecting environmental resources alongside the practical challenges of food production. With this in mind NFU Cymru has given careful consideration to the aims and objectives of any new, independent oversight body set up to protect the environment.

1.3 The Union's interests in this new governance body and policy principles will relate to how these

- Are framed to support a productive, profitable and progressive agriculture in Wales, while protecting our key natural resources including soils, air, water and wildlife
- Provide clarity and certainty for our members without adding unnecessary costs and burdens to business
- Improve environmental legislation
- Ensure that regulatory frameworks are evidence-based and outcome focused
- Give the EU and other trading partners confidence in our environmental standards; and
- Ensure that our regulatory regimes have appropriate levels of regulatory equivalence with trading partners, to maximise the potential and fairness of our trading relationships

Turning to address those issues that Committee is seeking our views on, NFU Cymru would offer the following commentary

¹ <https://businesswales.gov.wales/foodanddrink/about-us/welsh-food-and-drink-numbers>

Gaps in environmental governance structures and principles post-Brexit in Wales and whether the Welsh Government's analysis correctly and comprehensively identifies the deficiencies

2.1 NFU Cymru accepts and recognises that environmental governance structures and principles will open up (if and) when the UK should leave the EU. We are in broad agreement with those gaps which have been identified in the Welsh Government's consultation.

2.2 We would however emphasise the point that the only true governance gap which opens up as a direct result of the UK's intended departure from the EU is that which accompanies the loss of the European Commission's supervisory and enforcement function in relation to Member States' Community derived obligations.

2.3 Whilst the consultation points to other apparent gaps in environmental governance, it must be emphasised that these do not arise by dint of the UK's intended departure from the EU, rather they are gaps that the Welsh Government perceives to exist in relation to domestically inspired provisions and bodies (such as the Wellbeing of Future Generations Act, the work of the Future Generations Commissioner, the Public Services Ombudsman and the Auditor General).

2.4 The gaps that the Welsh Government perceives in relation domestically inspired provisions relate to matters which have never been under the control of the European Commission

2.5 Through the consultation proposals, the Welsh Government therefore appears to be considering going somewhat beyond the closing of the governance gap which will open up on our anticipated EU departure, as the consultation appears to propose to bring into the remit of the new oversight body not only compliance with retained EU law, but also compliance with domestically inspired environmental law, which has never been the purview of the European Commission in the first place.

2.6 With regard to principles of polluter pays and rectification at source, NFU Cymru would stress that before considering the import of these principles into Welsh legislation, there needs to be a mutually agreed definition of what these principles are. We would further add principles imported into domestic law should also be underpinned by the five principles of good regulation, namely proportionality, accountability, consistency, transparency and targeting.

2.7 The introduction of new principles must be accompanied with guidance as to how these principles can be interpreted in order to try and reduce unnecessary litigation in future, with such guidance subject to consultation. Such guidance would also need to be amendable in response to the latest scientific and economic developments.

2.8 NFU Cymru would make the point that whilst such overarching principles may appear as gaps in existing Welsh legislation, such overarching principles are not set to disappear entirely from the policy and legal landscape. They are for example referenced in

Directives such as the Water Framework Directive, which will be maintained as part of our domestic legal framework via the EU Withdrawal Bill.

2.9 Further to this, the body of pre-exit CJEU case law will continue to bind the lower UK courts, and so where these principles have informed decisions of the CJEU, they will, even after EU departure, by dint of our observance of pre-existing CJEU case law, find expression via decisions of the domestic courts.

Environmental Principles and the function, constitution and scope of the proposed governance body

3.1 If the purpose of the new oversight body is to replace the role of the European Commission and the Court of Justice of the European Union, then we are certainly of the view that the role of any new body should not exceed the functions and powers that are currently exercised by the European Commission in conjunction with the CJEU.

3.2 As such we do not for example believe that the new body should have powers to levy fines, we believe that such powers should rest with the Courts.

3.3 We do not believe that the new body should have any sort of policy making function either, we are of the view that such a role should remain the domain of the government and its agencies.

3.4 NFU Cymru is of the view that the oversight body's work must be subject to the control of the courts and its determinations susceptible to judicial review. As a public body, we also assume its actions will be captured by s6 of the Human Rights Act 1998, and the prohibition this introduces on public bodies acting in a way which is incompatible with Convention rights.

3.5 It has been suggested that the oversight body could be given a role in investigating complaints from members of the public. NFU Cymru sees the primary function of this body as being the oversight of public bodies rather than the investigation of complaints from members of the public. NFU Cymru is of the view that there are already existing routes by which members of the public may raise complaints. This includes in the first instance directing a complaint to the relevant organisation that they have a complaint against so that the matter is investigated internally, there is also recourse to the relevant ombudsmen, to elected representatives as well as the option of taking a matter to judicial review.

3.6 NFU Cymru is opposed to members of the public being able to raise complaints directly with the oversight body. If Welsh Government were to decide to give the oversight body a role in investigating complaints from members of the public then we would expect this to be confined exclusively to a vertical effect against a limited number of public bodies. We would not want to see a horizontal effect established providing individuals with a route for making claims against other private individuals.

3.7 If the new oversight body has a role in investigating complaints from the public, then it also needs to be equipped with sufficient latitude and discretion to screen out frivolous or vexatious complaints. In the absence of such latitude, we believe there is a real risk that

the body could become inundated with complaints lacking in merit, leaving it unable to discharge its functions properly.

3.8 It is important for the credibility of any new body that it is not only independent of Welsh Government but also seen to be independent of Welsh Government.

3.9 We would expect the new body to be accountable to the National Assembly for Wales, and subject to independent audit by the Auditor General for Wales, to have an independent appointment structure and independent sources of funding.

3.10 NFU Cymru is of the view that any powers for the new body to hold government to account for non-compliance should apply to central government. Extending this provision to other bodies such as NRW and local authorities would undermine the rights and responsibilities of Welsh Ministers.

3.11 As a Union we are quite strongly opposed to the creation of any advice giving role for the new body. It is our view that there is an inherent tension in a body having concurrent responsibility for the provision of advice around environmental legislation and the enforcement of any breaches of environmental legislation.

3.12 It is not difficult to envisage a situation arising whereby the advice of the oversight body has been sought and acted upon in good faith by one of the public bodies under its remit, and a complaint is lodged (perhaps by a member of the public) that the public body has breached its environmental duties. This immediately places the oversight body in the invidious position of having to decide whether the public body, in acting on the advice of the oversight body actually breached environmental law, a situation akin to the oversight body marking its own homework.

3.13 The role of the National Assembly for Wales in holding the Welsh Government to account is constitutionally fundamental. For the avoidance of doubt, NFU Cymru would make it clear that the existing role of the National Assembly for Wales and its committees should not in any way be diluted, diminished or displaced by the creation of a new environmental governance structure.

The value and practicality of a UK joint approach

4.1 NFU Cymru has discussed with its members the advantages and disadvantages of closing the governance gap with a stand-alone Wales only body, or alternatively with a body which has a wider remit (England and Wales, GB or even UK wide).

4.2 Our members did acknowledge that there were advantages and disadvantages associated with each approach, and also recognised the strong political considerations that would accompany any joint approach.

4.3 Amongst the advantages to creating a body with a wider territorial remit our members took the view that a large number of farm businesses straddle the Welsh-English border, and so it should offer these businesses greater certainty and consistency, as well as hopefully ensuring a more level playing field between the home nations. Members also

identified the potential cost savings that would attach to not having an oversight body in each of the home nations.

4.4 In terms of the disadvantages of creating a body with a remit beyond Wales our members recognised the surrender of control that this would imply on the part of Welsh Government and the National Assembly, and the desirability of having a Welsh body, answerable exclusively to the National Assembly.

4.5 Whilst recognising the advantages and disadvantages of either approach our members did not reach a concluded view on which approach might be better.

4.6 In terms of complying with international obligations in relation to the environment, this would probably be more easily achieved via a body which is UK wide.

4.7 There are of course other practical considerations such as how the financing of such a body might be agreed upon, to which bodies (legislatures) would the oversight body answer to, and how would any disagreements between those home nations which subscribe to the same oversight body might be resolved.

4.8 NFU Cymru recognises that some of the difficulties with having a joint body could be mitigated by for example ensuring that any joint body has offices in each nation, ensuring staff are recruited from each of the home nations, ensuring that there are robust dispute resolution mechanisms in place etc.

4.9 Other obvious difficulties that might attach to a joint approach include the fact that the home nations are not starting from a position of regulatory alignment, rather domestic initiatives such as Wales' Environment Act and the Wellbeing of Future Generations Act place Wales in a stronger starting position with regard to the environment than for example England. It is difficult to see how an oversight body might manage a situation whereby different territories are working to different standards and objectives.

4.10 It may also be the case that the window of opportunity that was presented by Defra to work together jointly with them (mooted in their consultation of last summer) may now have closed and there may not now be the opportunity to do so. We would also re-iterate that the prospect of a no-deal Brexit this Autumn is a real one, and time for devising governance arrangements, be they joint or stand-alone is very limited.
