National Assembly for Wales
Climate Change, Environment and Rural Affairs Committee

Common frameworks for the environment after Brexit

July 2018

1. Introduction

The environment sector has been heavily shaped by the UK's membership of the EU. EU frameworks currently regulate agricultural support and policy, trading relationships, environmental management and animal welfare. The Committee undertook a short piece of work to inform the development of common frameworks for the UK after Brexit.

1. Between 18 April and 18 May 2018, the Committee sought written evidence on the approach to common frameworks in environmental policy areas post-Brexit. A list of respondents is included at Annexe A.

2. On 20 June 2018, the Committee held oral evidence sessions with the following organisations or individuals:

- Country Land and Business Association (CLA);
- Famers' Union of Wales (FUW);
- Joint Nature Conservation Committee (JNCC);
- National Farming Union (NFU);
- Royal Town Planning Institute (RTPI);
- Wales Environment Link (WEL); and
- Dr Viviane Gravey, Queens University Belfast.

3. Dr Victoria Jenkins, Hillary Rodham Clinton School of Law, Swansea University, undertook an academic fellowship with the Assembly's Research Service on common frameworks for environmental law and policy post-Brexit. She produced a paper discussing the requirement for common frameworks between the UK and devolved governments in environmental policy areas post-Brexit.

4. Dr Jenkins's paper focussed on structural concerns for the Sustainable Management of Natural Resources in Wales as a lens through which to consider the impact of common frameworks. The Committee received a presentation from Dr Jenkins on her paper on 20 June 2018.

2. The development of common frameworks

The EU Withdrawal Bill and Intergovernmental Agreement

5. The EU Withdrawal Bill gives powers to UK Ministers to make regulations restricting the Assembly's powers to legislate in devolved areas. It was argued that this is necessary to establish common legislative frameworks for the UK after it leaves the EU. The power to impose restrictions lasts for up to two years after 'exit day' and the specific restrictions can last up to five years.

6. On 25 April 2018, the UK Government published an Intergovernmental Agreement on the EU Withdrawal Bill and the Establishment of Common Frameworks. The Intergovernmental Agreement outlines that common frameworks that have a legislative underpinning will be subject to the Sewel Convention.

Inter-governmental cooperation

7. At the Joint Ministerial Committee (EN) (JMC EN) meeting on 3 May 2018, it was announced that the UK Government and the devolved administrations had agreed plans to work together on common frameworks. The plans will involve "multilateral official level discussions in a range of areas where frameworks may be required".

8. The JMC is a mechanism for the co-ordination of the relationships of the four constituent nations of the UK. There was a widely held view amongst stakeholders that the JMC model will not be an appropriate forum for inter-governmental cooperation, once the UK has left the EU. Dr Gravey suggested it meets infrequently, and lacks openness and transparency.

9. Stakeholders emphasised that appropriate inter-governmental mechanisms are necessary for the UK's governments to agree matters relating to common frameworks and to resolve disputes. On 1 May 2018, the Minister of State for Agriculture, Fisheries and Food, George Eustice MP, told the Welsh Affairs Committee that the resolution of disputes would be considered as part of the next stage of the common frameworks process, alongside scrutiny processes.

10. Dr Gravey emphasised that cooperation between the four UK governments will need to extend beyond the development of common frameworks in the policy areas set out in the UK Government's analysis. Key reserved competencies, such as trade and migration, will significantly restrict the extent of divergence.

11. The Assembly's Constitutional and Legislative Affairs (CLA) Committee concluded in a recent report[1] that there is a need to strengthen existing inter-governmental relations to address the new challenges the UK will face after Brexit. In the short term, this should be achieved by strengthening the existing JMC structure. The CLA Committee sees a UK Council of Ministers as the most coherent, long-term solution to resolve concerns about inter-governmental relations.

The UK Government's provisional assessment of UK frameworks

12. On 16 October 2017, the UK and devolved governments agreed principles governing the establishment of common frameworks for the UK after it leaves the EU. A JMC (EN) Communique[2] setting out the agreed principles explains that frameworks will be established in order to:

- Enable the functioning of the UK internal market, while acknowledging policy divergence;
- Ensure compliance with international obligations;
- Ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- Enable the management of common resources;
- Administer and provide access to justice in cases with a cross-border element; and

[1] UK Governance post-Brexit, February 2018

[2] www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

- Safeguard the security of the UK.

13. On 9 March 2018, the UK Government published its provisional assessment[3] of where UK common frameworks might be required after Brexit in areas of EU law that intersect with devolved competence. The assessment allocates 155 powers to three categories:

- those which may require legislative frameworks (24 areas);
- non-legislative frameworks (82 areas) or
- areas where no further action is required (49 areas).

14. The assessment also lists 12 policy areas, which the UK Government believes are reserved but are still subject to discussion with the devolved governments.

15. The UK Government says the assessment is "a working document, designed to inform engagement between officials in the UK, Scottish and Welsh Governments and the civil service in Northern Ireland". It has been informed by "deep dives", described as exercises undertaken by civil servants to analyse in detail the issues relating to the operation of common frameworks.

16. Although stakeholders welcomed the principles set out in the JMC (EN) Communique, they criticised the lack of an apparent link between the principles and the provisional framework analysis. They went on to say that, of the principles, it appeared that the management of common resources had been given a much lower priority in comparison to trade and the internal market.

17. Some stakeholders believed that using the current EU frameworks as a starting point for the assessment of future requirements was a mistake. It was suggested that the decision to leave the EU gives the UK the opportunity to completely rethink its approach to the management of natural resources, to introduce systems that are entirely bespoke to the UK's needs. However, the majority agreed that using existing EU frameworks as the basis for this work was the most appropriate course of action, given the complexity of the work and the time that is available.

18. Some stakeholders expressed concerns that the UK Government's provisional assessment demonstrates a policy approach to have fewer common frameworks in operation after the UK exits the EU. There were associated concerns that the legislative frameworks governing some areas could, in the future, be replaced with

[3] www.gov.uk/government/publications/frameworks-analysis

non-legislative frameworks. There were additional concerns that there does not appear to have been an assessment of the impact of such changes.

19. Wales Environment Link (WEL) recommended that the development of common frameworks should be underpinned by an independent and objective analysis of where common frameworks are necessary for the protection of the environment. They said the analysis should be commissioned by the four UK governments. JNCC, RTPI and NFU agreed with this proposal.

Accommodating divergence

20. Many participants highlighted the need for flexibility within frameworks to accommodate divergence across the UK. For example, NFU and FUW stressed that this is required to recognise the specific challenges faced by Welsh agriculture. The Welsh Language Commissioner noted that common frameworks will need to be able to accommodate matters that are specific to Wales, such as the Welsh language.

21. However, stakeholders noted that international obligations will potentially limit the extent of divergence.

Policy integration

22. The RSPB and WEL raised concerns about the apparent lack of integration between policy areas. For example, agriculture and fisheries are listed as areas requiring legislative frameworks, but policy decisions in these areas may have implications on environmental areas, many of which are proposed to require non-legislative frameworks or no framework at all. There was concern that this could result in a less integrated approach to addressing such issues post-Brexit. Dr Gravey referred to the categorisation of transboundary environmental issues, such as water and air quality, as having either non-legislative frameworks or no frameworks at all to underpin them, as an example of a lack of policy integration.

Transparency and scrutiny

23. Dr. Gravey highlighted that existing EU frameworks were adopted in a highly transparent political system, with votes from member states and citizens and with opportunities for business and civil society to engage. This sets a precedent for existing domestic institutions such as the JMC.

24. Several contributors to the Committee's inquiry believed there has been a lack of transparency around the development and methodology applied to determining the areas in which frameworks should be required. Many

contributors highlighted the importance of stakeholder input into the development and implementation of common frameworks.

Our view

There is broad agreement that common frameworks are required to provide regulatory consistency and legal certainty after the UK leaves the EU. For environmental and animal welfare matters, common frameworks could ensure appropriate, transboundary, environmental and animal welfare standards and effective management of common resources.

The priorities of each government in the UK must be represented in the development of common frameworks and must be able to accommodate policy divergence across the UK. The Welsh Government must have the necessary freedom to develop policy in devolved areas

Inter-governmental cooperation

As this Committee made clear in its Report on the Future of Land Management in Wales (March, 2017), leaving the EU will necessitate new inter-governmental relationships.

We agree with the CLA Committee and our stakeholders that the JMC, as currently constituted, is not an appropriate mechanism to take these issues forward. We believe that a shared governance model is necessary, and continue to endorse the Welsh Government's proposal for the Joint Ministerial Committee to be developed into a 'UK Council of Ministers', with parity of status for each of the constituent parts of the UK. This new body must be a decision making body; have an independent dispute resolution, arbitration and adjudication mechanism; and be transparent and accountable.

We are pleased that there appears to have been cooperation between officials in the UK and devolved administrations as part of the "deep dive" exercises. We also note that, on 3 May 2018, it was announced that the UK Government and the devolved administrations had agreed plans to work together on common frameworks. As we said in our recent report on Environmental Governance and Principles[4], we are concerned at the apparent lack of cooperation at Ministerial level.

Effective inter-governmental collaboration is central to the development of common frameworks. We would like to see more evidence of a healthy

[4] **Environmental Governance and Principles**

collaborative relationship between the UK and Welsh governments. Welsh priorities, including the Welsh language and the particular needs of Welsh uplands farmers, should not be put at risk because of a lack of inter-government co-operation.

The JMC Principles

Along with our stakeholders, we generally welcome the principles set out in the JMC (EN) Communique of October 2017. However, there is no evidence of how these principles have been applied to the development of the UK Government's provisional assessment.

We agree with the Institute for Government, which said that there is considerable room for interpretation of the principles set out in the JMC Communique and argued that an agreed definition of the six principles is crucial.

The UK Government's provisional assessment

We note that the UK Government's assessment is intended to be a working document, designed to inform engagement between officials. However, the lack of transparency behind its development is a concern for this Committee. The UK Government has not explained the rationale for determining whether legislative or non-legislative frameworks are required in certain areas and not in others. This lack of transparency has made it very difficult for the process and output to be scrutinised.

The current UK Government proposals for common frameworks are focussed on political and trade concerns with less emphasis on the management of natural resources. We believe that both the UK and the Welsh Governments should ensure that this imbalance is addressed.

We agree that decisions on whether common frameworks are required should be underpinned by sound principles and based on evidence. There must be clarity about whether legislative or non-legislative frameworks are required and the reasons for those decisions.

We are also concerned that there is a risk that an attempt to minimise the number of common frameworks may result in a less integrated approach to transboundary issues, in particular environmental matters, in the future. This may also be a consequence of the lack of clear principles underpinning the process.

The emerging UK common frameworks will require new governance systems for oversight and enforcement in the absence of the European Commission, the European Court of Justice and other EU institutions. This issue has been explored by this Committee in its inquiry on Environmental Governance and Principles[5].

Transparency and scrutiny

It is important that, during these detailed discussions about rules and structures, governments do not lose sight of the role and rights of the citizen. We agree with our stakeholders that we must secure opportunities for citizens, business and civil society to engage in the policy-making and implementation process. There must also be clear and accessible opportunities to challenge the application of environmental legislation.

There have been limited opportunities for the legislatures in the constituent nations of the UK to influence or scrutinise the development of frameworks up to this point. There will be a need to ensure that any future mechanism facilitates this scrutiny. In particular, there will also be a need to ensure there are mechanisms for non-legislative inter-government agreements to be scrutinised by the legislatures of the UK.

Furthermore, it is vital that appropriate mechanisms are in place to ensure that the application of common frameworks can be scrutinised on an ongoing basis. This will be of particular importance where, in future, the policies of the governments of the UK diverge.

Recommendation 1. The UK and Welsh Governments should formalise inter-government working mechanisms. There is a need for a shared governance model to ensure that decisions are made and actions taken on the basis of parity of esteem. The Joint Ministerial Committee (JMC) should be reformed, or a new UK Council of Ministers should be established, to take these matters forward. There must be arbitration and adjudication mechanisms associated with this body to resolve disputes. It must be transparent.

Recommendation 2. The Welsh Government should clarify the role it has taken in the development of the UK Government's provisional assessment of common frameworks. The Welsh Government should clarify its position on the UK Government's provisional assessment and should publish a formal response to it.

[5] Environmental Governance and Principles

Recommendation 3. The Welsh Government should publish any explanation it has received from the UK Government about the rationale for determining whether frameworks are legislative or non-legislative.

Recommendation 4. The Welsh Government should clarify how it has ensured that uniquely Welsh matters, such as the Welsh language, have been taken into account when considering common frameworks. The Welsh Government should also confirm whether it has assessed the impact of the UK Government's provisional assessment on the Welsh language.

Recommendation 5. The UK and devolved governments should agree and publish detailed definitions of the principles agreed in the JMC communique of October 2017.

Recommendation 6. The Welsh Government should clarify how it will ensure that the Assembly has sufficient and adequate opportunities to inform the development of common frameworks and to scrutinise final proposals.

Recommendation 7. Stakeholders are yet to be convinced they have been engaged in a meaningful way during the development of common frameworks. The Welsh Government must set out how it will address this.

Recommendation 8. The current rights enjoyed by citizens to challenge the application of environmental legislation must be preserved in common frameworks for the UK. The process for challenging the application of legislation must be clear and accessible.

3. Specific matters for consideration

25. Stakeholders provided the Committee with their own analysis of individual policy areas, which is set out below.

Agriculture

26. FUW suggested that some of the 49 areas of the provisional assessment, categorised as requiring no further action, may in fact require common or legislative frameworks to ensure fair competition. It called for frameworks to secure and protect adequate long term funding for agriculture and rural communities, while also respecting devolved powers over agriculture. FUW stated that *enforceable* frameworks must be put in place similar to those currently in place under the Common Agricultural Policy (CAP). Dr Jenkins also argued for

legislative frameworks in these areas due to the important implications of agriculture for the sustainable management of natural resources in Wales.

27. WEL's Sustainable Land Management Vision supports a public money for public goods approach to land management policy. WEL believes all four UK countries must commit to this same approach for the purposes of a functioning internal market, and to avoid competitive deregulation.

Fisheries

28. WEL stated that fisheries regulation requires further discussion and may require both legislative and non-legislative frameworks. A commitment to fishing at sustainable levels means setting the Total Allowable Catch in line with the best available scientific advice from internationally recognised scientific institutions. The precautionary principle also needs to be applied so that fish stocks are maintained above levels capable of producing the Maximum Sustainable Yield and ensuring that, by 2020, fishing mortality is below levels that will deliver Maximum Sustainable Yield.

29. The Committee is currently undertaking an initial inquiry into fisheries after Brexit and will report in due course.

Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA)

30. RSPB and WEL suggested there is an inconsistent approach to the UK Government's categorisation of some policy areas, for example Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA). EU legislation has provided a common framework in these areas (with flexibility for varied implementation at a devolved level). The provisional assessment takes a different approach, classifying EIA as an area where no further action is required and SEA as an area where non-legislative frameworks are required.

31. WEL stressed the value of current common frameworks for both EIA and SEA in assessing the likely environmental impacts of plans, programmes and projects, especially for activities that have transboundary effects. WEL used the example of the UK Government's SEA of oil and gas licensing rounds and other offshore energy developments.

32. WEL considered that placing EIA in the "no further action needed" category is incorrect in terms of environmental justice as it falls short of the JMC (EN) principles on access to justice and compliance with international obligations such

as the Aarhus Convention. Dr Jenkins argued that legislative frameworks are required for both EIA and SEA.

Marine Strategy Framework Directive

33. The Marine Strategy Framework Directive (MSFD) promotes sustainable use of the seas and the conservation of marine ecosystems. Stakeholders believed the common framework provided by the EU Regulations should be retained whilst allowing each country freedom to go further.

Waste management

34. The UK Government has categorised waste management as requiring non-legislative frameworks. Other, arguably related, waste packaging and product regulations have been categorised as requiring legislative frameworks. Given that current EU legislation (such as the *EU Waste Framework Directive* and *Packaging and Packaging Waste Directive*) is designed for these regimes to work together, WEL stated that the rationale for the differences in categorisation is unclear.

35. The Food and Drink Federation (FDF) was also keen to ensure that EU policy relating to producer responsibility for packaging and associated business recycling targets continues to be taken forward on a UK-wide basis.

Flood risk management, water quality and water resources

36. WEL told the Committee they consider the EU Water Framework Directive (WFD) and its daughter directives to be crucial for tackling water quality issues, including transboundary water quality. It also highlighted the effectiveness of the EU Floods Directive in transboundary flood risk management.

37. The WFD adopts a river basin district approach to water quality management. It requires different jurisdictions to cooperate in drawing up management plans for river basins that cross-jurisdictional boundaries; implementing agreed control measures; monitoring improvements in water quality. It also requires the review of progress and water management plans to achieve water quality objectives. Across the UK, the common framework currently provided by the WFD facilitates a coordinated approach to the management and improvement of transboundary river basins.

38. The UK Government has categorised this matter as needing no further action, but stakeholders including WEL and Dr Jenkins argue that a common framework is necessary.

Birds and Habitats Directives

39. The Birds and Habitats Directives currently set a common framework for nature conservation providing for consistent support across political boundaries. Stakeholders emphasised that coordinated action is required for effective protection and restoration of habitats and species.

40. The in-built flexibility of the EU Directives has allowed the UK countries to adopt their own approach to fulfilling the EU objectives. After Brexit, cross-border coordination will continue to be essential for effective nature conservation in line with both country-level and international commitments.

41. Monitoring frameworks established under these Directives benefit from a common approach, enabling the four countries of the UK to consistently assess the status of species and habitats. The Birds and Habitats Directives are listed in the UK Government's provisional assessment as requiring non-legislative frameworks. Dr Jenkins argued that these matters require legislative frameworks.

Invasive alien species

42. Both RSPB and WEL noted the omission of invasive alien species (IAS) policy without explanation by the UK Government. Stakeholders emphasised that IAS are a critical threat to the UK's economy and environment and should be addressed by a transboundary approach and, as such, should be covered by a common framework.

Animal welfare

43. Animal health and traceability and animal welfare are both classed as requiring legislative frameworks in the UK Government's provisional assessment.

44. The National Office of Animal Health (NOAH), Dogs Trust and Cats Protection stressed the importance of UK legislative frameworks for animal health and welfare policies to protect against diseases and to uphold best practice in animal welfare across the UK.

45. Cats Protection emphasised the importance of prescriptive legislative frameworks for the pet passport scheme. Dogs Trust highlighted the importance of legislative frameworks for "welfare of companion animals during transport" and the "sale and import/export of dog fur". NOAH highlighted the importance of UK legislative frameworks to preserve the availability of veterinary medicines. Any divergence across the UK could increase the risk to medicine availability.

Food Geographical Indicators

46. Cytûn raised concerns about Food Geographical Indicators (protected food names) being classed as one of the 12 reserved matters in the provisional assessment. It suggests that Food Geographical Indicators should be a devolved matter subject to common frameworks, rather than a reserved matter.

Regulations for industry

47. Valero Pembroke Refinery emphasised the importance of recognising that Wales's businesses are competing in a global market and that regulation should not put Wales at a disadvantage. Of the 49 areas which the UK Government has assessed as not requiring common frameworks, carbon capture and storage, control of major accidental hazards and EIA are areas of particular concern to Valero. Valero states that areas categorised as requiring non-legislative frameworks such as SEA, Energy Efficiency Directive, air quality, the marine environment and waste management could have repercussions for its business where divergent attitudes across the UK are emerging. It also states that the proposed legislative frameworks for REACH chemicals regulations, Fluorinated greenhouse gases (F-gases), and EU Emissions Trading Scheme (ETS) require sufficient commonality of approach and purpose to avoid competitive disadvantages.

Our view

Determining the most appropriate regulatory and legislative approach after the UK leaves the EU is a significant challenge.

However, as set out in section two of this report, there is an absence of clear principles and rationale underpinning decisions. This has been exacerbated by a lack of transparency in the process, which has made it difficult to understand or scrutinise the decision. We have set out in the preceding parts of this report ways to address this problem.

Recommendation 9. The Welsh Government must ensure that the points raised by stakeholders in paragraphs 26-47 of this report are reflected and addressed in discussions with the UK Government about common frameworks.

Annex A – Written evidence

The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at Consultation Responses

- Dr Viviane Gravey, Queen's University Belfast
- Cats Protection
- Welsh Local Government Association
- Food and Drink Federation
- Valero Pembroke Refinery
- Joint Nature Conservation Committee
- Royal Town Planning Institute Cymru (RTPI Cymru)
- Dogs Trust
- National Office of Animal Health (NOAH)
- CLA Cymru (Country Land and Business Association Limited)
- RSPB Cymru (The Royal Society for the Protection of Birds)
- Farmers' Union of Wales (FUW)
- Cytûn (Churches Together in Wales)
- Welsh Language Commissioner
- Wales Environment Link
- National Farmers Union Cymru