

Governing the environment after EU exit: Is there a case for the four UK nations to share architecture?

A conversation starter
co-produced at the Institute for Government by leading academics

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Headlines

The EU has provided the governance framework within which, since devolution, Scotland, Wales, Northern Ireland and England have managed a largely shared environment and natural asset base.

Once the EU's horizontal governance architecture for the environment falls away, it will be harder to manage this shared environment and natural asset base effectively and in a way that gives confidence to international partners without some shared architecture at UK level.

There is therefore a strong case for the four nations to find the space to evaluate where shared architecture is necessary to enable effective policy making at devolved level and protect common interests, before it's too late. Any shared arrangements should then be genuinely co-designed.

This note is not intended to propose any fixed solutions, but to demonstrate that a substantive discussion between the four nations is needed. It has been co-produced with leading academics with an environmental policy, environmental law or constitutional background from across the four nations. (See annex).

While the work was commissioned by the Broadway Initiative, it has been developed by UK academics and has not had direct input from the organisations which participate in the Broadway Initiative.

Background

Brexit will be pivotal in defining the long term state of the environment and natural resource base on which future prosperity in Scotland, Wales, Northern Ireland and England will depend.

The EU has provided the common 'horizontal' architecture within which UK nations have managed the environment and, as devolution has taken hold, nations have innovated to improve the environment. For example: the Well-being of Future Generations Act in Wales, Scotland's Greener Strategic Objectives and prosperity agreements in Northern Ireland. Meanwhile, England has its 25 year plan.

Outside the EU, each nation's environmental performance could be far better or worse, at extremes, than in the past. But there are also interdependencies such that each of the four nations could either undermine or support each other. There is therefore a case for some shared architecture at UK level to ensure that all nations continue to maintain and improve the natural and physical environment and provide the basis for a race to the top, rather than the bottom.

Defra's principles and governance consultation proposes the adoption of environmental principles and an independent watchdog for England with an invitation for devolved administrations to co-design principles and the new body. The Scottish Government has also commissioned a [report on environmental governance in Scotland](#). Despite a pressured constitutional backdrop, the stakes are high enough to make it worth the 4 nations finding the space to discuss what horizontal architecture is mutually beneficial.

Structure of this note

This note starts from first principles, looking wider than the questions raised in the Defra consultation. It explores the:

1. **EU's existing role** – including 21 horizontal functions
2. **Scope to improve governance** – making space for approaches that within each country are more integrated, user friendly, locally appropriate and transparent, more focused on sustainability and outcomes, with clearer accountabilities.
3. **Potential reasons for sharing horizontal architecture** – including to secure good exit terms, meet general requirements for trade deals, manage shared environment and resources, secure a level playing field and avoid a race to the bottom.
4. **Potential UK architecture** – e.g. committing to high standards, accountability, co-operation and forums for sharing. These could help safeguard the purpose of the EU's role, while retaining the space for each nation to innovate.

The ideas presented are intended only to help stimulate discussion within and across UK governments.

1. What is the EU's role on the environment?

The EU's role in governing the environment across the 28 member states is multi-faceted and includes the following horizontal (i.e. as opposed to policy specific) functions:

1. **Setting principles.** The EU treaties establish the general principles for environmental decision-making.
2. **Horizon scanning.** The European Environment Agency and forwarding looking R&D programmes, currently under the umbrella of *Horizon 2020*, anticipate future trends and environmental issues.
3. **Developing long term strategy.** The periodic European Action Programmes set out future challenges and how they should be addressed.
4. **Initiating policy proposals.** The services of the Commission initiate proposals, sometimes at the request of the Council and Parliament.
5. **Appraising policy proposals.** This task is carried out by the Commission and by an independent regulatory scrutiny board.
6. **Consulting stakeholders.** The Commission consults on specific proposals with engagement from Member States and the European Parliament. The Commission also seeks citizens' views more generally on environmental issues.
7. **Legal drafting of EU Directives and Regulations.** This is done by the legal services of the Commission.
8. **Brokering political agreement on policy and legislative proposals.** This is done through the co-decision process involving the Commission, the Member States (through the Council) and the Parliament.
9. **Participating in international law.** The Commission negotiates, ratifies and reports back on many Multilateral Environmental Agreements on behalf of Member States.
10. **Incorporating environmental objectives in trade policy.** This includes agreements and contributing through various fora to wider trade norms.
11. **Guiding implementation.** This includes working groups, technical and legal fora and issuing EU level guidance.
12. **Sharing and transferring expertise and best practices.** This includes technical assistance, secondments and sharing expertise through technical fora such as IMPEL (EU network for the implementation and enforcement of environmental law).

13. **Setting standards.** Various EU fora and specialized EU bodies set standards for many and various products and activities.
14. **Authorising specific products.** This includes authorizing chemicals and GMOs for the EU market.
15. **Specific oversight roles.** This includes reviewing the designation of Natura 2000 sites and the justifications for projects harming priority sites beyond the legislative exemptions.
16. **Administering funding.** Environmental spending programmes include e.g. rural payments and LIFE.
17. **Monitoring and assessment.** The European Environment Agency and Commission both have functions to monitor and assess the environment and compliance with obligations.
18. **Evaluation of policies.** The Commission carries out cyclical and thematic reviews of policies. The Parliament also reviews environmental policies.
19. **Proactive scrutiny.** The Commission scrutinises legal and implementation arrangements.
20. **Hearing appeals.** The Commission responds to complaints from interested parties about the application of EU law in Member States.
21. **Enforcement.** The EU takes administrative and legal action against Member States and administers fines.

There are also potentially some values or attributes that the EU has, for example:

- **EU institutions are independent.** They are independent to a large degree, of domestic political control, though arguably lack direct democratic accountability.
- **EU legislation is long term and difficult to change.** This is partly intentional in giving long term direction, but also partly accidental in that the process of agreeing changes across Member States is non-trivial.
- **The EU is committed to high standards.** The EU promotes high standards of protection for the environment and human health.

2. How can we improve governance of the environment outside the EU?

It is widely recognised that the EU has been a powerful force for protecting the environment. However, environmental governance could still be improved. While some of these improvements are possible within the EU, leaving the EU arguably creates greater space and impetus to address them, including:

1. **A shift towards genuine sustainability of the economy as a whole and positive improvement of the environment** rather than a narrower focus on protection and conservation.
2. **More responsibility and sense of ownership for the environment and human wellbeing within each of the four nations or acting together as the UK** as for example shown in the cross-party political support for the Climate Change Act.
3. **More systemic integration of sustainability and the environment** across all government policy and activity, which is sometimes constrained by vertical implementation by Environment Ministries of single issue EU laws.
4. **Clearer and more consistent flows of political accountability for the environment** where EU institutions are sometimes perceived as unaccountable.
5. **Greater flexibility in the technology and processes that can be used to meet outcomes**, backed up by more targeted compliance and enforcement arrangements.
6. **Designing policies that are appropriate to the cultural, environmental, business and governance contexts within each of the four countries rather than designed for the 28.**
7. **Addressing the unordered proliferation of legal instruments and administrative arrangements.** This is partly caused by the fragmentation of EU law, which is extremely difficult to resolve, given the challenge of amending EU legislation. It is also partly caused at implementation stage and is arguably most acute in England, for example where siloed issue-specific regimes can be hard to engage with in practical terms.
8. **More transparency in the policy making process** where decision-making processes are sometimes opaque within Member States.
9. **Addressing pre-existing governance challenges in the UK** absence of an independent environmental agency in Northern Ireland and insufficient funding for enforcement in England.

While the potential can be acknowledged, it is certainly not guaranteed to emerge as we leave the EU. Many areas of potential bring risks (such as localized political accountability overshadowing wider goals), and there are more fundamental tensions for good environmental governance in linking the pursuit of substantive, long-term

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goals with democratic accountability. Thinking about shared architecture is vital if we are to maximise the positive potential while managing the risks and tensions.

3. What are the potential reasons for sharing architecture?

UK government has analysed where common frameworks should be pursued on a policy by policy basis. The includes both legislative and non-legislative frameworks. The [analysis was based on six principles](#)¹, agreed by the (UK) Joint Ministerial Committee and [concludes that common frameworks are required for a number of specific environmental policies](#), largely down to principle 2: ensure **compliance with international obligations** and principle 3: ensure the UK can **negotiate, enter into and implement new trade agreements and international treaties** and principle 4: **enable the management of common resources**. [Institute for Government analysis](#) shows more common frameworks are being considered within the Defra brief than for any other government department.

However, that policy by policy analysis does not address the many horizontal functions performed by the EU and where there may be mutual benefit in developing shared architecture for governing the UK environment over the next decades.

9 (interlinked) sources of mutual benefit would include:

1. **Secure favourable exit and trade terms with the EU** by giving the EU confidence that the UK government's commitment to high environmental standards is more than rhetoric and will apply across the UK. Environmental standards (and avoiding competing on lower standards) has emerged as a negotiation priority for EU institutions and member states.
2. **Meet the general standards of good environmental governance increasingly required to agree trade deals** for example [the approach Canada now uses](#) is shown in the recent Canada-Korea trade deal².
3. **Manage shared environment and natural assets coherently and effectively.** In general terms our shared environment and natural resources are a fundamental part of the canvas for UK prosperity. Managing integrated and interdependent natural assets requires coherent management and some level of common measurement and information. UK countries would be more vulnerable outside the EU frameworks to transboundary effects if a country decided to lower standards, for example where natural assets straddle boundaries within the UK, where there are transboundary affects through air and water pollution or where migrating species rely on habitat across the UK.

¹

1. enable the functioning of the UK internal market, while acknowledging policy divergence;
2. ensure compliance with international obligations;
3. ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
4. enable the management of common resources;
5. administer and provide access to justice in cases with a cross-border element;
6. safeguard the security of the UK.

² The Canada-Korea deal is provided as an example of environmental governance provisions, though worth noting that Canada doesn't currently have shared architecture to bind its provinces and territories into the obligations of the FTA Environment Chapter.

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4. **Avoid race to the bottom across UK** in a scenario where one or more countries seeks short term competitive advantage by relaxing requirement to the detriment of the environment.
5. **Secure level playing field** to avoid unfair competition. While individual UK countries may find more pro-competitive ways to achieve outcomes, there is mutual benefit in avoiding unfair advantage through lowering protection.
6. **Save costs (or making viable)**. This is to the extent that functions may be unaffordable for the smaller countries or where there'd be a strong mutual gain from economy of scale, for example in accessing scarce specialist expertise.
7. **Global leadership on the environment**. There is a growing view that the UK and constituent countries can provide moral leadership on the environment globally in a way that also creates economic advantage, but this could be undermined by individual countries.
8. **Achieve independence and durability**. Shared architecture is more likely to have the requisite independence from political and funding vicissitudes than would be the case with a single governmental master.
9. **Mutual accountability for a shared mission**. The constituent nations of the UK would have a strong interest in holding each other to account for their environmental performance. This includes shared accountability for how reserved competences (such as trade, transport and defence) reflect environmental objectives and evolve in ways that enable all nations to meet their environmental objectives.

A further dimension worth mentioning is the Irish border question and the common interest in giving the Republic of Ireland the confidence that Northern Ireland will operate within agreed environmental parameters. Benefits 3-5 above might also apply in that context.

4. What kind of commonality might therefore be beneficial?

The reasons in the preceding section suggest the following shared horizontal architecture could be mutually beneficial.

1. Commitment at UK level to maintain and improve the environment

This would include a shared commitment to maintain and improve the environment. At high level this could be achieved by something equivalent to the objectives in article 191 of the Treaty on the Functioning of the EU:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

To establish a common floor of environmental outcomes, this would need a qualification such as non-regression of environmental outcomes or to maintain at least the objectives reflected in current (including EU-derived) legislation. Without this commitment there is little to prevent future governments in any of the four nations from choosing to lower environmental protection.

There could be different options in terms of whether the detail of objectives and targets are determined together or separately and whether any requirements on the process are established in law.

2. Duty to cooperate where necessary to maintain and improve the environment

This would require the four nations to work together where necessary to manage our shared environment and avoid transboundary damage. There would also need to be a resolution mechanism for disputes.

3. Adoption of environmental principles

This would include common principles for decision-making affecting the environment. There's a strong logic in retaining the principles in the treaty which are already applied and understood.

The Withdrawal Act proposes that the Secretary of State publish a draft Bill to include these principles, and a duty to publish a policy statement on their application and interpretation. [Scotland](#) and [Wales](#) have also committed to environmental principles.

4. Commitment to be accountable for high environmental standards

This could include the following functions to achieve accountability for the commitments above and compliance with the law:

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- monitoring and reporting on the condition of the environment and the achievement of objectives
- independent advice on what's needed to stay on track
- independent scrutiny, a complaints process and enforcement procedures against non-compliance with legislation or failure to be on track to achieving goals

There are many options for the institutional arrangements to meet these functions, and the extent to which they are shared or separate. The route to the best result though is undoubtedly through a genuine process of co-design. There are already precedents for UK bodies with some of these functions including: the Joint Nature Conservation Committee and the Committee on Climate Change.

1, 2 and 3 together are necessary to ensure each country operates within the same environmental envelope to help manage our shared environment, avoid a race to the bottom and secure a level playing field and, in turn, to give the EU and international partners confidence.

There are different options for how the arrangements in 1-4 above could be given force. For example:

- A UK Act setting out shared arrangements
- A UK Act requiring each nation to put in place individual arrangements
- A binding concordat requiring each nation to put in place arrangements

5. Forums to facilitate collaboration

In addition to the Joint Ministerial Committee, or whatever successor forum is invented for political agreement, technical forums could provide the space for nations to solve mutual problems together. They could include forums to:

- solve specific problems that require the collaboration of two or more nations
- help those who either operate in multiple counties or across borders
- share technical expertise and capacity in resolving common issues
- share emerging proposals and policies

While there are some existing relatively informal arrangements for discussion – for example the 5 countries group of Environment Agency CEOs - more comprehensive arrangements are likely to be mutually beneficial.

Annex: People involved in producing this note

This note has been developed through a workshop on 27 April 2018 and subsequent discussions and comments involving the following:

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*Did not attend the workshop but provided written comments

+Did not attend the workshop but provided and discussed written comments.