

## **Dr Mary Dobbs – Written evidence (PBC0016)**

Submitted by Dr Mary Dobbs (Department of Law, Maynooth University, Ireland; Brexit and Environment Network) in a personal capacity. I have had the benefit of reading in advance the submissions by both Dr. Viviane Gravey (of Queen's University Belfast) and Greener UK and concur with the points therein. My main focus is from an environmental perspective.

The following are 5 key points I would like to highlight:

- Common frameworks created in a cooperative manner respectful of devolution bring advantages over UK-imposed frameworks;
- Common frameworks are needed beyond those areas identified by the Joint Ministerial Council (JMC);
- The JMC's underpinning principles and criteria need to be applied carefully and transparently in practice;
- The Internal Market Act and other UK-level developments challenge both devolved competences and the common framework process (but may incentivise devolved administrations to engage with the process); and
- Northern Ireland would benefit from common frameworks in environmental protection, as the NI Protocol remains largely silent on this.

### **1) Nature of common frameworks compared to UK-imposed frameworks:**

The points below are predicated on the idea that common frameworks would be created in a cooperative manner between the devolved administrations in conjunction with Westminster (depending on where precisely the common framework applies to), rather than simply a UK-imposed framework. Whilst both might entail UK-wide, GB-wide or other shared frameworks, the manner of the creation of common frameworks is fundamental to respecting devolution, ensuring recognition of contextual variations across the UK and improving buy-in across the devolved territories. Co-design, cooperation, respect and transparency are essential in the common framework process. Further, as discussed by Greener UK, stakeholder engagement is a valuable mechanism in identifying, designing and implementing common frameworks and would benefit from being strengthened – although care always needs to be taken to avoid regulatory capture.

### **2) Practical need for common frameworks:**

Common frameworks can serve practical purposes. In an environmental context, this could for instance be due to shared natural resources or epidemiological or biogeographical units that cross borders. This can call for shared governance approaches, cooperation and/or simply enabling clear communications. Difficulties could ensue for instance if a stream is polluted on one side of a border and then flows into a river on the other side of a border; where pollution permits, fishing licences, dredging licences or hunting permits are granted without consideration of what might happen just across the border; or where a habitat is only protected on one side of the border.

In the case of the powers returning from the EU considered by the Joint Ministerial Committee (JMC),<sup>1</sup> it is worth noting that these are areas where EU-wide frameworks were already deemed to be needed based on the EU principle of subsidiarity – essentially indicating that the objectives could be achieved better by EU-wide frameworks than by national measures or frameworks. Flexibility was maintained within these frameworks using the principle of proportionality – enabling variations in development and implementation between and even within the Member States, including within the UK. Therefore, a reasonable starting point would seem to be that common frameworks would be an effective and desirable approach for each of these areas – all 160 identified in the JMC’s mapping exercise.

Without common frameworks, there is considerable potential for divergence, which at least makes shared or cooperative governance more challenging. This is exemplified by the Environment Bill, where proposals exist to grant powers to enable changes for instance to water governance, standards and the monitoring of water quality. Even if simply the approach to monitoring is amended is one jurisdiction, this makes comparisons over time or with linked water bodies in the same river basin in the adjoining territory much more challenging.

Further, due to the potential for divergence, it is possible that some parts of the UK may maintain or even improve some standards or governance regimes, but it is also clearly possible that there will be a decrease in standards or environmental governance post-Brexit – on paper or in practice. This is especially the case if for example there are financial constraints (e.g. in funding for regulatory agencies or if industry become economically unviable), if political

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<sup>1</sup> Cabinet Office, 'Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland', April 2019, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/792738/20190404-FrameworksAnalysis.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf).

will favour deregulation (e.g. regarding controls on the spreading of slurry), or if trade negotiations or market forces mandate or incentivise lowering of standards (e.g. due to competitive (dis)advantages). Concerns have been raised in the context of both the Trade Bill (e.g. regarding chlorine-treated chicken or GMOs) and the Internal Market Act (due to the mutual recognition principle – see below). Whilst it is a welcome development that the new Trade and Cooperation Agreement with the EU contains a non-regression principle, this is limited in scope (relevant to impacts on trade/level playing fields with the EU) and is not very specific or easy to enforce.

The JMC determined that only 21 of the 160 areas might need legislative frameworks and the majority did not even require policy frameworks. This is a significant concern and raises issues regarding the balance of principles and criteria as they operate in practice (see next point). However, it also increases the significance of additional governance frameworks – frameworks that could operate to bolster relationships between the devolved administrations and Westminster (and their agencies), as well as facilitating effective governance more generally would be beneficial anyway and also help address potential issues caused by the lack of common frameworks on the substantive issues. E.g. a common framework could address procedures if one administration sought to amend one of the 160 areas (or other relevant areas) and how they might all engage and cooperate generally in respect of these areas. Further common frameworks could address governance more generally, e.g. an environmental governance framework encompassing objectives, principles, rights, procedures etc generally and where there are clear cross-border implications (going beyond the Environment Bill).

### **3) Concern regarding the balance of principles and criteria underpinning the common frameworks:**

On paper, the JMC's principles and criteria underpinning the identification of where common frameworks will be needed (and helping to determine the nature of such frameworks) appear quite reasonable. Some further recognition of cross-border aspects and issues of effectiveness could be included. It might also be worth including shared objectives, e.g. regarding high standards/values. However, it is their operation in practice that is particularly concerning – reflected in the initial identification of areas needing common frameworks (and their nature), the progress in developing common frameworks, the content of the Internal Market Act and also the debates regarding the Agriculture Act and the Trade Bill.

The choice of frameworks reflects a 'clear prioritisation in protecting a UK single market and facilitating trade',<sup>2</sup> whereas objectives such as environmental protection are effectively cast-aside – despite the obvious status of water for instance as a 'common resource' (a key factor for the JMC). This is reflected in over half the legislative frameworks being deemed necessary relating to agriculture, but with noticeable gaps regarding environmental protection. Further, the only two areas that had progressed as far as provisional frameworks by 25 September 2020 were on nutrition labelling, composition and standards; and on hazardous substances (planning).<sup>3</sup>

Whilst the developments within UK legislation are separate from the common framework process, they are relevant in providing insights to the development (or not) of common frameworks. The possibility of including guarantees regarding food or environmental standards in the Trade Bill or Agriculture Act was raised, but rejected (despite the focus on environmental public goods in the Agriculture Act). Further, the nature of the mutual recognition principle in the Internal Market Act and the very limited exclusions (narrower than under EU law) facilitate a race to the bottom in standards. The House of Lords proposals to enable 'public interest derogations' (including regarding environmental protection) and broad support in the case of common frameworks were unfortunately rejected by the UK Government in order to protect the UK internal market.<sup>4</sup>

Although the final Act incorporated a weaker (but welcome) version of protection of common frameworks, the Act as a whole clearly again prioritised economic interests over other objectives, including environmental and health objectives. Between the progress with common frameworks and also UK legislation, it seems clear that certain factors are weighted more heavily than others.

It is essential that transparency and accountability are improved in the context of the common framework process. For instance, justifications are needed regarding the identification of whether common frameworks are needed or not (and their nature), as well

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<sup>2</sup> C. Brennan, M. Dobbs, and V. Gravey, 'Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland', (2019) 21:2 *Environmental Law Review* 84, at 94.

<sup>3</sup> Cabinet Office, 'The European Union (Withdrawal) Act and Common Frameworks: 26 June to 25 September 2020', 9<sup>th</sup> statutory report, December 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/941711/The\\_European\\_Union\\_Withdrawal\\_Act\\_and\\_Common\\_Frameworks.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941711/The_European_Union_Withdrawal_Act_and_Common_Frameworks.pdf), p.7. It is clearly acknowledged that both Covid and Brexit pressures more generally have created significant challenges for those trying to develop and finalise common frameworks.

<sup>4</sup> <https://publications.parliament.uk/pa/bills/lbill/58-01/156/5801156.pdf> and [https://publications.parliament.uk/pa/bills/cbill/58-01/0224/amend/UKIM\\_pro\\_ccla\\_1207.pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0224/amend/UKIM_pro_ccla_1207.pdf).

as to why progress is being made in some and not others. This could be developed within the regular reports provided by the Committee. Without such transparency, the supposed underpinning principles and criteria can be effectively cast aside. Further engagement with stakeholders would also be of value from this perspective.

#### **4) Concern regarding the interactions of the Internal Market Act and other UK-level developments with common frameworks:**

Besides highlighting the balance in priorities for the UK Government, the Internal Market Act and progress with other UK legislation and trade deals could have significant impacts on common frameworks and devolved matters – including environmental protection.

The Internal Market Act firstly introduces the UK market access principle of mutual recognition, facilitating the sale and use of goods in any part of GB where authorised in another part of the UK (including where imported from other countries). Whilst pre-existing 'relevant requirements' can be maintained and used to impose restrictions, new ones cannot generally be introduced. Exclusions to mutual recognition exist, including regarding preventing the spread of disease, but these are very narrow. Devolved administrations are therefore curtailed in practice from achieving legitimate objectives in devolved matters, including environmental protection. The belated amendment to exclude the application of mutual recognition to common frameworks (where there is agreement between at least one devolved administration and a Minister of the Crown) may incentivise devolved administrations to develop common frameworks – but they remain dependent on approval by Westminster and are currently curtailed by the narrow scope of areas identified by the JMC. Thus, a UK-imposed law has restricted devolved powers and may lead to a decrease in standards and, although it incentivises devolveds to create common frameworks, it does not facilitate their creation in the first place. Indeed, it is questionable what incentive there would be for Westminster to agree to the common framework if it will impact negatively on the UK internal market or on potential trade deals that might be concluded.

The Agriculture Act primarily focuses on English agricultural policy, but for instance also includes components on fertilisers or subsidies/compliance with WTO law that apply more broadly. One finds therefore a UK-imposed law that creates shared frameworks once more, bypassing the common frameworks process.

With the Agriculture Act and the Trade Bill, suggestions to include guarantees regarding for instance food or environmental standards were rejected. In conjunction with future trade deals (and also mutual recognition in the Internal Market Act), there is the real possibility that the UK Government will impact substantively on devolved matters – both on the ability to make policy changes unilaterally and under the common framework process.

The common framework process is being bypassed and potentially undermined by these UK-level developments. Some areas are being legislated for already and other areas are being restricted in the future. UK-level developments risk blunt instruments that are insufficiently nuanced or tailored to the variations across the UK and also may simply prioritise UK reserved matters (such as trade and international relations) over devolved matters. This highlights the need for 1) swifter development of common frameworks (with clear reasoning provided) and 2) a more inclusive approach to UK-level developments that takes into account the development of common frameworks and the significance of devolved matters. Simply put, it is much harder politically for the UK Government to act unilaterally where a common framework has been agreed.

### **5) Specific issues regarding Northern Ireland:**

Northern Ireland raises numerous challenges, not least due to the unique position created by its land border with the Republic of Ireland and also the NI Protocol. It also raises particular concerns from an environmental governance front due to its chequered history, frequent lack of political will, economic constraints and lack of an independent environmental agency.<sup>5</sup> Whilst the Protocol does mandate that NI abide by a wide swathe of EU laws, these are frequently related to trade, addressing standards for consumers and maintaining a level playing field between NI and EU actors – there are major gaps, e.g. environmental law is largely omitted. The concern is that without pressure from the EU and without UK-wide frameworks (common or UK-imposed), then NI environmental governance may stagnate or diverge downwards. Common frameworks would help ensure maintaining of environmental protection. Common frameworks with the Republic of Ireland will also need to be considered in light of the shared biogeographical and epidemiological unit. In this regard, the Good Friday/Belfast Peace Agreement) provides for the possibility of enhancing cooperation between NI and Ireland – including regarding the environment. Care clearly needs to be taken in developing any

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<sup>5</sup> C. Brennan, M. Dobbs, and V. Gravey, 'Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland', (2019) 21:2 *Environmental Law Review* 84.

common frameworks to ensure compliance with the NI Protocol and Trade and Cooperation Agreement, but there is generally quite significant flexibility – especially if the aim is to maintain or improve environmental standards. However, this would be trickier in the context of areas of EU law covered by Annex 2 of the Protocol that NI must abide by, including regarding GMOs.

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