

Brexit and devolution: implications for intra-UK environmental governance

The impact of Brexit on the UK's devolution settlements has been described as “one of the most technically complex and politically contentious elements” of the UK's withdrawal from the EU.¹ Here, we set out our recommendations for how the UK and devolved governments should work together to protect and enhance the environment as we leave the EU.

Devolution and the existing EU framework of environmental governance

Powers relating to most environmental matters, including agriculture, fisheries, and aspects of energy policy, are currently devolved to Scotland, Wales and Northern Ireland. To date, these powers have been exercised in the context of the UK's membership of the EU, which has shared competence for such matters.²

Many environmental issues do not respect borders. Given the widely recognised importance of a co-ordinated transboundary approach, based on minimum common standards, for the effective protection of the environment and the prevention of competitive deregulation, these areas are strongly governed by EU policy and legislation.

Operating within this common EU framework, with oversight by EU institutions, has helped to address transboundary environmental challenges and to ensure a more level playing field for economic operators.

It has helped to:

- ensure that coherent and consistent approaches to environmental protection have been adopted across the four nations, such as the establishment of a common set of standards for the designation and management of protected Natura 2000 sites and the conservation of key habitats and species;
- support the integrity of the UK's internal market and prevent unfair regulatory competition; for example, by requiring minimum standards to be met across all of the UK's jurisdictions, it has reduced the risk of any one jurisdiction seeking to gain a short term competitive advantage by unilaterally lowering its own environmental standards; □ facilitate cross-border trade and cross-border environmental co-operation on the island of Ireland; and,

- underpin compliance with the UK's international environmental commitments and obligations.

Retaining a common framework as we leave the EU

For the effective protection of the environment, the importance of this common framework will not diminish post-Brexit. Indeed, the principles justifying EU-level co-operation and regulatory alignment on environmental matters apply equally, if not more strongly, to intra-UK co-operation and regulatory alignment, as well as to co-operation and regulatory alignment on the island of Ireland.

Therefore, in our view, the default starting position should be that the common set of environmental standards in place as a part of the UK's membership of the EU are retained in domestic law post-Brexit. The loss of these common standards would risk significant regulatory divergence and a less co-ordinated approach to environmental governance, to the detriment of our shared natural heritage. In addition, it could lead to an environmentally damaging process of competitive deregulation across the UK's different jurisdictions.

To respect the devolution settlements, it will be essential for the UK and devolved governments to work closely and constructively together as we leave the EU, to agree on how to embed all existing EU environmental law in domestic law, to maintain existing minimum common standards and avoid damaging legal uncertainty.

All four governments will also need to work together to address the post-Brexit governance gap. This means designing new domestic governance arrangements to replace functions currently carried out by EU institutions in securing compliance with common standards across the four nations.

Our early thinking is that a new high level body, or set of co-ordinated bodies (ie one for each of the four nations), should be jointly established to oversee implementation, with responsibility for roles such as compliance checking, monitoring, supervision and information provision, and with the power to initiate action through the courts.

Regardless of form, this body (or bodies) would need to:

- have oversight of all environmental law, as set out above, and be fully independent;
- be established under primary legislation and report to the relevant parliaments or assemblies;

- receive and publish regular reports on the implementation of environmental objectives;
- have a technically qualified staff with the relevant knowledge and expertise to fulfil a demanding role;
- be adequately resourced via public funding with an agreed five year budget;
- oversee a free and accessible mechanism for civil society to raise breaches of environmental legislation, as can be done now via the European Commission; and
- comment on the performance of delivery bodies and competent authorities.

Moving forward together

Environmental progress across the four nations should be built on this common baseline. Any post-Brexit changes should be jointly agreed and subject to an appropriate level of scrutiny by each of the relevant legislatures. Nevertheless, each nation should retain the freedom to develop more ambitious approaches as is currently the case under EU law.

When it comes to reaching agreement on the development of any new common frameworks post-Brexit, such as in relation to aspects of future agriculture and fisheries policies, it is essential that discussions are underpinned by a clear and agreed framework of guiding principles.

Any new common frameworks should:

- be based on a robust and transparent assessment of the environmental impacts under a range of plausible scenarios;
- maintain ambitious common standards that are at least as high as those set out in existing EU law, at the same time as retaining an appropriate degree of flexibility to allow implementation tailored to the specific environmental context in each nation;
- prevent competitive deregulation within the UK by setting a minimum common baseline but not prevent any nation from introducing higher standards;
- be developed alongside a new set of fair and transparent environmental funding arrangements, based on objective environmental criteria and the delivery of public benefit, to replace the loss of EU funding streams and enable effective implementation;

- include shared governance arrangements, as set out above, to replace the current set of processes by which EU institutions ensure that all the UK's jurisdictions are acting in accordance with their obligations under EU law; and,
- take into account the need to preserve cross-border environmental cooperation on the island of Ireland.

The UK and devolved governments will need to agree and establish new and improved mechanisms for inter-governmental working at both ministerial and official levels. Wider stakeholder involvement and consultation should also be a core part of this process.

In addition to the attached position statement, we would like to make the following points:

- Establishing and maintaining high environmental standards once we leave the EU is essential for defending health and wellbeing, and also protecting future economic sustainability, as natural resources underpin the value of Wales' land management, water, tourism and fisheries industries. Maintaining these standards also ensures a level playing field for business and trade.
- A lowering of environmental standards would make it more difficult for the UK and Wales to trade with the EU in future, which would be highly damaging for the Welsh economy according to analysis in the EAAL Committee's previous report on the impact for Wales of leaving the EU.
- Retaining environmental standards that are at least as high as those of the EU in future (and keeping pace with improvements at EU level), will allow the UK to cooperate on transnational environmental issues such as climate change, air and water quality, terrestrial and marine biodiversity and sustainable development.
- Ongoing cooperation with EU institutions that promote and enforce environmental protection will still be essential after the UK leaves the EU for the purposes of tackling transboundary environmental issues that go beyond the UK's borders, delivering on our international obligations, and sharing scientific evidence and best practice in terms of environmental policy, regulation and governance.

Endnotes

1 House of Lords European Union Committee (2017) Brexit: devolution 4th report of session 2017–19

2 Shared competence between the EU and the member states applies in relation to a range of areas, including agriculture, fisheries (with the exception of marine biological resources under the Common Fisheries Policy, which is an exclusive competence of the EU), energy and the environment. The exercise of the EU's competences in these matters is governed by the general EU principles of subsidiarity and proportionality.

3 Article 193 of the Treaty on the Functioning of the EU states that protective environmental measures adopted by the EU “shall not prevent any Member State from maintaining or introducing more stringent protective measures” subject to compatibility with the Treaties.