

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
PG 12
Ymateb gan : Coed Cadw
Evidence from : Woodland Trust

Introduction

Coed Cadw Woodland Trust is the UK's largest woodland conservation charity, working for a UK rich in native woods and trees, for people and wildlife. In Wales we have over 14,000 members and 85,000 supporters. We manage over 100 sites in Wales covering 2,697 hectares (6,664 acres).

Coed Cadw welcomes the committee's inquiry on environmental governance and principles in Wales post EU Exit, and the opportunity to provide evidence on the proposals of the Welsh Government. The Welsh Government has made a series of welcome commitments in relation to environmental governance and principles post Brexit including ensuring that there is no drop in environmental standards, to continue to improve environmental regulation and address the governance gap. In its White paper, Securing Wales' Future, non regression of environmental rights and the provision of continued citizens' rights to hold Government to account are policy priorities. The consultation includes a fair analysis of the gaps in environmental governance and principles that will emerge as a result of Brexit, and identifies the key features of new arrangements that will need to be set up. This paper summarises our views on the consultation proposals.

Environmental Principles

Article 191 (2) of the Treaty on European Union and the Treaty on the Functioning of the European Union) states that "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

The treaty also includes a set of objectives for union policy on the environment, namely:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

The analysis in the consultation focusses on the four core principles in Article 151 the TFEU and principles in Welsh legislation, namely the Environment (Wales) Act 2016 and the Well being of Future Generations Act 2015. It is acknowledged that although some of the EU environmental principles are reflected in Welsh legislation that they might not be directly comparable in terms of drafting or their application. It is also recognised that the principles are not applied in the same way as EU environmental principles, with the principles of the sustainable management of natural resources set out in the Environment (Wales) Act 2016 only applying to the functions of Natural Resources Wales (NRW) and to Welsh Ministers in the development, production and implementation of the natural resources policy (Paragraph 2.26). However, it is claimed that prevention and precaution are reflected in Welsh legislation, and on this basis the proposal is to legislate to incorporate rectification at source and polluter pays into the existing principles for the sustainable management of natural resources as set out in the Environment (Wales) Act 2016 and extend their application.

We do not agree that the principles of prevention and precaution are effectively covered within Welsh legislation. The precautionary principle is not comparable with the principle that it is important to “take account of all relevant evidence and gather evidence in respect of uncertainties” (Section 4, Environment (Wales) Act 2016), neither it is equivalent to the interpretation of the precautionary principle in the EU.

The analysis also omits crucial elements of the relevant articles in the Treaty including the set of objectives and the overarching aim that environmental policy should achieve a ‘high level of environmental protection’ as well as the longer list environmental principles included in the UK Government’s draft environment bill. With the exception of sustainable development, is not clear why the full list of environmental principles set out in the draft environment bill have not been included in the Welsh Government's analysis. The full set merit consideration for inclusion.

Non regression

The Withdrawal agreement includes a commitment to non-regression, namely to ensuring that “the level of environmental protection provided by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the UK at the end of the transition period”, in relation to a list of areas that cover all the main topics of EU environmental law, including pollution control, nature conservation, climate change and public participation.

The Welsh Government’s Brexit policy Securing Wales’ Future identifies non regression of environmental rights and to provide continued citizens’ right to hold Government to account as priorities. The consultation also states that there is an opportunity to develop a structure which supports a commitment to non regression, and more fundamentally a commitment to enhancing the environment to meet challenges faced (paragraphs 1.3 and 1.5).

The table on page 16 of the consultation includes the Welsh Government’s analysis that non regression is “reflected in the objective of sustainable management of natural resources” (Environment (Wales) Act 2016). Whilst it is acknowledged that a commitment to maintain and enhance natural resources could be interpreted in this way, this drafting is not equivalent in its meaning to the principle of non regression.

The principles as set out in the Treaty should be fully articulated in Welsh legislation including the aim for a high level of environmental protection. Their inclusion would give the principles coherence and provide clarity on their interpretation and application. It would also be consistent with replacing the environmental acquis of EU law.

We recommend the inclusion of an unambiguous commitment to non regression or a principle of non regression in the revised legislation alongside the four core principles and the overall objective for a high level of environmental protection. The purpose of such a principle would be to ensure that there is no reduction in environmental protections and could also incorporate “progression”. The principle of non-regression is already a principle of international law as acknowledged by the International Union for Conservation of Nature (IUCN). We have made the same recommendation in relation to amending the draft environment bill.

We would support the extension of the the duty on environmental principles (as amended) to all public bodies in Wales so far as they are relevant to the discharge of their functions.

A shared set of principles across the UK

The Welsh Government proposes that the four environmental principles of prevention, precaution, rectify at source and polluter pays could provide a core set to be applied in relation to areas of joint decision making and legislation between the administrations (paragraph 3.62). This is a sensible proposal and would be in keeping with the commitment to non regression as well as the requirements of the Withdrawal Agreement. A shared set of principles would facilitate consistency with international commitments and provide coherence for environmental governance across the UK. The draft environment bill could still be the most appropriate legislative vehicle to achieve this.

Governance

The Withdrawal agreement includes relevant provisions on environmental governance and in particular requirements for any new oversight body or bodies. Article 3 of Annex 4 to the backstop obliges the UK to ensure effective enforcement of its laws, regulations and practices relating to the common standards agreed to in Article 2, and this covers almost all environmental law. The UK must “implement a transparent system for the effective domestic monitoring, reporting, oversight and enforcement of its obligations” relating to the environment by “an independent and adequately resourced body or bodies”.

The Withdrawal agreement requires that the new body or bodies must:

- Have powers to initiate enquiries about alleged breaches of compliance with the law;
- Have powers to receive relevant complaints;
- Have the right to bring a legal action before a competent court or tribunal in the United Kingdom;
- Be able to seek an “adequate remedy”;
- Cover climate change law;

- Cover all four countries of the UK.
- Cover activities of all public bodies, not just Ministers of the Crown.

Whilst the Welsh Government's consultation does not make specific proposals on structures, it accurately describes the functions that will be lost as a result of leaving the EU and outlines "the key elements that would be required to provide proportionate, independent, effective and robust oversight" "irrespective of the type of body, which may operate as an oversight body in Wales." It identifies three potential gaps in environmental governance that would emerge as a result of existing the EU (Paragraph 3.22), namely:

- Independent accountability
- A simple and inexpensive mechanism to raise complaints: – the simple and free citizen complaint procedure provided by the EU would no longer be in place
- Enforcement mechanisms – the EU has both formal and informal complaints procedures and mechanisms that enable disputes to be addressed via negotiations. It can also seek recourse to the CJEU, which can result in significant financial penalties where there is failure to comply with the courts judgements

It is proposed (paragraphs 3.27 and 3.28) that the following objectives would help set a broad purpose for a body providing oversight, fully aligned to the Environment (Wales) Act 2016 and the Well-being of Future Generations Act 2015:

- Ensure policy and legislation is developed in a way which maintains and enhances Wales' natural resources in line with the principles in Welsh legislation (e.g. that already specified within the Environment (Wales) Act);
- Ensure legislation is implemented effectively and delivery is in line with the aim of maintaining and enhancing Wales' natural resources;
- Act in an advisory capacity on the sustainable management of natural resources for public bodies;
- Act impartially in assessing the effective implementation of Welsh legislation relating to the environment;
- Act impartially in receiving complaints from citizens.

We broadly agree with the role and objectives for environmental governance as outlined in the consultation and set out more detailed comments on the functions of a new independent oversight body below.

The consultation provides an overview of existing governance arrangements including the functions of UK and Welsh bodies. It acknowledges that whilst there are several bodies operating in Wales which hold public bodies to account, such as the Public Services Ombudsman and the Auditor General, that these bodies were established for different purposes and do not have the role of scrutinising the proper implementation of environmental law, nor do they have the required expertise or equivalent functions to undertake continuous monitoring or enforcement. These factors, as well as the intended purpose, objectives and functions of new governance arrangements as outlined in the consultation clearly indicate that a distinct oversight body is required rather than modifying existing structures. It will be important however to ensure that there is no duplication of roles with existing bodies.

In order to meet the criteria of the Withdrawal Agreement and the Welsh Government in terms of its status, form and constitution, the new oversight body should be established as a fully independent body corporate, of similar status to the National Audit Office.

The consultation states that the Welsh Government recognises that the environment is intrinsically linked to the economy and society and therefore their approach to the environment is cross cutting. It asks how the governance gaps can be addressed in a way which continues to drive environmental improvement, enhances Wales' reputation for high standards, provides a coherent governance framework and builds on Welsh legislation. In this context, all areas of policy that interact with or have an impact on the environment should be included within the scope of new governance arrangements. This would be equivalent to the the European model whereby the Commission considers environmental effects across all areas of competence.

The remit of the oversight body's advisory and scrutiny functions should extend to all public bodies in line with the proposal to extend the scope of the application of environmental principles and the sustainable management of natural resources. The list proposed in the consultation is insufficient.

Article 3, Part 2 of the Withdrawal Agreement makes clear that sanctions need to be effective, proportionate and dissuasive and have a real deterrent effect". The consultation rightly acknowledges that judicial review has received criticism as an inappropriate mechanisms to replace the infraction procedures available to the CJEU (Paragraph 3.53) and states that the Welsh Government wants to ensure that deterrents relating to compliance with environmental law are genuine and effective including interim measures to prevent additional damage (paragraph 3.54). We agree that recourse to the courts should be a final method of enforcement or last resort.

In order to achieve equivalence with EU infringement proceeding new enforcement arrangements should incorporate the following mechanisms.

The oversight body's remit should include the following:

- Powers to investigate breaches of environmental law
- Powers to instigate its own investigations into breaches of environmental law or systematic problems, and issue guidance and recommendations. This would be consistent with the "power to investigate on own initiative" in the Public Services Ombudsman (Wales) Act 2019.
- Powers to issue interim measures and stop notices to prevent environmental damage
- Power to require damage to be corrected by the polluter, and for interim measures to be put in place to prevent additional harm while investigations are being conducted.
- Powers to issue binding decision notices/advisory notices and seek enforcement action for non compliance. Binding notices could include requirements for actions, policy implementation or financial compensation/ fines.
- Powers to seek enforcement action for non compliance with its binding decision notices/ advisory notices through the Environmental Tribunal
- Powers to initiate legal proceedings and refer cases directly to the Environmental Tribunal
- Powers to request information from competent authorities where it relates to the environment.
- Powers to intervene in legal proceedings relevant to its purpose

UK Governance

In addition to the governance gap emerging from exiting the EU, Brexit has exposed weaknesses in the UK's constitutional and intergovernmental arrangements and a need to establish new arrangements to facilitate collaboration and collective decision making. There is recognition across all of the administrations that new UK wide frameworks or agreements will be required to ensure the functioning of the UK internal market, as well as facilitating commitments to international agreements and securing trade deals.

The Joint Ministerial Communiqué agreed in October 2017 includes a framework for the UK Government and the devolved administrations to work together to establish common approaches in areas that are currently governed by EU law. The Communiqué is focused on trade concerns and maintaining compliance with obligations under international agreements, but mentions the management of 'common resources', a reference to cross-border concerns around air and water. The Communiqué makes it clear that the need to maintain the current competence of devolved institutions is crucial, and specifically states that the aim will be to significantly increase their decision-making powers. The Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks forms the basis of an agreed approach between the governments.

Whilst there has been a lack of transparency in the process, it is clear from public statements and written evidence from the Welsh and Scottish Governments that intergovernmental collaboration on these matters has been problematic. Whilst the Welsh Government is proposing to legislate and develop its own arrangements for environmental governance and principles, it recognises the importance of the four administrations working more closely post EU Exit and advocates more sustained cooperation between governments in the exercise of individual but connected competences in its White paper – Brexit and Devolution: Securing Wales' Future. It states that where there are common UK obligations or where there is an interface between the UK nations on environmental matters, a UK wide governance mechanism may be appropriate (paragraph 3.60).

The UK draft environment bill is intended to apply to England and reserved matters. The complex constitutional arrangements across the UK mean that the scope of reserved matters differs between the devolved nations. It is our understanding that the scope of reserved matters has not been defined or agreed, and as a result there remains a lack of clarity regarding the geographical scope of the bill and therefore the extent to which it is intended to or could be the legislative vehicle to include UK-wide provisions on governance and principles including intergovernmental arrangements.

As things stand there could be a divergence of environmental principles and governance arrangements across the UK which in itself would represent a weakening of the current common legal and governance framework that exists across the UK as a member state.

As the Communiqué indicates, the need for management of 'common resources' cross-border and maintaining compliance with international obligations/ commitments will remain, and whilst the UK as the sovereign state is signatory to international treaties, the devolved administrations have full or partial responsibility for delivering on those commitments. Intra UK governance arrangements should be established on the basis of the principles set out in the Communiqué and the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks and will need to account for international commitments, non regression, and dispute resolution.