

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 01

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1. In which policy areas, within the remit 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?
 - a. Whether frameworks should be adopted or not can be justified in many ways. First, the *environmental justification* – what is the nature of the environmental problem? is it transboundary, or is it easily confined in a given space? Second, the *economic justification* – is this environmental challenge strongly or only loosely connected to economic activities? Would divergence in environmental protection standards add costs and potentially create unfair competition? Third, the *political justification* – do neighbouring countries trust each other's to do the 'right thing' and resist the temptation of environmental dumping? If not, what procedures are needed – in terms of common rules but also common enforcement mechanism – to guarantee such trust? To what extent do countries prioritize choosing their own laws over having a say over the rules in place in neighbouring countries?
 - b. As the UK prepares for policy in the absence of EU law it is important to remember that the starting point – EU membership – is one of common frameworks around a wide range of policy areas within the remit of this committee. Debates around which issues require frameworks and of what

types are not new. The development of EU policies in the fields covered by this committee has been highly contested since the early 1990s (Gravey & Jordan 2016) on the ground of both subsidiarity (limiting EU action to when it is needed and/or can better achieve common objectives (Teasdale 1993)) and proportionality of public action. More recently these debates have been rephrased as the EU acting only “where the EU adds value” (European Commission 2017). – this raises the question, in a post-Brexit UK, will the UK government or the devolved administrations have to demonstrate ‘added value’ of their action?

- c. The current discussion in the UK, as demonstrated by the provisional assessment published by the UK government aims to *reduce* the number of common frameworks and to *change their status* – many issues currently bound by common EU legal frameworks are to be replaced by UK non-legislative frameworks, and UK legal frameworks have different underpinning governance systems than EU ones.
- d. The provisional assessment does not set an appropriate approach – it does not set any kind of approach or process, only a list of policy areas split across 3 categories with no justification. Critically, while the Joint Ministerial Committee (EN) meeting in October 2017 (Joint Ministerial Committee (EU Negotiations) 2017) listed a number of reasons why common frameworks would be pursued, the provisional assessment does not even link back to these justifications (HM Government 2018). This is particularly concerning as a key justification agreed then, to ‘enable the management of common resources’ appears to have been ignored. Why, otherwise, would key transboundary environmental issues such as water and air have either no framework or only non-legislative frameworks to underpin them (Gravey & Reid 2018)?
- e. As it stands the provisional assessment thus appears focused on maintaining the unity of the UK Single Market (an economic justification). Where the UK government appears to consider the UK Single Market is not at risk (e.g. water, air, biodiversity), devolved demands for control are being listened to

(with no frameworks or non-legislative frameworks). But environmental needs – what is needed to manage common resources sustainably – does not appear to rank high (or at all) in the provisional assessment.

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

- f. The existing frameworks (EU law) were adopted in a highly transparent political system with votes from both states and citizens, and, critically, opportunities for business and civil society to engage in the policy-making and implementation process. After a referendum fought on ‘taking back control’, it is crucial that the quality of governance does not decrease. This puts a lot of pressure on existing institutions, such as the Joint Ministerial Committee.
- g. There is a growing understanding that the JMC is not fit for purpose (Thimont et al. 2018) : lack of frequent meetings, lack of openness and transparency, very limited public statements after meetings. This is problematic as the JMC is for now, the location for intergovernmental cooperation. Its limitations – outlined notably by the Welsh Government but which the UK Government does not seem to be keen to address – mean that frameworks – even non-legislative frameworks – should not only be agreed within the JMC.
- h. The recent memorandum agreed between the Welsh and UK government proposes a mixed governance model, with (1) civil service ‘deep dives’ feeding into (2) JMC(EN) discussions, leading to the (3) UK Government drafting legislative frameworks and (4) giving 40 days to the devolved assemblies to grant consent. If consent is not forthcoming, the devolved administrations will have to explain why (5), and the UK government will have to explain to the UK parliament why the frameworks are nevertheless required (6). If the UK Parliament agrees, the frameworks will then be adopted even in the absence of devolved consent (7) (HM Government & Welsh Government 2018).

i. Critically, this system, while agreed by the Welsh Government, has not received Scottish assent. Nor is Northern Ireland, *sans* Executive, able to provide consent. Furthermore, the process relies on the UK Government's commitment to a "collaborative process" and the Welsh Government's commitment to not "unreasonably withhold recommendations of consent" (HM Government & Welsh Government 2018). Both are highly subject to interpretation, especially in the current climate of distrust between the different UK governments.

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

j. Discretion cuts both ways. When obtaining discretion to develop own approaches, the devolved administrations are also losing their influence over the standards set for England. This can be problematic as England is a much larger market. The devolved administrations may struggle to resist a race to the bottom if it were to be started by DEFRA (Gravey & Reid 2018).

k. The need for cooperation and consultation further extends beyond the 153 areas currently discussed. Hence, key reserved competences (such as trade, migration) will severely impact the abilities of the devolved administrations to diverge (Thimont et al. 2018). When it comes to international obligations, the UK government is responsible for negotiating and reporting compliance with international commitments (WTO, UNFCCC etc.). Delivering on international objectives is likely to constrain the ability of the devolved administrations to diverge from UK policy. Improving devolved consultation in setting out international negotiation position would be a critical show of goodwill from the UK government and may help attain an accord on common frameworks.

l. All three different devolved administrations have different devolved settlements. Different degree of discretion may also be needed. Hence, under

the North/South cooperation agreement elements of the Good Friday Agreement, Northern Ireland is currently cooperating with the Republic of Ireland on a number of issues: tackling waste crime, implementing the water framework directive in shared international river basins, managing shared protected sites straddling the border, shared rules on animal health, on pollinators etc (Northern Ireland Environment Link & Environmental Pillar 2017). The October 2017 JMC(EN) conclusions talked of common GB or common UK frameworks (Joint Ministerial Committee (EU Negotiations) 2017). Added discretion for Northern Ireland could be addressed either via 1) common GB frameworks and separate NI rules, 2) common UK frameworks allowing more flexibility for NI than Wales and Scotland and 3) looser common UK frameworks with high flexibility for all.

- m. Ultimately, the degree of prescription depends on two unresolved issues: first, whether current standards are kept on as a baseline (akin to the EU article 193 TFEU, the environmental guarantee principle (Burns et al. 2018), or to an idea of environmental 'non regression') leaving the 4 nations free to diverge upwards but not downwards; or whether environmental roll-back is accepted. Second, which of the three principles outline above wins out in determining whether frameworks are needed and how prescriptive they need to be.
- n. Currently, it appears that the UK is headed towards rolling back cooperation on managing common resources, not only within Europe but also within the UK. While both Scotland and Wales have demonstrated their environmental ambition within the present margins of manoeuvre offered through devolution and EU membership, efforts to bring powers straight back to the devolved levels may come at the cost of much needed environmental cooperation.

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