NAW Climate Change and Rural Affairs Committee
Environmental Governance Arrangements Post-Brexit 10th May 2018
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Information presented here draws in part on evidence submitted to the Environmental Audit Committee, available here http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/25-year-environment-plan/written/79279.html

Environmental Governance

1) What are the current key functions of the European Commission (EC), the European Court of Justice (ECJ) and other EU bodies in implementing and enforcing environmental legislation?

EU institutions have performed a number of important functions in UK environmental policy that are put at risk by Brexit. Most attention has been given to the powers of the EC and ECJ to take enforcement action against Member States, with the important provision for third parties to bring complaints and to issue fines for infractions. However, the key functions of EU bodies *also extend beyond enforcement*, to embrace:

- pooled expertise and specialist agencies (for example European Chemicals Agency);
- monitoring, policy evaluation and transparency (with the UK obliged to provide regular reports to the Commission on its ability to deliver against targets which, by being publicly available, can provide a basis for holding governments to account), with the European Environment Agency having a key evaluation role;
- delivering interpretations of EU environmental legislation and more detailed guidance;
- new policy formulation and strategic thinking

2) What type of domestic governance body will be needed to replace these functions post-Brexit?
3) What will the key functions of the body be? Will/can these mirror functions of the EU institutions? What additional powers should be considered?

The prospective new body promised in the UK Government's 25 Year Environment Plan has been described as 'green watchdog' but, as above, this scarcely captures

the important functions of the EC and ECJ, which are 'guide dog' as well as watchdog[1], and the proposals presently appear only to cover England.

If the goal is effective environmental policy, then all of the key functions listed above need to be institutionalised somewhere in the UK's environmental governance architecture. An independent body could be an appropriate portmanteau institution for housing functions on monitoring and enforcement. Conceivably, the UK (or the devolved nations) could set up a dedicated arbitration court to hear environmental cases; perhaps based on the New Zealand model; or revisiting older reflections on the merits of a UK 'Environmental Court'[2]. The current environmental tribunal for England and Wales seems only to address appeals by the regulated against regulatory action, not third party appeals. But *debates about a new body need to be widened to a process of identifying where all of the roles of EU environmental governance, including those beyond the remit of a new body, will be discharged*. Ongoing compliance with the Aarhus Convention is also germane to these tasks.

It should also be noted that *the ability of any future body to exercise a firm and effective implementation role will depend to a large extent on how UK environmental policy evolves as the EU's influences diminishes*. Action taken by the EC on monitoring and enforcement was made effective because EU legislation tended to have 'hard edges' e.g. firm, measurable targets and clear timetables for implementation. Should post-Brexit environmental legislation in the UK become more vague, more discretionary, more accepting of trade-offs, then holding governments to account for implementation failures loses its efficacy.

4) What should be the core principles of the body? For example, independence, adequate resourcing, expertise? What governance arrangements are required?

Any new, effective environmental body requires significant levels of independence from government, adequate resourcing (the governance of which is itself a dimension of independence) and expertise. Achieving these requires nothing less than a *volte face* in the treatment of environmental bodies in the UK. The period since 2010 has seen a series of government moves, mainly at Westminster level, to cut the resourcing of environmental bodies with knock on effects for expertise; reduce their independence and remit and, in some cases, to cut them altogether e.g. Sustainable Development Commission, Royal Commission on Environmental Pollution. Governance arrangements are thus required that can establish the

[1] Davis H and Martin S (2008) *Public Services Inspection in the UK*, Jessica Kingsley.
[2] Grant M (2000) *Environmental Court Project*, Final Report, DETR.

requisite high level of independence, authority and *also permanence* – allowing long-term thinking and learning – that characterises the EC's environmental roles.

5) Should there be a single UK-level body or separate bodies for each part of the UK?
6) For a UK-level body, should it be accountable to Parliament and if it is a national body how should it be accountable to the devolved legislatures? What role should the devolved administrations play in setting it up?

Given the deep and profound connections between Brexit, environmental policy and devolution, it is very important that the devolved administrations have a major role in shaping how any such body is set up, alongside the Westminster government. There are also likely to be considerable returns from cross-UK collaboration, given that post-Brexit environmental legislation will be subject to various forms of Common Framework, the need to consider compliance with international conventions and possibly EU alignment, and the desirability of sharing expertise and back office functions. Collaboration in institutional design should also foster buy-in and cement the organisation's status.

There are arguments for either creating a single body at UK level or for separate bodies in each part of the UK: the former may score better on efficiency, cross-UK coherence and critical mass; the latter more on attunement to devolution. But attention should also be given to what kind of accountability relations are most likely to make the body effective, by giving it power, permanence and status: unity or separate bodies? Arguably a single UK body, but with a high level of corporate ownership from the constituent UK governments, might best foster the sense of joint accountability, mutual interest and collective importance that characterises the EC and ECJ and underpins their robust environmental action. It would foster a level of detachment from political vicissitudes in any given governmental arena. And if, as would often be the case, a failure of environmental policy in (say) England has repercussions for the rest of the UK, then a single body with multiple lines of accountability might best address spillover effects. The areas in which such a body might be called to act would of course reflect the legislation in each devolved government, itself a product of discussions on Common Frameworks.

7) Are there any existing bodies at UK or Welsh level that could adopt these governance functions? If so, what action is need to ensure they are ready to perform these additional functions?

There are existing bodies that could adopt these functions or which perform similar functions, but they are rarely perfect analogues. The use of the Planning Inspectorate to deal with planning appeals in Wales illustrates how technical aspects

of enforcement, against Welsh legislation and policy, can be performed by officers within a cross-border (England and Wales) body, but its major decisions are issued as recommendations to Welsh Ministers. The Office for Future Generations, charged with guarding the interests of future generations under the Future Generations (Wales) Act 2015, might be adapted *though it would be a major, transformative extension of its functions, and raise new questions about the scope for issuing sanctions for failure against governments*. The same challenge would need confronting if one were to extend the role of the Climate Change Committee to cover wider environmental issues. However, the CCC may offer more of a model in that Wales already relies on this body for monitoring and enforcement of policy, and the legislation is also designed in such a way – with measurable targets and timetabled action plans - that facilitate holding governments to account.

8) Does the body need to be in place on exit day? Or by the end of the transition period?

This depends on the nature of the transition period agreement and which aspects of EU environmental legislation are included. If it is the entire EU environmental *acquis*, then risks of a governance gap are somewhat postponed[3], though the task of setting up an effective body, sensitive to the devolved governance setting, and recruiting appropriate staff, will be challenging even with any breathing space conferred by transition.

EU Environmental Principles

9) Should the core EU principles be retained once we leave the EU?

There is a strong case for retaining the core EU environmental principles and making sure that they are institutionalisedin the environmental governance architecture of the UK as we leave the EU. The principles – polluter pays principles, precautionary principle etc – have given EU environmental legislation a 'degree of coherence' and 'assist in the direction of legal interpretation where there are ambiguities or new situations'[4]. Instituting a clear commitment to aim for a high standard of environmental protection (as does the Lisbon Treaty) would facilitate effective application of the other principles.

[3] Carpenter J (2018) 'Transition deal gives UK breathing space on post-Brexit governance', *ENDS Report* 23rd March.

[4] Macrory R (2018) 'What role will environmental principles play post-Brexit?' *ENDS Report* 515, 1st February and Macrory R and Thornton J (2017) 'Environmental principles: will they have a legal role after Brexit?' *Journal of Planning and Environment Law* 907-913

The list of EU principles need not be regarded as exhaustive, and non-environmental EU principles with significant implications for environmental governance warrant consideration, too, notably subsidiarity. There are emerging principles that might also be considered. The idea of a 'non-regression clause' in various regulatory standards may be hard-wired into any future trade agreement with the EU.[5] Westminster has begun articulating principles of environmental 'net gain'. While distinctive, both speak to beliefs that after thirty years pursuing 'sustainable development', our guiding principles need to confront more sharply those policy areas where environmental degradation continues.

10) Should the principles be retained in legislation or through other means?
11) How should the principles be implemented and enforced?

These questions should be considered together, as the means by which the principles should be retained ought to be guided by consideration of the best scope to bring them to bear on decisions (i.e. implementation and enforcement).

However, there is much debate and uncertainty on this point. Enshrining the principles in legislation would appear to confer greater status on them than a policy statement. The Well-Being of Future Generations (Wales) Act 2015 institutes a set of duties for public bodies and provides one model. However, analysis of the utilisation of EU and other environmental principles in decisions suggests that principles enshrined in policy statements can be impactful; what matters is that policy statements are given clear legal relevance to decision-making, as in planning.[6] The risks of enshrining them purely in policy concerns is ensuring sufficient durability, and that the ambit of their potential application is not unduly narrow (e.g. confined to environmental matters).

This is an issue on which the NAW should draw on Welsh experience, since the sustainable development duty in the Government of Wales Act 1998 (Section 121) provides insights into the substantive effectiveness of broad principles. Assessments tend to show that this duty was patchy at best in mainstreaming sustainable development as a driver of concrete actions. The issue of implementation, then, returns us to the mechanisms created for ensuring compliance within the overall environmental governance architecture e.g. legal challenges and redress, discussed above.

[5] Barnier M 10th April 2018.
[6] Macrory and Thornton, op cit.

12) Should the principles be UK-level or bespoke to Wales?

Given their general nature, it is hard to see why Wales would necessarily seek to achieve a bespoke list of principles. Territorial variation would arise from the way in which they are applied to different circumstances, not from the principles themselves. There are precedents for the devolved governments elevating principles not considered by other parts of the UK – an example is the Scottish Government's commitment to 'environmental justice'.

13) To what extent are the principles already covered by existing domestic legislation? How would the retention of EU principles in domestic law interact with existing domestic principles?

The issue about interaction between EU and domestic principles is not substantively novel – by their nature, more than one principle may require consideration in a given case. The more significant principle, as above, is how to institutionalise EU principles in the UK's environmental governance architecture, that encourages their appropriate use. Creating an effective environmental body may be key to that.

As legal experts have noted, retaining EU environmental principles is not, in itself, likely to be a substitute for making sure that policies and legislation exemplify those principles.[7]

[7]Macrory and Thornton, op cit.