

Written submission from Scottish Environment LINK

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 35 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

One of the key benefits of EU legislation is that it provides common standards for environmental protection. These common standards allow EU member states to tackle shared problems jointly, for example, climate change or air and water pollution which have a clear transboundary impact. Similarly, common standards such as in the case of restrictions for chemicals, biocides and other pollutants ensure a common level of environmental protection across the EU which deters competitive deregulation or disruption of the Single Market. The EU also promotes a degree of harmonisation that allows different Member States to better cooperate, exchange information more meaningfully and learn from each other. As a result, the EU as a whole can protect our environment and shared resources while also supporting a joint approach to tackling international environmental issues.

Within the UK, EU standards have meant that while different devolution settlements have devolved powers to Scotland, Wales and Northern Ireland, these powers operated within the wider context of EU law. While individual countries could pursue more ambitious standards, these could only be introduced if compatible with EU law.

The loss of common EU standards, as a result of the UK's exit from the EU, could potentially compromise the transition of Scotland and that of the entire UK towards a low carbon and sustainable society. In the absence of any common standards and coordination, the four countries of the UK could decide to take different approaches to the management of common resources and introduce varying degrees of environmental ambition. This would not only drive a race to the bottom in terms of standards due to competitive deregulation but it would also hamper efforts of jurisdictions with higher standards.

It is therefore clear that in a post-Brexit environment, there is still a case for maintaining a degree of cooperation and common standards when it comes to the management of common resources, as acknowledged by the Joint Ministerial Committee (JMC) in October 2017¹. What is critical to establish is the kind of coordination and types of frameworks that might be needed.

1. The nature, scale and number of potential shared frameworks that may relate to work within the remit of the ECCLR Committee and likely issues that these could cover;

It is important that any post-Brexit frameworks set up **ambitious common environmental standards** across the UK to manage our shared resources and

1

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

address transboundary effects. This would ensure that there is no drive towards competitive deregulation in any part of the UK that would damage our environment.

Any shared framework needs to **respect core EU environmental principles**. Respect for the internationally recognised environmental principles enshrined in EU Treaties is key to pursuing an ambitious path towards sustainable development, allow for continued cooperation with EU partners and live up to the spirit of international agreements such as the UN Sustainable Development Goals. These principles are detailed in the Treaty of the Functioning of the EU and include the precautionary principle, the polluter pays principle, the rectification at source principle and preventive action principle (Article 191). The Scottish Government has made good use of these principles also in domestic legislation and has reaffirmed its intention to ensure that those principles are carried through in Scotland².

It is also important that any shared or common frameworks **build on existing protections** that Scotland currently enjoys through the UK's membership of the EU. As such, the status of retained EU law needs to be that of primary legislation, meaning that changes to retained EU law can only happen if a full parliamentary procedure is launched.

The policies underpinning the environmental standards set in any common frameworks must **be legally binding** and part of domestic law. At the same time, any joint frameworks must allow for **policy divergence** when circumstances require this, such as climate, geography, local biodiversity, and local traditions. It would not be appropriate to pursue a "one size fits all" approach as this could potentially lead to negative environmental outcomes.

Under EU law, the Scottish government as well as the administrations in Wales and Northern Ireland, can pursue more ambitious environmental objectives. Should the UK exit the EU, it should continue to be possible for the Scottish government and other UK nations to **pursue more ambitious environmental policies**, beyond the baseline provided by any UK frameworks.

While it would be difficult to provide an estimation of the number of frameworks that could be required, it is clear that **different types of frameworks are possible** (as indicated later on in our submission) and that they could provide different levels of policy detail and granularity depending on the policy area.

What is key, however, is that there is a need to **address the governance gap** created by the loss of the functions of EU bodies. On leaving the EU, Scotland and the rest of the UK will lose the governance and enforcement roles of the Commission, European Court of Justice and other EU bodies. Therefore, to ensure that retained EU law has the same practical impact, governance mechanisms are needed to take on the functions of existing EU bodies. Such a body or institution must have (i) adequate resources, (ii) be independent of government, (iii) have

² <http://www.eebconference.eu/wp-content/uploads/2017/11/European-Environmental-Bureau-Speech-6-November-Roseanna-Cunningham.pdf>

relevant expertise and (iv) have sufficient legal powers to enforce the law and hold the various governments to account. This may require the creation of new bodies (either at the UK level or at country level) to ensure the governance gap is addressed; this would be in addition to any joint policy frameworks. Similarly, existing bodies may need to have some functions expanded or strengthened to compensate for functions currently performed by EU bodies.

We welcome the Scottish Government's commitment to "considering the nature of potential gaps in existing domestic monitoring, scrutiny and enforcement powers that would need to be addressed to ensure Scotland maintains its current high standards of environmental protection and accountability" and the request it has made to the "Roundtable on the Environment and Climate Change to provide advice to Ministers on future environmental governance arrangements in Scotland following the UK's Exit from the EU"³. It is critical that the reflections of the Scottish Government are also shared with UK partners as different jurisdictions are taking action on this issue.

We hope that the Scottish Government and Scottish Parliament would assess the benefits of seeking to retain membership to EU agencies such as the European Environment Agency which already includes non-EU member states.

2. **What principles should be used to guide the development of such frameworks**

It is the position of LINK members that **any common or shared framework needs to be jointly developed and agreed**. This means that all concerned governments need to have an equal say in the process and the relevant parliaments need to be involved in a meaningful way. Any such framework initiative needs to be developed in a transparent way, in line with international law and particularly the Aarhus Convention, and allow for stakeholder consultation. It is therefore concerning that the October 2017 JMC statement did not make any reference to public or stakeholder consultation.

Any shared frameworks must **respect the different devolution settlements of the UK**. In addition, shared frameworks could involve any or all of the countries of the United Kingdom as well as the Republic of Ireland and other British Isles.

This is reflected in [a joint position](#) developed by Scottish Environment LINK members along with sister Link organisations in England, Wales and Northern Ireland as well as Greener UK on Brexit and devolution. This joint paper, published on 14 November 2017, indicates that, to respect the devolution settlements, it will **be essential for the UK and devolved governments to work closely and constructively together** on how to embed all existing EU environmental law in domestic law, to maintain existing minimum common standards and avoid damaging legal uncertainty.

³ Written Answer to Parliamentary Question S5W-13447

Currently, the Withdrawal Bill does not provide a clear way forward for agreeing which policy areas may require the introduction of UK frameworks, while also taking into account the provisions of the devolution settlements. Combined with the absence of any public initiative to openly and transparently discuss these critical issues with stakeholders across the UK, this creates a lot of uncertainty particularly given the complexity of EU law, not least where the environment is concerned.

LINK members **support an open, transparent and informed debate on these processes to ensure the best outcomes for our environment.** Such a dialogue needs to be initiated as soon as possible and involve stakeholders. We therefore warmly welcome the Committee's initiative and hope it can provide a useful platform for these deliberations. Given the complexity of the issue and the fact that it would be the first time such a process is attempted at a UK level outside the EU, LINK members believe that the process should be based on **robust evidence and data**, including impact assessments and scenario development adapted for relevant policy areas. The process should also provide ample opportunities for **meaningful stakeholder engagement** and input across the UK countries.

It would also be critical to understand how any such frameworks would interact with the provisions of any trade legislation with other countries as well as the final exit agreement with the EU and future relationship with EU countries.

3. What form could such frameworks take

There are a number of examples of intra-UK coordination as well as UK/Irish cooperation. The same is true for the Nordic countries which cooperate further through the Nordic Council while several studies have been conducted regarding examples of asymmetrical cooperation between EU member states and different levels of governance. It will be important to assess those against the criteria outlined above and through appropriate stakeholder consultation as well as deliberation with Parliament, to develop an approach to the inter-governmental structures needed post-Brexit.

It is possible that different inter-governmental structures will be needed for different policy areas, involving different parts and levels of governments as well as agencies. It will also be important to ensure parliamentary oversight of these structures and how they are delivering on their remit. LINK members look forward to engaging in this process and contributing to help ensure that the structures agreed can deliver for our environment.

It is also important to acknowledge that there are different ways of cooperating in the context of shared frameworks, as the following examples from the UK illustrate.

a) Marine Planning

Marine planning is a complicated area of devolved and reserved powers. Broadly Scottish Ministers have powers out to 12 nautical miles, but UK ministers retain powers between 12 nautical miles and the edge of the UK marine area at 200 nautical miles. To create a level of consistency, whilst protecting devolution arrangements and allowing geographical flexibility, a combination of policies has been created, including a high-level [Marine Policy Statement](#) (jointly agreed by Ministers in Westminster and all the devolved administrations), a UK Marine Act (requiring an LCM), and individual devolved Acts (including the Marine (Scotland) Act 2010).

As part of the process Scottish Ministers were given the responsibility to prepare marine plans out to 200nm (including on reserved matters), with the exception that they must be 'signed-off' by UK Ministers too. The Marine Policy Statement also includes a shared goal of achieving 'Good Environmental Status' for all the UK's seas. In effect, a 'common framework' has been created, albeit with the EU's Marine Strategy Framework Directive having already provided an additional further overarching common framework. [More information](#).

b) The Great Britain Electricity Market

The Great Britain Electricity Market creates a kind of common framework through keeping powers over 'generation, transmission, distribution and supply of electricity' reserved to Westminster, whilst some strategic powers and crucially planning & consenting powers are devolved to Holyrood. However, in the absence of this common framework being 'commonly agreed' there has been tension, notably when Holyrood has been happy to be more permissive recently towards onshore wind generation, whilst the UK Government has shut off routes to market.

c) Guidelines for selection of biological Site of Scientific Interest (SSSIs)

SSSI site selection criteria apply across Great Britain and Ireland. The guidelines are developed and coordinated by JNCC with representation from the Country Nature Conservation Bodies from the devolved countries. The guidelines reflect a 'common approach to the biology and ecology underpinning site selection in the context of devolved governance and continue to recognise their relevance to the parallel process of site selection in NI so as to support and ensure a coherent approach at the UK level.'

d) The Committee on Climate Change

The Committee on Climate Change provides scientific information and advice in the climate change policy sphere. It is interesting from a devolution point of view as it covers many devolved areas and performs many functions for the Scottish Parliament and Welsh Assembly. It is jointly sponsored by the Department for

Business, Energy and Industrial Strategy (BEIS), the Northern Ireland Executive, the Scottish Government and the Welsh Government. It was set up as an independent, statutory body established under the Climate Change Act 2008 but through the 2009 Climate Change Act this remit has expanded to include advice to Scottish Ministers⁴.

e) The Non-native Species Secretariat (NNS)

The NNS is responsible for coordinating the approach to invasive non-native species in Great Britain. NNS is responsible to a Programme Board which represents the relevant governments and agencies of England, Scotland and Wales.

4. Potential shared governance arrangements for such frameworks

What is needed is a process for agreeing such common frameworks that takes into account current intra-UK government coordination methods and arrangements, how they have performed, how they could be improved and whether they are fit to meet the challenges that leaving the EU creates.

In considering the common features of these UK frameworks, it is important to note one key similarity among those that are functioning more effectively: some form of secretariat or resource to underpin their functioning. In addition, LINK members believe it would be conducive to good policy-making that governance arrangements supporting such frameworks be open and transparent, allow for stakeholder consultation and parliamentary scrutiny.

It is critical to consider the form of governance arrangements needed in the context of the “governance gap” identified above.

Daphne Vlastari,
Scottish Environment LINK Advocacy Manager

⁴ <http://www.gov.scot/Topics/Environment/climatechange/scotlands-action/climatechangeact>