

RESPONSE BY UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) TO THE CALL FOR EVIDENCE BY THE HOUSE OF LORDS COMMON FRAMEWORKS SCRUTINY COMMITTEE

Introduction

1. UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment. It prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response to the call for evidence by the House of Lords Committee on Common Frameworks Scrutiny Committee has been prepared by UKELA's Governance and Devolution Group, which aims to inform the debate on the development of post-Brexit environmental law and policy. This response does not necessarily, and is not intended to, represent the views and opinions of all UKELA members but has been drawn together from a range of its members.
2. The comments in this response pertain specifically to common frameworks as they relate to environmental protection and UK laws relating to the environment. UKELA has commented in previous evidence submissions and consultation responses¹ that the highly devolved nature of environmental policy makes the post-Brexit transition to UK environmental law particularly complex, since much of environmental law derived from, and was unified by, EU environmental law pre-Brexit. This is partly due to the extensive body of EU environmental law, as well as international environmental law obligations that were implemented through EU law (such as the 1979 Bern Convention on the Conservation of European Wildlife and Habitats, and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters).
3. International obligations relating to environmental protection arise not only from multilateral environmental agreements (MEAs), but also, pertinently in this context, from the EU-UK Trade and Cooperation Agreement (TCA). Article 393 TCA outlines a set of 'environmental and climate' principles which each party commits to respect, including the principle of preventive action to avert environmental damage, the precautionary approach, the polluter pays principle, and a commitment to environmental impact assessment. Article 391 of the TCA also commits both the EU and UK not to 'weaken or reduce, in a manner affecting trade or investment between

¹ See e.g. UKELA's written evidence to the House of Lords EU Environment Sub-Committee Inquiry on the UK-EU Trade and Cooperation Agreement (5.2.21): www.ukela.org.

the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period'. In thinking about designing common frameworks for environmental protection, the UK administrations should be prioritising compliance with these international commitments to environmental protection policy and non-regression.

4. The primary reason for extensive international obligations and EU competence in the field of environmental law is that regulating the natural environment often involves crossing boundaries, whether because environments or ecosystems cross political boundaries (as in the case of shared watercourses, habitats or other aspects of the connected biosphere) or because activities in one geographical location will impact the natural environment in another location (as in the case of air pollution).
5. At the same time, EU environmental law allowed divergence in the national implementation of environmental law where more protective approaches were taken by national or subnational governments (eg Scotland has maintained more stringent ambient air quality standards; Art 193 TFEU), or where internal market principles were overridden by proportionate environmental protection requirements (Art 36 TFEU; Case C-302/86 *Commission v Denmark* [1988] ECR 4607). Member States can also diverge from EU market harmonisation measures on environmental protection grounds, although a careful balance between market harmonisation and environmental protection needs to be struck (Arts 114(4) and (5) TFEU). The EU case law around the balance between promoting the internal market and environmental protection is highly complex, reflecting the challenge of striking the right balance between these often countervailing interests.
6. Of the agreed principles for common frameworks issued under the Joint Ministerial Committee (EU Negotiations) Communiqué (16 October 2017), four are particularly relevant in relation to environmental policy and should inform any common frameworks established in the field of environmental protection:
 - enabling the management of common resources (this is highly relevant in the case of environmental protection);
 - enabling the functioning of the UK internal market, while acknowledging policy divergence (policy divergence is particularly important to safeguard where UK administrations pursue more protective environmental policies);
 - ensuring compliance with international obligations;

- administering and providing access to justice in cases with a cross-border element (particularly in light of obligations under the Aarhus Convention).
7. For the reasons set out in paragraphs 3-6, it is unsurprising that Defra is the department responsible for the largest number of ‘active framework policy areas’ under the common framework programme (CFP). It is however alarming that significant potential framework areas of environmental protection were moved to ‘no further action’ after April 2019, despite originally been identified as appropriate for the development of common frameworks. These areas are where ‘collaborative work between the UK Government and devolved administrations [has led] to the shared understanding that no further action is required to create frameworks in several areas’ (see Frameworks Analysis 2020). These areas include:
- Natural environment and biodiversity, including protection of Natura 2000 network;
 - Water quality;
 - Land use, specifically in relation to the implementation of the EIA Directive and SEA Directive.
8. Moving these major areas of environmental policy out of the CFP seems to be consistent with common frameworks changing ‘from being about common standards and common approaches to being mostly about process, in particular processes for managing divergence’ (Dr Viviane Gravey, House of Lords Common Frameworks Scrutiny Committee, *1st Report of Session 2019–21 HL Paper*), but it creates risks that any environmental policy divergence across UK administrations is not based on clear harmonised baselines that meet international obligations, and is not able to be protected legally from any inconsistent regulatory requirements under the Internal Market Act 2020 (discussed further below).
9. UKELA is a leading stakeholder in environmental law but has not been involved in the development of any common frameworks for environmental policy, reinforcing concerns raised in the 2019-21 HL paper that the CFP is ‘weakened by the lack of inclusion of external stakeholders’ [para 54]. In UKELA’s view, lack of transparency is the primary concern at this stage of developing common frameworks for environmental policy, including in decision-making for whether common frameworks are required.

What effect, if any, has the Common Frameworks programme had in the seven months that it has been provisionally active for?

10. The CFP has had very limited in the sphere of environmental policy, despite the strong case and need for common frameworks in this area, as outlined above. None of the active frameworks that come within Defra's remit have been published, even provisionally.

How could the governance structures of either the programme as a whole or for individual Common Frameworks be made more efficient?

11. Governance of the CFP should be made much more transparent. Considering the complexity of the constitutional and policy issues at stake for environmental common frameworks, the efficiency of the process can only improve by involvement of all administrations and stakeholders to ventilate issues.

What does good scrutiny of intergovernmental relations look like? Should each Government be required to publish its preferred position on matters under discussion through intergovernmental forums?

12. Respect for the devolved settlements must lie at the heart of the arrangements. At its most basic, this involves an early appreciation of when issues may have an effect on devolved matters, or a differential effect in different parts of the UK, prompting discussion to inform the shaping of policy. The role of the devolved Parliaments must also be considered – if a common framework is progressed through delegated legislation made by UK Ministers, the devolved Parliaments' role is very indirect, at best being able to call devolved Ministers to account for their decisions to approve of this course of action. Early notification of proposed action (or inaction) and transparency are key to ensuring good relations.
13. Good scrutiny of intergovernmental relations, in the context of environmental common frameworks, must involve expert analysis to ensure compliance with international environmental law, as well as respect for our interconnected environment, within and beyond the UK. This includes ensuring a common baseline of environmental protection policy across the UK that aligns with the environmental principles outlined in the TCA and avoiding divergence that compromises UK environmental ambitions. Compliance with the Good Regulatory Practices and Regulatory Cooperation Part of the TCA (Title X) also requires an improvement in communication between

governments so that the UK Government can fulfil its responsibilities under that Title in relation to matters of devolved responsibility.

What should the Office for the Internal Market look for in assessing the impact of divergence agreed through the Common Frameworks on the Internal Market?

14. In relation to environmental protection, as outlined in paragraph 6, there are legitimate reasons relating to environmental protection for regulations that might impede market access rules. Any policy divergence in the environmental domain across the UK must thus be seen as part of a wider policy picture in which legitimate environmental policy goals might in fact be supported by divergence, and in which environmental policy ambition is to be encouraged. The history of EU law on this issue indicates that proportionality is a useful and critical benchmark in assessing any conflicts between environmental regulations and internal market rules, whereas the United Kingdom Internal Market Act 2020 sets much narrower constraints in permitting departures from the mutual recognition principle. The fact that environmental policy is a devolved policy competence supports the case for allowing a degree of policy divergence, or resolving matters through common frameworks.
15. In light of this constitutional position, any environmental policy divergence that is agreed within environmental common frameworks should be respected, rather than giving market considerations almost total dominance. There is a strong case for expanding the exclusions from any conflicting UK market access principles under section 10(3) of the Internal Market Act 2020.
16. Divergence that arises *outside* any common frameworks is potentially more problematic in the field of environmental protection, since it may not be protected from the application of market access principles through an exclusion under section 10(3) of the Internal Market Act 2020 (albeit this is subject to a discretion). This is a specific legal reason why moving so many environmental areas out of the scope of 'active common framework areas' is cause for concern.

What should ongoing reporting on the progress and implementation of the Common Frameworks programme look like?

17. It bears repeating the point that the processes for developing and agreeing common frameworks should be transparent, before contemplating processes of ongoing reporting.

18. In relation to ongoing reporting and implementation of any environmental common frameworks, the (currently interim) Office for Environmental Protection and Environmental Standards Scotland will have an important role to play. This kind of work in monitoring the implementation of environmental law comes within their respective oversight remits, and the fact that Environmental Standards Scotland is expressly entitled to “keep under review implementation of any international obligation of the United Kingdom relating to environmental protection” means that compliance with international obligations (including parts of the TCA) can be considered.

How can measuring divergence under the Protocol on Ireland/ Northern Ireland be built into the Common Frameworks programme?

19. Divergence under the NI Protocol is usefully assessed through an environmental protection lens, as well as other perspectives. This is because Northern Ireland shares common natural resources with the rest of the United Kingdom as well as the Republic of Ireland, and has devolved UK environmental policy competence which remains affected by EU internal market rules. In relation to environmental protection, UK common frameworks will thus need to accommodate NI competence in relation to environmental matters, which must respect EU internal market rules as prescribed under the NI Protocol (including how these rules accommodate norms of EU-wide environmental protection – see paragraph 6), and also support a UK commitment to its common natural resources. The legal constraints in operation in NI strengthen the argument for allowing greater divergence across the UK in environmental matters than the Internal Market Act currently envisages, and greater use of common frameworks that are designed to accommodate a degree of difference.

16 September 2021

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