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This evidence is divided into three parts. The first considers a number of structural issues in relation to the design of common frameworks. The second considers a number of possible options for delivering such frameworks. The third considers some principles for determining how particular areas should be dealt with.

A. Structural issues

As identified in the Communique of 16 October 2017 from the Joint Ministerial Committee (EU Negotiations), there are many different ways in which frameworks for collaboration or co-ordination can operate: common goals, minimum and maximum standards, harmonisation, limits on action and mutual recognition. Whatever level of detail and formality is involved, a number of structural issues have to be faced. The simplest approach (at least in purely technical terms) is to confer exclusive and over-riding power on the UK authorities acting in isolation, but this is recognised on all sides to be politically unacceptable. Another radical approach reflecting the other extreme of distributing power, namely a move towards a fully federal structure with a clear separation between the UK and English authorities and comprehensive mechanisms for dealing with all matters of shared interest, does not appear to be a realistic option at present. Finding solutions in between these extremes first requires a number of fundamental design questions to be considered, and different solutions may well be appropriate for different areas.

A difficulty here is the range of interlocking options, their level of detail and the extent to which individual jurisdictions are to remain free to adopt their own policies and make their own laws. Where a common framework is proposed there are perhaps four options:

- exclusive power on matters relating to the common position could rest with the UK authorities (representing a rolling back of devolution).
- a legal arrangement could be made whereby the devolved authorities contribute to (and maybe even have a veto over) the common position but are obliged to implement it once it is in place and cannot lawfully do anything inconsistent with it (similar to the UK's relationship with the EU at present).
- a political agreement could be reached to follow the common position, whilst legislative power remains legally unfettered (this represents a political commitment to the common position without restricting the legal competences of the devolved authorities).
- the common position could be merely a recommendation, with no political or legal fetter on the devolved authorities' powers to act as they see best (preserving maximum freedom of action for the devolved authorities but with an increased risk of divergence and fragmentation of policy and law).

The less intense the collaboration, the less formal the arrangements need to be, but if there is any desire to guarantee co-operation, legal mechanisms may be unavoidable. There may be a tension between what is desired in constitutional terms in relation to marking out separate areas of competence and what is needed to address shared environmental concerns. The reasons why States have moved

towards close collaboration within the EU on environmental matters, surrendering some of their independence to act, apply also within the UK: transboundary environmental problems, the integrity of a single market, avoiding free riders, etc. The resolution of this tension is central to decisions on the structural issues and is not unique to environmental matters, although it is particularly acute here given the scale of EU involvement in shaping environmental law and policy.

Who will develop common standards/rules?

The question of who is to develop common standards or rules (whether these emerge as matters of policy or of law) is fundamental and again there are several possible models that can be envisaged:

- joint working and agreement: The UK and devolved authorities could work together to produce standards/rules which would be adopted only when all parties agree.
- joint recommendations: The UK and devolved authorities could work together towards producing standards/rules, but these would have the status of recommendations only and need not be accepted (or implemented) by all parties, although it would be expected that they are followed.
- lead authority acting with the consent of others: One authority could take the lead in developing standards/rules (either the UK body by default or responsibility for different topics could be allocated to different countries), but the outcomes would be adopted only when all parties agree.
- lead authority acting with consultation: The UK authorities could be responsible for developing standards/rules, consulting the other countries but without them having a veto on the final outcome.
- new authorities: Power to establish standards/rules could be conferred by the UK and devolved authorities on new official bodies established for this purpose, operating across the UK.
- specialist advisory bodies: The task of developing standards/rules could be given to new or existing bodies, but the outputs would take the form of recommendations only, with each administration responsible for deciding when and how to implement these.

In all cases there are important questions over what opportunities there should and could be for external stakeholders and the public to participate in the decision-making processes.

All of these models have implications for the formal or practical freedom of action of the devolved authorities, as well as raising questions over resources and accountability, especially where administrations are to be bound by the outcomes of joint working.

Who has the power to legislate?

Although much co-ordination can be achieved without legal intervention, some issues will require legislation to implement common solutions and to underpin regulatory action. Quite distinct from the questions of how standards and rules are developed and of whether any framework is itself based on a legally binding structure; the question arises of how the detailed standards and rules that emerge

are to be translated into legal form so as to take full effect. There needs to be a clearly identified legislative body with the constitutional authority to make the law that is required. Again there are several potential options:

- exclusive power for the UK authorities: Regardless of the underlying devolved or reserved nature of the topic, power to legislate to implement common frameworks could be conferred on the UK authorities (Parliament and/or Ministers), subject to scrutiny only at the UK level. This would clearly assert the UK authorities' dominance, rather than reflecting the distribution of power inherent in the devolution settlements.
- exclusive power for the UK authorities, subject to constraints: In this option although it would be only the UK authorities that could legislate, they could exercise this power lawfully only if certain prior procedural requirements were met. These could require having the explicit consent of the devolved administrations (akin to legislative consent motions but with a veto power), having consulted the devolved authorities and proceeding so long as no explicit objection is made, or simply having consulted them. Within the devolved administrations there would then be the issue of which body (Parliament or Executive) expresses the official view, or whether both are involved and if so how (e.g. whether Ministers merely report to the Parliament (and if so, before or after responding), or require express approval for their response to London).
- exclusive power for the devolved authorities: The power to legislate could rest exclusively with the devolved authorities in areas of their competence, with or without any procedural constraints involving the other jurisdictions. This approach would require careful separation between devolved matters (which could be handled only by the devolved administrations) and reserved matters (only by UK authorities).
- shared powers: As is the case at present in relation to implementing EU measures (Scotland Act 1998, s.57), power to legislate outwith matters reserved to the UK could be shared between the UK and devolved authorities, with either being able to take action as appropriate. This may allow for flexibility and convenience (especially where matters may straddle the devolved/reserved boundary), but raises questions over scrutiny at the different levels over the decision who is to legislate and the content of such legislation.
- shared powers with constraints: Legislative action might be possible at either UK or devolved level but subject to procedural requirements, ranging from consultation with to full consent from the other. For example, on a topic straddling reserved and devolved matters it might be possible for the devolved authorities to allow comprehensive legislation to be made at UK level, but with the express consent limited to that one instance without ceding future competence on the matter.

Compliance with common frameworks?

Whatever frameworks are established, there is a question of what happens if these are not followed (whether by one administration not taking the requisite action, by it taking incompatible action or by it acting in a way that does not wholly implement the common position). There are two stages to consider: how non-compliance is

monitored and detected and then the response to that. In both cases much depends on the nature of the framework and whether it operates at a political or legal level.

- Monitoring could be achieved largely through reporting requirements, calling on each administration to report regularly, in public, on what is being done to implement any common framework or on actions in the relevant areas that might be seen as potentially conflicting. Alternatively, a scrutiny role could be given to a distinct new body - a single shared body or one for each jurisdiction – or conferred on existing bodies. Whoever is fulfilling this role, they might be informed by reporting requirements, their own investigations or complaints from stakeholders and/or the public (followed up by either investigation or a requirement on the relevant authorities to respond where a complaint appears credible). All of these options have resource implications as well as raising questions over expertise and capacity.
- In the event of non-compliance the remedy could be mere publicity, which would rely on wider political processes to achieve results, or some form of intervention sparking negotiation or other dispute resolution mechanisms between the authorities, ultimately including arbitration or adjudication. Where there is legal backing for a framework, then a judicial remedy might be available, with questions over the forum for adjudication, time-limits, remedies and who has the standing to raise actions. Experience within the EU is that States are very reluctant to use formal enforcement measures against a fellow State even when there is blatant non-compliance, which might point to a role for citizens and NGOs in invoking the compliance mechanisms.

Stability

In all cases a further dimension is added by the balance desired between flexibility and stability, between enabling the structures to evolve even in the absence of complete unanimity and embedding features to protect them from being changed without full agreement. The desire to provide guaranteed actions and a secure future for the frameworks might point towards enshrining certain features of them in law, even if only for a fixed period. Guaranteed funding at an appropriate level to support the work of any joint bodies or networks will be a further requisite for long-term effectiveness. At the same time, it would be undesirable to have the arrangements too firmly set so that elements that are not working well cannot be sensibly remedied.

Scrutiny

An overarching issue is that of scrutiny and accountability. Whether handled at UK or devolved level, much of the activity covered here will of necessity be in the hands of the Executive, both in forming and agreeing policy and in making law through delegated legislation. At each level, existing mechanisms for exercising parliamentary scrutiny and control over the Executive may have to be revised to ensure adequate and timely involvement, e.g. if there is a strong commitment to implement the outcomes of a process establishing a common framework, it is leaving it too late to use the parliamentary scrutiny of any regulations implementing that framework as the means of ensuring accountability for the decisions made. Express

approval mechanisms may be very cumbersome, but at the very least, reporting and notice requirements seem appropriate, to ensure that the Parliaments are aware of what is happening in a timely manner and when there is still time to intervene. The extent to which the different Parliaments may wish to find ways of working together in scrutinising common frameworks is a further dimension to consider.

B. Possible Models

Looking at the current position, the fact that certain matters are reserved to the UK authorities is the most basic way of ensuring a single regulatory framework but there are other models for future co-operation. The devolution settlements focus on bilateral arrangements between the UK and individual devolved authorities rather than those involving all four administrations, and developing these multilateral mechanisms may be an important element of the way forward. A further challenge is ensuring more meaningful participation by the devolved administrations in areas of reserved power, notably the making of international agreements which may have the effect of constraining freedom of action within areas of devolved competence.

As the Welsh Government has proposed, the Joint Ministerial Council could be enhanced to operate in a way similar to the EU Council, forming a decision-making body involving all the administrations, capable of making binding decisions. A criticism of this model has been the lack of accountability of the national representatives to their home Parliaments – a consequence of any pooling of sovereignty - and there is scope for establishing greater transparency to enable scrutiny of how the government representatives operate.

The Committee on Climate Change provides an example of where work is done by a single statutory body but its position respects the devolution settlement. The Committee operates both as a UK body and as the body designated by the Scottish Government to exercise tasks within devolved competence, with potential for separate Scottish provision if this arrangement proves unsatisfactory (Climate Change (Scotland) Act 2009, ss.24-25).

One aspect of the work of the Joint Nature Conservation Committee (Natural Environment and Rural Communities Act 2006, s.34 and Sched 4), is to provide recommendations on the lists of plants and animals to be given legal protection, but again the devolution settlement is respected since the decision whether to implement the recommendation and the legal power to do so rests with the devolved authorities.

C. Areas for Common Action

The EU has a hand in many areas of environmental law, including those of greatest importance. The attached Appendix, taken from a leading textbook published in the Netherlands, provides a convenient list of the areas where the EU has been active and where there will in future be scope to develop distinct responses to the environmental problems involved. Some of these areas are currently reserved matters, whilst others are wholly or partially devolved.

In many of these instances, what matters across the UK is having broadly equivalent levels of environmental protection rather than exact uniformity. This reflects the

status quo, with the EU in environmental topics predominantly using directives to stipulate the objectives to be met whilst leaving each Member State (and the competent units within each State) to determine how best to achieve these. Accordingly there are currently differences in how EU directives are implemented in each part of the UK, both to fit in with wider legal frameworks (e.g. Water Framework Directive) and to reflect policy differences (e.g. Strategic Environmental Assessment). In other areas, though, any differences between the different parts of the UK might have an effect on business (both operating costs and access to markets) or encourage undesirable behaviour (e.g. transfers of waste to take advantage of lesser landfill controls in one country), or thwart environmental goals (e.g. air or water pollution crossing boundaries).

A number of questions might be proposed to shape thinking on whether, and what level of, co-operation is required or desirable across the UK, including:

- Are there external constraints, notably international law obligations, which require certain standards to be observed?
- Are there physical or other features (e.g. species and rivers that travel across the boundaries within the UK) such that a difference in standards might undermine attempts to achieve environmental protection, enhancement or sustainability, or where coherence beyond a single jurisdiction is significant?
- How would different standards/rules affect access to markets, both home producers (including service providers) seeking to access external markets and external producers having access to home markets?
- Would a difference in standards/rules create a difference in operating costs for producers conferring a commercial advantage or disadvantage, which in turn might affect where business chooses to operate?
- Might a difference in standards/rules create opportunities for undesirable behaviour undermining environmental objectives?
- Would separate regulation impose unnecessary or undesirable burdens on industry?
- What are the relative demands on the public sector of unified and separate regulation, in terms of cost, staffing, expertise and regulatory effort?
- How far can any additional burdens be minimised whilst maintaining formally distinct regulatory mechanisms, through having parallel systems, mutual recognition, sharing of data, etc.?
- How far should individual jurisdictions be free to innovate and try new approaches to tackle recognised or emerging problems in ways that may prove to be of general value (e.g. the gradual spread of charging for plastic bags)?
- How appropriate is an area for having agreed minimum standards with scope for individual jurisdictions to adopt higher ones?
- How can appropriate levels of accountability and public/stakeholder participation best be provided?

Even without regard to the current reserved/devolved divide, some areas seem obvious candidates for a fully common approach, such as an emissions trading scheme. Given the nature of supply chains, there seem strong commercial reasons for a common approach on issues such pesticide residues. In some areas such as

access to environmental information, the UK's international obligations, in this case under the Aarhus Convention, require broadly similar regimes, but some differences across the UK could be tolerated. Areas such a bathing waters may call for common minimum standards but allow for higher standards where desired.

Even where a framework is designed at a high level of generality, e.g. to adopt broad principles such as the polluter pays or the precautionary principle, there may still be debate. Such principles leave plenty of scope for differing interpretations (see the discussion of the polluter pays principle in the Privy Council in *Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment* [2017] UKPC 37) and such differences can be viewed as either a problem creating harmful inconsistency or a fertile source for innovative developments of the law.

In all areas it will be a political choice, informed by practical considerations, whether a shared approach is appropriate and how far this should include binding commitments. The desire for stability and the limited capacity to take on complete responsibility *ab initio* might suggest a wider range of shared action in the early years following Brexit than may ultimately be considered appropriate.