

Cynulliad Cenedlaethol Cymru / National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol a'r Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol / The Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee

Ymgynghoriad ar Fil yr Undeb Ewropeaidd (Ymadael) a'i oblygiadau i Gymru / The European Union (Withdrawal) Bill and its implications for Wales

EUWB 11

Ymateb gan Rhwydwaith Brexit a'r Amgylchedd / Evidence from the Brexit and Environment Network

Evidence submitted by Professor Charlotte Burns, (Department of Politics, University of Sheffield) on behalf of the Brexit and Environment Network.¹

This evidence focuses upon the implications of the European Union (Withdrawal) Bill (EUWB) for environmental policy in Wales. The authors belong to a network of academics working on the implications of Brexit for the future of United Kingdom (UK) and European Union (EU) environmental policy (www.brexitenvironment.co.uk), and are funded by the ESRC's UK in a Changing Europe programme to investigate the impact of Brexit on UK environmental policy.

1. The EUWB foresees the incorporation of EU law into the UK statute book and anticipates the extensive use of secondary legislation to effect this 'copy and paste' exercise. Government Ministers and Ministers within the devolved regions of the UK are allowed a good deal of discretion to decide which areas of policy may need to be amended without parliamentary scrutiny.
2. As environment, agriculture and fisheries are all devolved policy sectors the UK's prospective exit from the EU has major ramifications for their future development and implementation. The devolution agreements post-date the UK's membership of the EU and were crafted in the light of the multi-level governance structure that has evolved at

¹ Prof. Charlotte Burns, (University of Sheffield), Prof. Neil Carter (University of York), Prof. Richard Cowell (University of Cardiff), Dr Viviane Gravey (Queens University Belfast), Prof. Andy Jordan (University of East Anglia) and Prof. Colin Reid (University of Dundee).

EU level. Consequently for devolved policy areas such as the environment, EU rules provided a minimum benchmark that all EU (and by extension UK) states have to abide by.

3. There is already divergence in environmental policy within the UK but within the context of EU minimum standards. Under the environmental guarantee principle enshrined in [Article 193](#) of the Treaty on the Functioning of the European Union (TFEU), 'more stringent protective measures' than those stipulated in legislation can be adopted. Brexit raises the prospect of further divergence emerging across the UK, as responsibility for devolved policy areas will revert to the devolved administrations.
4. However, it is essential both for the successful operation of the UK economy and market, and for the meaningful protection of the environment to have co-ordinated and ambitious environmental standards across the UK. Brexit should not be seen as an opportunity for a race to the bottom within the UK. For many areas ([such as chemicals](#)) there is likely to be a need to conform with EU standards for trade related reasons (Roger 2017).
5. The UK [government has made clear](#) its commitment to try to maintain structures at the national level that replicate those at the EU level in order to safeguard the UK's internal market (Department for Exiting the European Union 2017). However, as noted by the [Constitutional and Legislative Affairs Committee](#) it is unclear exactly what role is envisaged for the devolved nations and their legislatures in such future structures (Constitutional and Legislative Affairs Committee 2017a).
6. At the EU level the division of competence between the Commission, the Council and the European Parliament is clearly articulated and allows for democratic scrutiny. If the UK government wishes to

replicate EU structures at national level it should allow for similar levels of democratic scrutiny via the participation of the devolved national legislatures in decision-making.

7. However, the current wording of the EUWB raises the risk that the UK government will decide on behalf of the devolved nations what future environmental governance structures should look like, with limited input from the devolved governments, the three devolved legislatures and the Westminster Parliament. Moreover as noted in the letter of [31 July from the Constitutional and Legislative Affairs Committee](#), (2017a) as currently worded the bill appears to allow more power to be exercised by the Westminster Parliament than the devolved legislatures.
8. Given the need for future policies to be coordinated and negotiated by the devolved administrations together with the UK government, the lack of explicit and detailed consideration of how those administrations and, crucially, their legislatures can be involved in both the transfer and future development of policy is an oversight. It also fails to satisfy the principle of participation that underpins good environmental governance.
9. Securing the UK's withdrawal from the EU involves a delicate balance between efficiency and legitimacy. There is a need to maximise the efficiency of the withdrawal process given the tight negotiating deadlines for the UK and EU, but there must be scope to represent the democratically elected chambers of the UK.
10. Whilst there maybe scope to allow for wider parliamentary representation in the withdrawal process, an on-going concern is [legislative capacity \(Hunt 2017\)](#). The devolved policy areas are extensive and involve complex legislation and, [as noted by the Constitutional and Legislative Affairs committee](#) (2017b), could result

in a 'substantial amount' of legislation being brought to the Assembly, which could be challenging to scrutinise effectively within the short time frame.

11. Environmental policy is often transboundary in nature and many of the UK's commitments under EU law stem from international agreements, which are reserved to the UK government, but implemented at the local level. As currently worded the EUWB seems to enhance Westminster's powers in this area. It is also unclear how this overlap between reserved and devolved powers will operate in the new post-Brexit context. Specifically, what, if any scope, will the devolved legislatures, which will have to give effect to international treaty commitments, have to scrutinise and participate in negotiations? The same question applies to trade negotiations.
12. The EUWB does not provide sufficient detail upon how [environmental principles \(such as the precautionary principle and the polluter pays principle\)](#) that are articulated in the EU treaties, but given effect via legislation, are to be transferred to the UK (Haigh 2017).
13. For example, EU policy is informed by the precautionary principle, which requires that when the outcome of releasing a substance is unknown, a precautionary approach should be adopted in order to avoid harm to human health or the environment. Likewise, the EU Treaties formally recognise and require that policy be informed by the principle of sustainable development and that environmental considerations should be integrated across all policy areas.
14. Some elements of these principles may initially survive as integral parts of EU law are being retained, but there is no mechanism for transposing these principles into domestic policy (unless they have been the subject of Court of Justice of the European Union (CJEU) case

law) and therefore no guarantee that they will continue to inform policy UK wide.

15. The EU requires the UK government to monitor and report across a range of environmental standards. If the government fails to meet the goals to which it is committed, the European Commission can under its own initiative, or following complaints from national citizens and activist groups, take it to the CJEU where it may ultimately face fines. The House of Lords (2017) has called the government [‘worryingly complacent’](#) for failing to detail how it will replace the governance architecture that supports the meaningful implementation of environmental policy. The EUWB is unclear on the relationship between CJEU jurisprudence and the future rulings of national courts in upholding ‘retained’ EU law.
16. The government has suggested that the current system of judicial review will be enough to ensure that domestic environmental policies are enforced. However, judicial review is a corrective measure once the system has failed: it cannot substitute reporting and monitoring requirements. Moreover, as noted by [UK Environment Law Association \(UKELA\), judicial reviews can be complicated, time consuming and expensive](#), and may limit the scope for groups and individual citizens to be able to hold the government properly to account for policy failures (UKELA 2017).
17. The fact that the future post-Brexit environmental governance architecture will involve the devolved administrations heightens the need for meaningful consultation and scrutiny of the EUWB, subordinate legislation and future policy developments by the devolved legislatures.
18. The development of much EU environmental policy was driven by market considerations, to ensure a level playing field across EU

member states as the Single Market programme was completed. However, there are also environmental policies that have no market based justification, i.e. their primary aim is to protect the environment.

19. The [Welsh Government's Brexit and Devolution White Paper, Securing Wales' Future](#) (Welsh Government 2017) suggests that there is scope for divergence in environmental policies that are not derived from market-based measures, and cites the habitats and bathing water directives as examples. It must be noted that both these directives (like much EU legislation) cover transboundary environmental issues. The future development of such non-market based, but still transboundary environmental policies must be informed by the highest standards and on-going policy coordination across the nations of the UK.
20. To conclude, there is ample scope for the EUWB to be amended and clarified to secure on-going parliamentary scrutiny of environmental legislation, which should include the devolved legislatures; the transposition of environmental principles as well as policy; and the commitment to an equivalent monitoring, implementation and enforcement framework for environmental policy as that currently enjoyed by the UK as an EU member state. Moreover, future environmental policy must be informed by the highest standards to avoid a race to the bottom within the UK market.

References

Constitutional and Legal Affairs Committee (2017a) *Letter to Secretary of State for Exiting the EU*, 31st July 2017, available at:

<http://senedd.assembly.wales/mgConsultationDisplay.aspx?ID=269>

Constitutional and Legal Affairs Committee (2017ba) *Letter to Chair of Procedure Committee, House of Commons*, 25th April 2017, available at:

<http://senedd.assembly.wales/mgConsultationDisplay.aspx?ID=269>

Department for Exiting the European Union (2017) *Legislating for the United Kingdom's withdrawal from the European Union*, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

Haigh, N. (2017) *A principled green Brexit?* available at:

<https://www.brexitenvironment.co.uk/2017/08/02/principled-green-brexit/>.

House of Lords (2017) *European Union Committee, Brexit: environment and climate change, 12th Report of Session 2016-17 - published 14 February 2017 - HL Paper 109*, available at:

<https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/109/10902.htm>

Hunt, J. (2017) *Bringing powers back from Brussels – But to where?* available

at: <https://www.brexitenvironment.co.uk/2017/02/10/bringing-powers-back-from-brussels-but-to-where/>

Roger, A. (2017) *Can Brexit truly bring a 'better' chemicals regulation?*

available at: <https://www.brexitenvironment.co.uk/2017/07/31/brexit-better-chemical-regulation/>

UKELA (2017) *Brexit and Environmental Law, Enforcement and Accountability Issues*, available at: <https://www.ukela.org/content/doclib/317.pdf>

Welsh Government (2017) *Securing Wales future, Transition from the European Union to a new relationship with Europe*, available at:

https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf