

FINANCE AND CONSTITUTION COMMITTEE
COMMON UK FRAMEWORKS CALL FOR EVIDENCE
SUBMISSION FROM RSPB SCOTLAND

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Introduction

Currently around 80% of our environmental protections in the UK stem from EU law and institutions.¹ The loss of common frameworks provided by the EU therefore poses significant and far-reaching implications for our natural environment. We strongly agree with the Committee that this critically important area of work warrants further consideration.

Earlier this year, RSPB Scotland submitted evidence to the Environment, Climate Change and Land Reform (ECCLR) Committee's inquiry into common frameworks² and the Finance and Constitution Committee's inquiry into the impact of the EU (Withdrawal) Bill on the devolution settlement.³ These submissions outlined the current arrangements for environmental protection, explaining that EU common frameworks were developed as a rational response to the inherently transboundary character of the EU environment, namely that nature and environmental pressures do not respect borders and therefore require a coordinated approach across the EU Member States.

Our previous evidence additionally set out the continued need for some form of common frameworks across the four UK countries post-Brexit, to ensure robust protection of our natural environment, and provided a set of general guiding principles for the development of these frameworks. RSPB as part of 'Greener UK', a coalition of NGOs, has produced a document detailing the need for improved joint-working across the UK on environmental protection.⁴

The Committee should refer to these previous submissions on the need – from an environmental perspective – for some form of mutually-agreed common frameworks across the UK. On the issue of how common frameworks should be developed and agreed across the four countries, there have been several key developments since January, in particular: the publishing of the Cabinet Office's analysis of areas where we will need common frameworks post-Brexit, the passing of the UK's European Union (Withdrawal) Act 2018 and the European Union (Legal Continuity) Scotland Bill. This submission therefore updates our thinking on common frameworks in line with those developments.

1. What should replace the current EU policy-making processes across the UK

The importance of ensuring high, and where appropriate common, standards for the effective protection of the environment will not diminish post-Brexit. Indeed, the principles justifying EU-level cooperation and regulatory alignment on environmental matters apply equally, if not more strongly, to cooperation and regulatory alignment between the four UK nations. The loss of common frameworks for the environment would risk

¹ <https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/599/59906.htm#footnote-154-backlink>

² http://www.parliament.scot/S5_Environment/Inquiries/RSPB_written_submission.pdf

³ http://www.parliament.scot/S5_Finance/General%20Documents/10_RSPB_Scotland.pdf and http://www.parliament.scot/S5_Finance/General%20Documents/RSPB_Scotland_WWF_Scotland_and_Scottish_Environment_LINK_-_roundtable_submission.pdf

⁴ http://greeneruk.org/resources/Brexit_and_devolution.pdf

significant regulatory divergence and a less co-ordinated approach to environmental governance, to the detriment of our shared natural heritage.

The case for maintaining common frameworks of some kind across the UK is therefore clear. However, many questions remain as to what form those frameworks should take, how they should be developed and agreed and in which specific policy areas they will be necessary.

A report from the Institute for Government on *Devolution after Brexit* provides a useful contribution this discussion, for instance by examining the advantages and disadvantages of legislative and non-legislative frameworks.⁵ It is our view that a comprehensive analysis of these issues still needs to be undertaken jointly by all four administrations, in consultation with external stakeholders.

Progress to date

In October 2017, agreement was reached between the four nations at the Joint Ministerial Committee (JMC) (EU Negotiations) on the importance for cooperation and collaboration on common frameworks, and on six principles to underpin where common frameworks would be needed.⁶ Whilst, at the time, this demonstrated a willingness from each of the four nations to collaborate, RSPB Scotland is concerned at the lack of progress that has been made on this issue in recent months.

We agree with the IfG proposal that discussions around common frameworks should be based on the principles set out in the JMC October communique. We understand that the provisional assessment of common frameworks, which was subsequently published by the Cabinet Office⁷ was a working draft based on areas of EU law that intersect with devolved competence, and that it had not been agreed by the devolved administrations.

We have a number of concerns and questions about the published assessment. It was published without a methodology or detailed commentary on decision making processes, which makes it difficult to determine the basis for categorisation of specific policy areas. We are concerned that decisions seem to have been made based on a narrow consideration of internal market and trade issues, without considering the wider importance of transboundary cooperation or coordination to solve shared environmental challenges, to ensure effective transboundary protection, to manage shared resources, and to ensure a regulatory level playing field that limits downward pressure on standards and enables a 'race to the top'.

It is unclear how decisions made in the frameworks document are consistent with the principles set out in the October communique and with wider environmental commitments. We are especially concerned about the implications of assigning policy as requiring no further action or a non-legislative framework being required – for instance, in the area of 'nature policy'. One of the advantages of EU environmental law is its recognition that environmental issues cross borders and can often only be solved (or can be addressed most effectively) by working together, which the results of this provisional analysis would risk undermining. Furthermore, there are some notable omissions from the analysis, such as invasive non-native species policy, with no explanation provided as to why this has been excluded.

We therefore remain concerned that this analysis appears to form the basis of decision making around the need for common frameworks going forward. We understand that 'Deep Dive' sessions between the governments have begun to test and refine the analysis and that these sessions have identified that legislative frameworks may not be necessary in all the 24 areas identified. As there are still outstanding questions about the processes and analysis that have led to the provisional assessment, we would urge the governments of the UK to make this process more transparent and to enable stakeholder participation as soon as possible.

⁵ <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devolution-After-Brexit-180413-FINAL-WEB.pdf>

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

⁷ <https://www.gov.uk/government/publications/frameworks-analysis>

Maintaining strong environmental standards through common frameworks

RSPB Scotland's view is that the common set of environmental standards – including underpinning environmental principles - currently in place as part of the UK's membership of the EU, should be retained in domestic law and policy post-Brexit. This will require the four nations of the UK to work collaboratively to achieve this in a way which respects the devolution settlements. We have been pleased to note several positive commitments from the Scottish Government to collaborate with the other UK countries where appropriate and necessary.⁸

We therefore suggest that the starting point of these conversations should be to look across each policy area where there are existing EU common frameworks, making a robust assessment of the implications and potential risks of divergence caused by failure to maintain these frameworks in the future. This should be an open and transparent assessment of how decisions are made, against the principles agreed in the October communique. Any post-Brexit changes should be jointly agreed and subject to an appropriate level of scrutiny by each of the relevant legislatures, to respect the existing devolution settlements.

As discussions around common frameworks are likely to take some time, consideration of how to maintain existing frameworks should be taken, to avoid unmanaged divergence, until robust assessments on the implications of removing or loosening existing common frameworks are undertaken. Assessments should also be made on the implications of maintaining or creating new common frameworks, or their removal, on other policy areas. For example, negotiations around new trade and other international agreements, where the UK Government acts on behalf of the whole of the UK, will have implications for common framework discussions relating to environmental standards.

Intergovernmental working arrangements

One key reason behind the failure to progress the development and agreement of common frameworks is the inadequacies of the current intergovernmental working arrangements. Whilst the Scottish, Welsh and UK Government have made positive acknowledgements about the need for some form of collaborative working on environmental issues, the forum in which these conversations occur does not seem to be effective in facilitating agreement on cooperation or collaboration. Meetings within existing structures are not transparent, with few, if any, opportunities for stakeholder engagement or buy in, and have been widely regarded by the devolved governments and numerous other stakeholders as insufficient for effective, transparent and representative joint working.

For example, the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) session on devolution and exiting the EU agreed with the evidence submitted to it that "*one immediate problem, starkly revealed by the return of EU powers, is the lack of adequate intergovernmental arrangements capable of dealing with the developing situation*" (Professor Page evidence to the Committee). The Committee's report itself highlighted that "*There appears to be a consensus in the evidence we received of the desirability to place the UK's inter-governmental machinery on a statutory footing [...] This would have the effect of guaranteeing a basic level of communication and dialogue.*"⁹

The previous PACAC report¹⁰ also highlighted the inadequacy of the current arrangements and the need for more formal mechanisms to develop an atmosphere of trust and good-will among the four administrations. The report made several recommendations including steps to allow committees of the House of Commons to meet jointly with committees of devolved legislatures and to ensure that written notice and summaries of the Speakers and Presiding Officers quadrilaterals are published. The Welsh Assembly also published a report in

⁸ For instance, in the *Government's Programme for Scotland 2017 – 2018* the Scottish Government committed to 'collaborate where appropriate to develop UK-wide approaches for relevant issues'.

⁹ The House of Commons Public Administration and Constitutional Affairs Committee, November 2017, Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration. First Report of Session 2017 – 2019.

<https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/484/484.pdf>

¹⁰ <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/839/839.pdf>

February 2018¹¹ that set out various recommendations for intergovernmental relations, including calls for the JMC to become a UK Council.

The IfG report also identified this as a key sticking point in the discussions around common frameworks, recommending that *'the four legislatures should work together to improve their relations with each other to help support the scrutiny of new agreements, including via joint evidence sessions and inquiries, and interparliamentary forums'*.¹²

We see it as unlikely that, in the absence of a forum which can enable genuine four country co-design, agreement and implementation of common frameworks, this process can progress in the way we have suggested is necessary to secure effective protection of our natural environment across the UK.

We therefore welcome the JMC process update from the 23rd July, where David Lidington MP, Minister for the Cabinet stated that *"Ministers agreed that officials should take forward a review of the existing intergovernmental structures and the underpinning Memorandum of Understanding and report their findings to the Committee in due course."*¹³

2. Addressing the governance gap in relation to the monitoring, implementation and enforcement of frameworks

Environmental laws must be underpinned by strong institutions and mechanisms to monitor, implement and enforce them. At present, EU institutions play a key role in securing compliance with environmental frameworks and standards in Scotland and the other UK countries. This issue of an emerging environmental governance gap post-Brexit has been set out in more detail by Greener UK,¹⁴ and a recent report by the Scottish Government's Roundtable on Environment and Climate Change.¹⁵

We therefore welcome the commitments that the Scottish Government has made to date on tackling the environmental governance gap through its forthcoming Governance and Principles Consultation. RSPB Scotland has been working closely with the Roundtable on Environment and Climate Change and strongly supports the assessment and options set out in the Sub-Group's Report on Environmental Governance.

It is evident from this report that some distinct solutions to the environmental governance gap will be necessary to fit with the unique political and legal systems in Scotland. However, it is also clear that the governance gap applies just as much to shared frameworks for environmental standards across the UK, as well as to environmental legislation in each of the four nations – the effectiveness of common frameworks will only be as good as the enforcement mechanisms which support them.

There will therefore need to be some form of joint mechanism across the four nations to ensure the monitoring, implementation and enforcement of common frameworks. This could take various forms, including some wholly joint governance institution such as a co-designed and co-owned four-country watchdog, or it could require coordination of four separate country governance institutions with some joint element¹⁶. Again, for the UK countries to properly jointly assess the options and agree on a solution that respects the devolution settlements, there needs to be significant changes to the intergovernmental working mechanisms.

In response to the UK Government's recent consultation on 'Governance and Principles', the Environment Links UK submission highlighted the need to address these matters across or in all parts of the UK, and the

¹¹ <http://www.assembly.wales/laid%20documents/cr-ld11405/cr-ld11405-e.pdf>.

¹² <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devotion-After-Brexit-180413-FINAL-WEB.pdf>

¹³ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-07-23/HCWS905>

¹⁴ http://greeneruk.org/resources/Greener_UK_Governance_Gap.pdf

¹⁵ <https://www.gov.scot/Resource/0053/00536067.pdf>

¹⁶ This UK dimension was discussed in the RoundTable report at paragraph 5.11 *et seq.*

need to do this by improved intergovernmental working – that recognised the devolution settlements and utilised the methods of co-design.¹⁷ This approach should also apply to common frameworks.

3. The interaction between frameworks and the negotiation of new international agreements including free trade deals

As set out in our previous submissions, it is important to note that what form continued coordination and regulation of environmental matters will take will largely be circumscribed by the Withdrawal Agreement and the content of any future trade deal between the UK and EU. Any continued regulatory alignment with the EU will represent *de facto* 'common frameworks' and will limit the extent to which the UK countries are able, or need, to develop new common frameworks in certain policy areas.

Furthermore, as set out in the JMC (EN) agreement reached in October 2017, one of the broad principles that will be used to determine where new UK-wide frameworks may need to be established will include where they are necessary to ensure that the UK Government "*can negotiate, enter into and implement new trade agreements and international treaties*".

From an environmental perspective, the terms of any new trade agreements and multilateral environmental agreements negotiated by the UK Government could have significant implications for common environmental standards across the four countries.

We were therefore pleased to see the commitment from the UK Government in its White Paper¹⁸, that: '*Our approach to developing our future trade policy must be transparent and inclusive. Parliament, the devolved administrations, the devolved legislatures, local government, business, trade unions, civil society, and the public from every part of the UK must have the opportunity to engage with and contribute to our trade policy.*' However, we were disappointed in the lack of clarification as to how this increased inclusivity, representativeness and transparency will be delivered. It remains unclear what role the devolved administrations and legislatures will play in the negotiation and ratification of future trade agreements, an issue that was not addressed in the Trade Bill.

This again highlights the need for a more effective forum where the UK and devolved governments can work jointly to ensure trade and international negotiations deliver positive environmental outcomes across all four nations. We reiterate our concerns that the current mechanisms for intergovernmental working lack transparency and stakeholder engagement opportunities. Given the national importance of these issues and the wide range of expertise on environmental issues within civil society, we strongly recommend that this process should consider the views of stakeholders from across all four nations. The Institute for Government have also echoed these views and proposed that a new JMC sub-committee on international trade is established to tackle this issue and '*ensure the devolved administrations can feed into the UK's negotiating position for future trade agreements*'.¹⁹

Other than future trade deals, there is also a strong interaction between international environmental agreements and common environmental frameworks across the UK countries. Not only would the negotiation of future international environmental agreements affect the environmental obligations placed on each of the UK nations, but a failure to jointly develop and agree common environmental standards could undermine the ability of the UK to meet its existing international obligations relating to the environment. For instance, if there was a strong divergence in protections afforded to nature across the UK, or one of the four administrations was in breach of a requirement, there would currently be no domestic mechanism for the other three governments to challenge this. The Institute for Government again has proposed the establishment of a new JMC sub-committee on the environment to address this issue and facilitate cooperation, to '*enable the four*

¹⁷ <http://www.scotlink.org/wp/files/documents/ELUK-response-to-Defras-principles-and-governance-consultation.pdf>

¹⁸ <https://www.gov.scot/Resource/0053/00536067.pdf>

¹⁹ <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devolution-After-Brexit-180413-FINAL-WEB.pdf>

*nations to agree on the UK's position ahead of international environment conventions, for example coordinating a UK position on the post-2020 biodiversity framework.*²⁰

4. Funding of obligations and commitments arising from frameworks

Depending on the frameworks concerned, there are two types of funding that may, or may not, either be affected or determined by those frameworks. These are: -

- The amount and distribution across the UK of whatever funding for the environment replaces current EU funding. This would include reformed/replacement CAP pillar II measures and any replacement for schemes such as LIFE, Interreg, etc; and
- The amount and distribution across the UK of 'existing UK/Scottish' government funding for the environment, especially that funding that serves to meet EU-led environmental obligations.

Alongside private funding, including that from lotteries, trusts and foundations (which are also declining), both these public sector funding streams have been under pressure in recent years. Yet, the environment remains in need of investment to secure the protection and enhancement works that are necessary to fulfil the welcome commitments made by both the UK and Scottish Governments.

It is noteworthy, for instance, that in SNH's report on progress in Scotland towards the Aichi targets (the globally agreed targets for biodiversity conservation)²¹, it is only target 20 – related to funding issues – that is "moving away from target". This is due to a mix of declining public expenditure as well as a change in priorities for some expenditure streams, uncertainty over post-Brexit land management funding, declines/changes in priorities for lottery-based funding mechanisms and the potential loss of other EU funding, such as LIFE and Interreg.

In the light of this, RSPB Scotland has called on the Scottish Government to use its forthcoming environment strategy to recognise the funding challenge and commit itself to working to address it – within its own budget, the policy decisions it takes on land use matters, and the guidance/support it provides to NDPBs and lottery bodies, foundations and trusts. Such a commitment would clearly need to address the issue of post-Brexit funding arrangements and the impact of any common framework agreements on that funding.

Accordingly, as part of the Committee's consideration of post-Brexit common frameworks, and if/how they are developed, we believe it would be highly relevant for the Committee to challenge the UK and Scottish Governments over what plans it has to manage these two types public sector funding – and how any common frameworks might either determine, or be affected by, these funding arrangements.

²⁰ <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devotion-After-Brexit-180413-FINAL-WEB.pdf>

²¹ <https://www.snhpresscentre.com/news/embargoed-until-00-01hrs-on-tuesday-22nd-may-scotland-leads-the-way-in-international-nature-targets>