

JOINT COMMITTEE ON IMPLEMENTATION OF THE GOOD FRIDAY AGREEMENT

Committee Room 4, Leinster House, Dublin 2.

Thursday 4th July 2019

WRITTEN SUBMISSION OF ALISON HOUGH BL¹

This submission presents a summary of the research carried out for the report “Brexit, The Good Friday/Belfast Agreement and the Environment: Issues arising and possible solutions” which explored the impact of Brexit on cross-border environmental co-operation under the Good Friday Agreement, and the role of the Good Friday Agreement in maintaining and preserving such co-operation post-Brexit, and generally. The Committee have been provided with a copy of the report

Executive Summary: <https://nienvironmentlink.org/cmsfiles/Brexit-GFA-report-SUMMARY.pdf>

Full version: <https://nienvironmentlink.org/cmsfiles/Brexit-GFA-report-FULL.pdf>

The report was commissioned by the Environmental Pillar and NIEL (Northern Ireland Environment Link), umbrella bodies for Environmental NGOs in Ireland and Northern Ireland respectively.

Background:

In nominating the environment as one of the twelve areas of co-operation, the drafters of GF/BA showed an awareness of the interlinked nature of this island’s environment. Despite political arrangements, there are no borders in nature and what happens in one jurisdiction inevitably impacts the other. The only way to preserve the environmental integrity of both Northern Ireland and Ireland is through a coherent system of environmental management.

EU membership provided the ideal context for this, with shared regulatory standards, common supra-national enforcement, a funding agenda designed to encourage co-operation and a trade agenda which removed the need for a hard border.

The failure of full implementation of all of the provisions of the GF/BA means that the full potential of cross-border co-operation has not yet been realised.

It is likely that Brexit (in any form) will interfere with Good Friday/Belfast Agreement cross-border co-operation and place obstacles in its way, in general, as well as in the area of environmental co-operation, through loss of the features of EU membership mentioned above. In particular, regulatory divergence between the two jurisdictions or uneven enforcement of regulatory standards resulting in de facto regulatory divergence represents the biggest threat to maintaining the environmental co-operation required by the GF/BA. However, it is possible that the GF/BA could offer potential solutions to precisely these obstacles. More complete utilisation of the GF/BA bodies and institutions could assist in preventing regulatory and policy divergence.

¹ Alison Hough BL is a barrister and law lecturer in Athlone Institute of Technology. She is the author of an independent report on the role of the Good Friday Agreement in maintaining cross-border environmental co-operation on the island of Ireland in a post-Brexit scenario entitled “Brexit, The Good Friday/Belfast Agreement and the Environment: Issues arising and possible solutions”.

Overarching Recommendation:

That full implementation of the Good Friday/Belfast Agreement be made a matter of the highest priority, and that sufficient resources be directed towards achieving this aim (such as provision of adequate facilities and support to the GF/BA bodies and institutions). To this end, practical steps, a workplan and a timeline for completion should be recommended by this Committee.

Detailed Recommendations:

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Detailed Recommendations:

A. Brexit Negotiations Recommendations:

Recommendation 1: That coherence of environmental regulation and management between Northern Ireland and Ireland be prioritised in the negotiations on a future relationship, in order to safeguard GF/BA environmental co-operation.

The reality is that the island of Ireland is a single biogeographic unit housing two separate political entities, Ireland and Northern Ireland/UK. However, the interconnected nature of ecosystems and biodiversity means that coherent environmental management is essential for effective environmental protection².

In order to achieve this is necessary to have

1. Similar regulatory standards.
2. Even enforcement of these standards. Uneven enforcement leads to different “de facto”-regulatory standards.

Therefore, as a matter of priority, the future relationship between the UK and EU must encompass arrangements that allow for consistent regulatory standards both sides of the border.

“Brexit” as UK Withdrawal from the European Union is known represents an obvious challenge³ to the framework of co-operation created by and as a resulting from of the GF/BA. It threatens to undermine the environmental integrity of the Island of Ireland in a number of ways, the most significant of which appear to be the potential for the emergence of different standards and regulations which will make continued environmental co-operation almost impossible.

Some of the main threats posed by Brexit involve:

- **Regulatory divergence** - loss of the shared regulatory context of the European Union creates the potential for less coherent environmental governance/regulation across the island as a whole. The EU has been a big driver of legislative/regulatory activity in relation to the environment⁴ particularly in Northern Ireland⁵. Deregulation in response to market pressure is a possibility, leading to lower standards in Northern Ireland and the UK, issues with cross-border pollution and environmental degradation of protected sites (although it must also be said that there is also the potential for higher standards to be adopted also, as promised by the current UK Government⁶). Membership of regulatory bodies such as the European

² Gravey, V., Burns, C., Carter, N., Cowell, N., Eckersley, P., Farstad, F., Reid, C. (2018). Northern Ireland: Challenges and opportunities for post-Brexit environmental governance. *Brexit and Environment*. Retrieved from <http://ukandeu.ac.uk/research-papers/northern-ireland-challenges-and-opportunities-for-post-brexit-environmental-governance/>

³ Tonge, J. (2017). The Impact and Consequences of Brexit for Northern Ireland. Briefing Paper, European Parliament. Retrieved November 21st, 2018, from [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI\(2017\)583116_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI(2017)583116_EN.pdf)

⁴ Cowell, R., Ellis, G., Fischer, T., Sykes, O., Jackson, T., & Muinzer, T. (2019). Environmental Planning after Brexit: Working with the legacy of EU environmental directives. Royal Town Planning Institute. Retrieved from <https://www.rtpi.org.uk/media/3186871/Environmental%20Planning%20After%20Brexit.pdf>

⁵ Turner, S. (2009). Devolution as a Barrier to Environmental Reform: Assessing the Response to the Review of Environmental Governance in Northern Ireland. *Environmental Law Review*, 11(3), 150 - 160.

⁶ Gove, M. (2018). Health and Harmony: the future for food, farming and the environment in a Green Brexit. British Government. Retrieved from

Chemicals Agency will likely cease^{7, 8}. The potential exists for divergence from EU standards by Westminster, further complicated by the divisions of responsibility between the devolved administrations, who may set their own standards in the areas of devolved competence^{9, 10} and by the potential for UK Government overreach into the areas of devolved competence for a two year period post-Brexit¹¹ to amend retained EU law.

- **Loss of the supra-national governance structures of the EU** in Northern Ireland, with their agenda of integration and coherence, including the regulatory, monitoring and enforcement functions of the European Commission, and the supra-national Jurisdiction of the Court of Justice of the European Union (CJEU) in Northern Ireland, which provides consistency in interpretation of environmental law in both jurisdictions (Lee, 2017). The Supreme Court in the UK will have the option of departing from previous CJEU interpretations of EU law^{12, 13}.
- **Potential loss of significant streams of funding** for cross-border co-operation in general (e.g. PEACE funding) and environmental cross-border co-operation in particular (e.g. Interreg funding) which have been acknowledged to be a very important driver of cross-border co-operation. Dr. Gravey points out that cross-border co-operation is largely informal and predicated on pragmatic considerations of the need for joint funding applications from the EU funding streams¹⁴. It is through this EU incentivisation of co-operation that the GF/BA was able to “reframe the border as a point for cooperation not conflict”¹⁵. This cross-border funding is a huge driver of environmental co-operation and the loss of it would be detrimental to cross border co-operation in this area. The EU has guaranteed the PEACE and Interreg funding streams up until 2020 in the event of a no-deal Brexit¹⁶. The UK also committed to replacing these funding streams and those under CAP¹⁷.
- **Physical and regulatory barriers to cross-border co-operation.** A hard border or a customs border would represent a potential physical obstacle to cross-border environmental projects, potentially causing innumerable problems from movement of staff on projects and goods necessary for the carrying out of projects, to the more abstract problems caused by regulatory divergence and governance changes necessitated by Brexit.
- Potential reduction of ability to take joint action on prosecution of Environmental Crime.
- Loss of the EU Charter on Fundamental Rights.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684003/future-farming-environment-consult-document.pdf

⁷ Macrory, R. (2018, September 24). Environmental law in the United Kingdom post Brexit. ERA Forum. doi:<https://doi.org/10.1007/s12027-018-0531-6>

⁸ Lee, M. (2017, June 1). Accountability for Environmental Standards after Brexit. *Environmental Law Review*, 19(2), 89 - 92

⁹ Reid, C. T. (2017). Brexit and the devolution dynamics. *Environmental Law Review*, 19(1), 3 - 5.

¹⁰ Hilson, C. (2018). The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship. *Transnational Environmental Law*, 7(1), 89 - 113.

¹¹ <https://www.legislation.gov.uk/ukpga/2018/16/section/12/enacted>

¹² Macrory, R. (2018, September 24). Environmental law in the United Kingdom post Brexit. ERA Forum. doi:<https://doi.org/10.1007/s12027-018-0531-6>

¹³ Hilson, C. (2018). The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship. *Transnational Environmental Law*, 7(1), 89 - 113.

¹⁴ Gravey, V. (2018, November 4th). Interview. (A. H. BL, Interviewer)

¹⁵ Phinnemore, D., & Hayward, K. (2017). UK Withdrawal ('Brexit') and the Good Friday Agreement. European Parliament's Committee on Constitutional Affairs. Director General for Internal Policies. Retrieved November 15th, 2018

¹⁶ Donohoe, P. (2018, November 27th). Oireachtas Questions. Retrieved from Oireachtas Website: <https://www.oireachtas.ie/en/debates/question/2018-11-27/61/>

¹⁷ UK Government. (2018, July 24). Funding from EU programmes guaranteed until the end of 2020. Retrieved November 16th, 2018, from [www.gov.uk: https://www.gov.uk/government/news/funding-from-eu-programmes-guaranteed-until-the-end-of-2020](https://www.gov.uk/government/news/funding-from-eu-programmes-guaranteed-until-the-end-of-2020)

Overall, this means that Brexit presents a challenge for instituting and maintaining cross-border cooperation. It shifts considerably the context within which the GF/BA operates, simultaneously making it more important and potentially less stable than before.

In order to mitigate the worst effects of UK withdrawal from the EU it will be necessary to achieve an arrangement where, insofar as is possible, environmental policies, legislative instruments and enforcement standards are maintained in common, and environmental governance is supported adequately on both sides of the border.

Recommendation 2: That common frameworks be developed between the UK, Northern Ireland and Ireland, in order to safeguard GF/BA environmental co-operation.

For the reasons set out above, regulatory and policy divergence represents one of the greatest threats to effective environmental protection in a Brexit scenario. Consistency of environmental standards as between Ireland and Northern Ireland is of utmost importance, and from that point of view mechanisms for maintaining policy and regulatory alignment must be put in place in any future arrangement, that take account of the practicalities of the ever-evolving body of EU law in the era of Better Regulation¹⁸.

The GF/BA bodies such as the NSMC, BIC and BIIC as well as the all-island consultative mechanism, represent important opportunities to engage in policy dialogue for the development of all-island policy frameworks in the area of the environment. Common policy and or legislative frameworks would help prevent regulatory divergence after Brexit.

The UK Government has already begun work on a Common Frameworks Policy¹⁹ to prevent undue regulatory divergence between England, Scotland, Northern Ireland and Wales post Brexit.

Until now, areas such as environment were largely devolved to the administrations in Scotland, Wales, and Northern Ireland, but the freedom of the devolved administrations to actually create their own legislative and policy initiatives was largely curbed by the fact that many of these areas fell under EU competence instead. The EU Withdrawal Act 2018, while it commits to retaining the EU “acquis” or existing body of law, will return²⁰ large swathes of decision making power in these areas to the devolved administrations, with the potential for regulatory divergence in the future as the EU acquis in the Member States like Ireland moves on and changes, while in the four UK jurisdictions it remains the same or evolves differently.

The UK have attempted to tackle this through the development of Common Frameworks, identifying areas where joint action will be necessary.

In the UK Government’s “Revised Framework Analysis”²¹ published in April 2019, they identified 160 policy areas where EU law intersects with devolved legal frameworks²². These include environmental regulation, agriculture, State Aid for industry, public procurement and aspects of justice, transport, and energy.

¹⁸ https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en

¹⁹ Institute of Government (21st June 2019).” Common frameworks, devolution and Brexit”
<https://www.instituteforgovernment.org.uk/explainers/common-frameworks-devolution-and-brexite>

²⁰ The EU Withdrawal Act 2018, section 12.

²¹ UK Cabinet Office, (4th April 2019). Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

²² Institute of Government (21st June 2019).” Common frameworks, devolution and Brexit”
<https://www.instituteforgovernment.org.uk/explainers/common-frameworks-devolution-and-brexite>

They categorised these policy areas into three categories²³, with environmental policy split across all three:

Firstly, those where legislative action will be required to maintain common standards (21 areas including emissions trading, GMO and Agriculture Technology, Fisheries Management, Ozone Gases, Animal Health, Waste Packaging, Pesticides, Plant Health, Food Labelling, REACH, CLP, Organic Farming, Fertiliser use).

Secondly, areas where policy action but no legislation will be required (78 areas including many aspects of environmental regulation such as Air Quality, Biodiversity, Marine Environment, Spatial Data, Waste Management, Major Accidents Hazards, SEA). In these areas commonality will be maintained using concordats or memoranda of agreements between Ministers.

Thirdly, areas where no action will be required to maintain common standards (63 areas including Carbon Capture & Storage, Environmental law concerning energy industries, Energy Efficiency metering, CHP Plants, Internal Energy Market, Hydrocarbons Licensing, Renewable Energy, Gas, Planning Consents, Flood Risk Management, Extractive Industry Wastes, Water Quality, Water Management, Forestry, Land Use (EIA), Noise, Harbours (Marine Environment Issues), Environmental Impact Assessment, Ionising Radiation, Health and Safety at Work, Energy Performance of Buildings.).

Critics of these proposals (Brennan et al.) (commenting on them in their original form as published March 2018²⁴) point to the failure to provide for common legislative frameworks in areas with a clear transboundary element - water, air pollution, biodiversity protection. Brennan et al. point out that this is a departure from the current status quo with shared legislative frameworks currently in place under EU law, and appears to ignore the rationales underpinning these EU laws²⁵.

Another issue is highlighted in a 2018 report by Gravey et al.²⁶ (again commenting on the March 2018 draft of the framework analysis) is that for Northern Ireland, looser cooperation may lead to environmental challenges being further neglected, while closer cooperation (presumably within a binding legislative framework) would lead to pursuit of higher environmental ambition.

²³ UK Cabinet Office, (4th April 2019). Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

²⁴ UK Cabinet Office, (9th March 2018). Frameworks Analysis: Breakdown of Areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL_Frameworks_analysis_for_publication_on_9_March_2018.pdf

²⁵ Brennan, C., Dobbs, M., Gravey, V., & Ui Bhroin, A. (2018). Policy Paper: The Future of Environmental Governance in Northern Ireland. Brexit and Environment, p.5. Retrieved from https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2018/07/Environmental-Governance-in-NI-Policy-Paper-final.pdf

²⁶ Gravey, V., Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Jordan, A., Moore, B. and Reid, C., 2018. Northern Ireland : Challenges and opportunities for post - Brexit environmental governance. <https://ukandeu.ac.uk/wp-content/uploads/2018/10/Northern-Ireland-challenges-and-opportunities-to-post-Brexit-environmental-governance.pdf>

Despite repeated commitment to North-South co-operation by the UK Government throughout the Brexit discussions, and the provision in Section 10 of the EU Withdrawal Act 2018²⁷ prohibiting laws undermining North-South co-operation, there appears to have been no consideration of the special position of Northern Ireland in the discussions around common frameworks within the UK, or thought put into how commonality between Ireland and Northern Ireland can be maintained. The placing of so many important environmental areas outside of the joint legislative action raises the prospect of a high level of legislative divergence internally in the UK and consequently between the Northern Ireland and Ireland, if this latitude is used to move in a different direction to prevailing EU standards in the future.

Brennan et al., in a later paper²⁸ commenting on the April 2019 draft, offer a variety of solutions, including “variegated geometries of frameworks” enabling two or more frameworks to overlap in Northern Ireland (UK wide and All-Island), and that an Environmental Charter based on the French model could guarantee minimum standards and underpin common frameworks with a strong principles-based approach.

I would argue that in discussions of Common Frameworks, emphasis needs to be placed on preventing any downward regulatory trends, and the need for all-island frameworks on the island of Ireland must be recognised and factored in.

²⁷ <http://www.legislation.gov.uk/ukpga/2018/16/section/10>

²⁸ Brennan, C., Dobbs, M., Gravey, V., “Out of the Frying Pan, Into the Fire: Environmental Governance Vulnerabilities in Post-Brexit Northern Ireland” (2019) E.L.R. 21(2), 84–110.
<https://doi.org/10.1177/1461452919843646>

Recommendation 3: An independent environmental regulator be established having responsibility for Northern Ireland, as part of the terms of any future relationship.

As mentioned above under Recommendation 1, regulatory divergence represents one of the greatest risks to continued cross-border environmental co-operation. If regulations are in place, but are not fully and consistently enforced this results in an effective divergence in standards, described above as “de facto” regulatory divergence. This is as great a threat to coherent cross-border environmental management as actual regulatory divergence.

Current environmental governance arrangements in Northern Ireland are widely acknowledged to be inadequate^{29, 30, 31, 32, 33, 34, 35, 36} and this has resulted in many high profile environmental scandals. In particular the current regulator is situated within a government department, which has drawn much criticism due to perceived lack of independence^{37, 38}. It has been argued that an independent environmental regulator for Northern Ireland is a necessary pre-requisite for proper environmental governance. Ireland should request that this matter be addressed by the Northern Ireland Executive, should one form, or the UK government, as part of any future relationship agreement.

Draft Environment (Principles and Governance) Bill 2018³⁹, published on the 19th December 2018 by the Department for Environment, Food & Rural Affairs in the UK proposed an Office of Environmental Protection (OEP), to replace the oversight of the EU Commission in the area of the environment. However the proposal was widely criticised as the proposed regulator would only oversee public bodies, only have powers of Judicial Review, and only have jurisdiction in England, not the other devolved jurisdictions.

Even if the OEP was extended to cover Northern Ireland, to provide some environmental oversight and accountability, it does not fill the governance gap created by a lack of an independent environmental regulator for Northern Ireland. Oversight of public bodies is only one element of environmental governance. Additional arrangements would be needed to safeguard environmental

²⁹ Muinzer, T. (2018, December 14th). Interview. (A. H. BL, Interviewer)

³⁰ Phinnemore, D. (2018, December 6th). Interview. (A. H. BL, Interviewer)

³¹ Gravey, V. (2018, November 4th). Interview. (A. H. BL, Interviewer)

³² Brennan, C., Dobbs, M., Gravey, V., “Out of the Frying Pan, Into the Fire: Environmental Governance Vulnerabilities in Post-Brexit Northern Ireland” (2019) E.L.R. 21(2), 84–110.
<https://doi.org/10.1177/1461452919843646>

³³ Brennan, C., Hjerp, P., & Purdy, R. (2017). Political, economic and environmental crisis in Northern Ireland: The true cost of environmental governance failures. Northern Ireland Legal Quarterly.

³⁴ Turner, S. (2009). Devolution as a Barrier to Environmental Reform: Assessing the Response to the Review of Environmental Governance in Northern Ireland. Environmental Law Review, 11(3), 150 - 160.

³⁵ Turner, S. (2006). Transforming Environmental Governance in Northern Ireland. Part One: The Process of Policy Renewal. Journal of Environmental Law, 18(1), 55 - 87.

³⁶ Macrory, R. (2004). Reshaping Environmental Governance in Northern Ireland.

³⁷ Brennan, C., Dobbs, M., Gravey, V., & Ui Bhroin, A. (2018). Policy Paper: The Future of Environmental Governance in Northern Ireland. Brexit and Environment, p.16. Retrieved from https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2018/07/Environmental-Governance-in-NI-Policy-Paper-final.pdf

³⁸ Brennan, C., Dobbs, M., Gravey, V., “Out of the Frying Pan, Into the Fire: Environmental Governance Vulnerabilities in Post-Brexit Northern Ireland” (2019) E.L.R. 21(2), 84–110.
<https://doi.org/10.1177/1461452919843646>

³⁹ Secretary of State for Environment, Food and Rural Affairs (December 2018). Draft Environment (Principles and Governance) Bill. <https://www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018>

governance as a precondition to continued cross border co-operation. A regulator that can tackle State and Private Sector operators alike is what is required, whether this takes the form of an independent standalone regulator for Northern Ireland, a UK wide regulator, or a “four plus one” model with individual regulators answerable to an overarching regulator as proposed by . The last model would tie in well with the approach of having common frameworks.

Recommendation 4: That funding streams for cross-border co-operation continue to be guaranteed after Brexit.

Cross-border funding and the work of SEUPB, the Special European Union Programmes Body, is a huge driver of environmental co-operation and its loss would be detrimental to cross border co-operation in this area^{40, 41, 42}.

SEUPB⁴³ is responsible for handling funding streams under the European Regional Development Fund (ERDF). SEUPB’s main role is to manage cross-border European Union Structural Funds programmes in Northern Ireland, the Border Region of Ireland and parts of Western Scotland. SEUPB’s two current programmes (2014-2020) are the European Union’s Programme for Peace and Reconciliation (otherwise known as the PEACE IV Programme) and the European Union’s Cross-border Programme for Territorial Co-operation, Northern Ireland, the Border Region of Ireland and Western Scotland (otherwise known as the Interreg VA Programme). SEUPB is responsible to the European Commission, the Northern Ireland Executive and the Irish Government for the delivery and management of the programmes.

Concerns have been raised⁴⁴ regarding the continued eligibility of SEUPB for structural funding from the EU. Reassurances have been given that funding is secure up to 2020, and that work is being conducted by the European Commission on a PEACE Plus funding program to replace the PEACE and Interreg Programs^{45, 46}. However, it is not known whether the funding will continue past that point. Ensuring that there is no disruption to those funding streams should be high priority.

⁴⁰ Gravey, V. (2018, November 4th). Interview. (A. H. BL, Interviewer)

⁴¹ Tannam, E. (2006, May 1st). Cross-Border Co-Operation between Northern Ireland and the Republic of Ireland: Neo-Functionalism Revisited. *British Journal of Politics and International Relations*, 8(2), 256 - 276.

⁴² Henderson, J. McGloin, E. (2004). "North/South infrastructure development via cross-border PPP mechanisms", *International Journal of Public Sector Management*, Vol. 17 Issue: 5, pp.389-413, <https://doi.org/10.1108/09513550410546589>

⁴³ <https://www.seupb.eu/>

⁴⁴ The Centre for Cross Border Studies. (2016). Briefing Paper 2: The UK Referendum on Membership of the EU: Potential Constitutional Consequences. *EU Referendum Briefing Papers*, p.3.

⁴⁵ Donohoe, P. (2018, November 27th). Oireachtas Questions. Retrieved from Oireachtas Website: <https://www.oireachtas.ie/en/debates/question/2018-11-27/61/>

⁴⁶ UK Government. (2018, July 24). Funding from EU programmes guaranteed until the end of 2020. Retrieved November 16th, 2018, from [www.gov.uk: https://www.gov.uk/government/news/funding-from-eu-programmes-guaranteed-until-the-end-of-2020](https://www.gov.uk/government/news/funding-from-eu-programmes-guaranteed-until-the-end-of-2020)

B. General Recommendations:

Recommendation 5: Should an executive form in Northern Ireland, that the North-South Ministerial Council be re-established as a matter of priority, and utilised as a vehicle for discussing policy and regulatory alignment on environmental matters falling within devolved competence.

The North-South Ministerial Council (hereinafter the NSMC)

The North-South Ministerial Council should be the primary body for cross-border co-operation but it has been rendered inoperative by the crisis of Executive formation in Northern Ireland.

The NSMC is a body established for the purpose of co-ordinating all-island co-operation in at least twelve policy areas⁴⁷, and managing the work of six North/South Implementation bodies in six of these areas⁴⁸. The purpose was to bring together those with executive responsibilities in Northern Ireland and the Irish Government, “to develop consultation, co-operation and action within the island of Ireland”⁴⁹.

The NSMC meets in the environment sector in order to make decisions on common policies and approaches in the areas such as environmental protection, pollution, water quality management and waste management in a cross-border context. The work program includes research into environmental protection (with a focus on environmental information and databases), and cross-border water and waste management which encompasses Water Framework Directive river basin issues as well as agricultural impacts⁵⁰.

The last meeting of the Environmental Sector Council was on the 14th September 2016, and the communique⁵¹ produced from it gives a flavour of the breadth of cross-border co-operation in the area of the environment that the NSMC was responsible for co-ordinating. These included water quality, waste legislation, cross-border illegal dumping, fuel laundering, co-operation on the main sources of EU Funding in the Environment sector- Horizon 2020, Interreg VA and LIFE (including joint meetings of Northern Ireland and Ireland contact points, joint training and information events in both jurisdictions, and reciprocal access to partner search databases to facilitate access to the funding).

As mentioned the NSMC oversees the six implementation bodies prescribed for all-island co-operation under the GF/BA. The ones with environmental relevance are discussed below, which are SEUPB (Special European Union Programmes Body), Waterways Ireland, and the Loughs Agency.

⁴⁷ 1. Agriculture - animal and plant health. 2. Education - teacher qualifications and exchanges. 3. Transport - strategic transport planning. 4. Environment - environmental protection, pollution, water quality, and waste management. 5. Waterways - inland waterways. 6. Social Security/Social Welfare - entitlements of cross-border workers and fraud control. 7. Tourism - promotion, marketing, research, and product development. 8. Relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors. 9. Inland Fisheries. 10. Aquaculture and marine matters. 11. Health: accident and emergency services and other related cross-border issues. 12. Urban and rural development.

⁴⁸ 1. Waterways Ireland, 2. SEUPB, 3. Foyle, Carlingford and Irish Lights Commission, 4. Intertrade Ireland, 5. Language Body, 6. Food Safety Promotion Board. (<https://www.northsouthministerialcouncil.org/>)

⁴⁹ Strand 2, para 1, Good Friday/Belfast Agreement 1998.

⁵⁰ <https://www.northsouthministerialcouncil.org/>

⁵¹ NSMC. (2016). North-South Ministerial Council Environment meeting: Joint Communiqué. Retrieved from <https://www.northsouthministerialcouncil.org/sites/northsouthministerialcouncil.org/files/publications/Paper%20NSMC%20ENV%201%20%2816%29%20JC%20-%20Joint%20Communique.pdf>

The NSMC has been described as having played a key role in developing consultation, co-operation, and action on the island of Ireland and potentially had a crucial role to play in Brexit⁵². It is also viewed as having a crucial role in creating cross-border political and civil-service co-operation, but not providing cross-border co-operation that filters down to on-the-ground grassroots level co-operation⁵³.

However, in the absence of a Northern Ireland Executive and a First/Deputy First Minister, the North South Ministerial Council cannot meet.

⁵² Coveney, S. (2017, July 13). Dail Questions. Retrieved from Oireachtas Website: <https://www.oireachtas.ie/en/debates/question/2017-07-13/382/>

⁵³ Tannam, E. (2006, May 1st). Cross-Border Co-Operation between Northern Ireland and the Republic of Ireland: Neo-Functionalism Revisited. *British Journal of Politics and International Relations*, 8(2), 256 - 276.

Recommendation 6: Ensure that the British-Irish Council be allocated sufficient resources, and that it prioritise maintaining common environmental policy between Ireland and Northern Ireland, in order to safeguard environmental co-operation.

The British Irish Council⁵⁴ (hereinafter the BIC) has met on a more frequent basis and has an active work program that includes the environment⁵⁵. As a regional body encompassing Scotland, Wales, Northern Ireland, the UK, Ireland, the Channel Islands and the Isle of Man, it has immense potential to ensure coherent environmental governance in the British Isles, and has already been used to deal with issues such as invasive species and climate change adaptation⁵⁶, that require joint action.

The BIC was established as part of Strand 3 of the multi-party agreement reached in Belfast on 10th April 1998. Its membership comprises representatives from the Irish Government; UK Government; Scottish Government; Northern Ireland Executive; Welsh Government; Isle of Man Government; Government of Jersey and Government of Guernsey^{57, 58}. Its objective is to “promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands”. A standing secretariat was established under the 2006 St. Andrews Agreement.

The Council’s objectives are wide-ranging and non-specific, and as such it determines its own sectoral focus. It was established to:

- further promote positive, practical relationships among the people of the islands; and
- to provide a forum for consultation and co-operation.

The current list of work areas and the member responsible are:

- Collaborative spatial planning (Northern Ireland)
- Demography (Scotland)
- Digital inclusion (Isle of Man)
- Early years policy (Wales)
- Energy (United Kingdom - Electricity Grids, and Scotland - Marine)
- Environment (United Kingdom)
- Housing (Northern Ireland)
- Indigenous, minority and lesser-used languages (Wales)
- Misuse of Substances (drugs and alcohol) (Ireland)
- Social inclusion (Scotland and Wales)
- Transport (Northern Ireland)
- Creative Industries (Jersey)

Environment has been a sectoral area of the BIC since 1999. Under environment it has covered topics such as food waste, recycling, invasive and non-native species, climate adaptation and the UN

⁵⁴ <https://www.britishirishcouncil.org/about-council>

⁵⁵ <https://www.britishirishcouncil.org/areas-work>

⁵⁶ BIC. (2018, March 23rd). Areas of Work: Environment. Retrieved Nov 17, 2018, from British-Irish Council Website:

<https://www.britishirishcouncil.org/sites/default/files/Communique%2015th%20BIC%20Environment%20Ministerial.pdf>
<https://www.britishirishcouncil.org/sites/default/files/Communique%2015th%20BIC%20Environment%20Ministerial.pdf>

⁵⁷ BIC. (2018). Home Page. Retrieved from Website of the British Irish Council:

<https://www.britishirishcouncil.org/>

⁵⁸ Morgan, A. (2000). The Belfast Agreement a Practical Legal Analysis. London: The Belfast Press. Retrieved November 22, 2018, from https://www.austenmorgan.com/wp-content/uploads/2018/02/Belfast_Agreement.pdf

Sustainable Development Goals^{59, 60}. The area of Collaborative Spatial Planning (and related area of Housing) is obviously of environmental significance, as is the issue of Energy (BIC, 2017).

Generally the BIC has kept to its schedule of two summit meetings per year plus sectoral meetings. The most recent BIC summit (32nd Summit) took place in the UK on the 28TH June 2019⁶¹.

The composition of the British Irish Council, composed of the devolved political entities as well as the UK, on an equal footing, overcomes issues raised by the complexity of the devolved governance arrangements across the jurisdictions of Scotland, Wales and Northern Ireland. In the usual course environment is a partially devolved competence, therefore bodies like the British-Irish Intergovernmental Conference are compromised in their ability to deal with environmental issues in total. The BIC on the other hand would be the ideal vehicle for maintenance of regulatory alignment, in the normal course of things. However the continued political vacuum in Northern Ireland and the absence of an executive means that there are no representatives with sufficient authority to represent Northern Ireland on the body and make meaningful decisions about policy changes.

This is ameliorated in a way by two factors:

1. The powers granted to civil servants to make high-level decisions⁶² necessary to run their departments under legislation which extends the time during which the executive crisis can continue. Therefore Civil Servants could in theory represent Northern Ireland's interests on this body (however there are concerns with the accountability of these arrangements⁶³).
2. The EU Withdrawal Act 2018, section 12⁶⁴ provides for powers of "overreach" by Westminster into the devolved administrations, which allow them to amend primary legislation in areas that were devolved competence for a period of two years after Brexit.

The lack of political representation for Northern Ireland and the existence of the overreach powers in relation to any matters pertaining to Brexit, mean that the British-Irish Inter-Governmental Conference, a previously neglected body, takes on potentially more significance as a vehicle for maintaining policy alignment between the UK and Ireland in a post-Brexit scenario.

⁵⁹ BIC. (2018, March 23rd). Areas of Work: Environment. Retrieved Nov 17, 2018, from British-Irish Council Website:

<https://www.britishirishcouncil.org/sites/default/files/Communique%2015th%20BIC%20Environment%20Ministerial.pdf>

⁶⁰ BIC. (2017). British-Irish Council Annual Report 2017. Retrieved December 7th, 2018, from

<https://www.britishirishcouncil.org/sites/default/files/attachments/Annual%20Report%202017.pdf>

⁶¹ <https://www.britishirishcouncil.org/thirty-second-summit-held-united-kingdom>

⁶² Northern Ireland (Executive Formation and Exercise of Functions) Act 2018

<http://www.legislation.gov.uk/ukpga/2018/28/enacted>

⁶³ Gravey, V. (2018, November 4th). Interview. (A. H. BL, Interviewer)

⁶⁴ <http://www.legislation.gov.uk/ukpga/2018/16/section/12>

Recommendation 7: That the British-Irish Intergovernmental Conference be more effectively realised by allocation of a greater budget, a website, increased secretariat, more frequent meetings and any other resources needed to render it functional, and that maintaining common environmental policy be added to its remit.

Also under Strand 3, this was intended to be another East-West orientated body, but instead of operating on a regional basis like the BIC, it is a contact point between the UK and Irish Governments. Designed to replace the Anglo-Irish Conference⁶⁵, it is described as a forum for bilateral co-operation on “all matters of mutual interest within the competence of both Governments” later specified to be non-devolved issues, in recognition of the Irish Government’s special interest in Northern Ireland. Relevant members of the Northern Ireland Administration were also permitted to be present, and will be invited to “express views” to the conference, suggesting an observer role.

The Conference is supposed to meet at Summit level (Heads of Government) primarily, but provision is made for the Government to be represented by appropriate Ministers.

The institution has a very broad and non-specific remit, basically all non-devolved matters. It has not yet dealt with environmental issues but there is no obstacle to it doing so in principle.

One possible limitation on its use as a vehicle for environmental policy alignment is the reference to it being a forum for “non-devolved matters”. There is no express restriction on discussions of issues that are not devolved, but it given the parties to it are intended to be Ireland and the UK governments. This could be seen to militate against discussing devolved matters. Environment is a partially devolved area.

There are several factors that would overcome this limitation:

1. Given the powers of overreach discussed under the BIC above, and the fact that environment is only partially devolved, it would seem possible to use the BIIC as a vehicle for policy alignment discussions between the UK and Ireland, in the absence of an executive in Northern Ireland.
2. The GF/BA expressly provides for relevant members of the Northern Ireland Administration to be present at meetings and express views, hopefully diffusing any political tension potentially caused by the UK Government engaging in policy discussions of a partially devolved matter.
3. The now record-breaking executive formation crisis in Northern Ireland makes it look increasingly likely that the UK government will have to step in to deal with matters which are usually devolved in general anyway. The lack of a government in Northern Ireland means that any policy discussions currently will have to formally go through the UK Government as things stand, and the BIIC was designed as the vehicle to perform this role.

⁶⁵ Morgan, A. (2000). *The Belfast Agreement a Practical Legal Analysis*. London: The Belfast Press. Retrieved November 22, 2018, from https://www.austenmorgan.com/wp-content/uploads/2018/02/Belfast_Agreement.pdf

Recommendation 8: That the Irish Government emphasise the importance of any future Northern Ireland Government re-establishing the Consultative Civic Forum, to provide important policy input on environmental policy from civic society.

The Consultative Civic Forum⁶⁶ in Strand 2 offers an important safeguard against “race-to-the-bottom”⁶⁷ deregulation⁶⁸ that may be a danger post-Brexit, offering a chance for a strong NGO/Civil Society voice into policy making in Northern Ireland. This body was instituted but has not run since 2002.

The Civic Forum is provided for in section 56 of the Northern Ireland Act 1998, which provides that the First Minister and Deputy First Minister shall take from the forum their views; the Forum is the consultee. The provisions were commenced on the 2nd December 1999 (on devolution). In its first iteration it was established (after cross party consultation) with 60 members, plus a chairperson who was appointed by the First Minister and Deputy First Minister (BBC News, 2000). The Ministers also appointed six members. Business and Trade Unions appointed seven each. The Community and Voluntary sector appointed 18 members. The other sectors sharing 22 seats were: Agriculture/fisheries (3), churches (5), culture (4), arts & sport (4), victims (2), community relations (2) and education (2)⁶⁹. There were arrangements for securing nomination from consortia and other sectors with gender, community background, geographical and age balance⁷⁰. The work of the Forum was cut short in 2002 after the collapse of the assembly due to the dispute over decommissioning. The Consultative Civic Forum has not been convened since 2002.

Recent proposals are to reduce the Forum from its original panel of 60 members (divided into Trade Union, Community and Voluntary and Other), to a six person panel⁷¹. There has also been a proposal for a Northern Ireland Citizens Assembly⁷². This however lacks the collegiate structure envisaged in the GF/BA for the Consultative Civic Forum, and does not envisage any Civil Society organisation representation. It is submitted that neither of these bodies fulfil the role of the Forum originally envisaged in the GF/BA.

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http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2013/assembly_exec_review/10913.pdf

⁶⁷ <https://www.theguardian.com/commentisfree/2019/feb/07/disaster-capitalists-no-deal-brexit-environment>

⁶⁸ <https://www.theguardian.com/politics/2016/dec/07/tory-mps-suggest-firms-draw-up-list-for-bonfire-of-eu-laws-after-brexit>

⁶⁹ Nolan, P., & Wilson, R. (2015). Dialogue and Engagement: lessons from the Northern Ireland Civic Forum. Joseph Rowntree Charitable Trust. Retrieved January 21st, 2019, from https://cain.ulster.ac.uk/othelem/organ/jrct/Nolan_Wilson_2015_JRCT.pdf

⁷⁰ Morgan, A. (2000). The Belfast Agreement a Practical Legal Analysis. London: The Belfast Press. Retrieved November 22, 2018, from https://www.austenmorgan.com/wp-content/uploads/2018/02/Belfast_Agreement.pdf

⁷¹ <https://www.theyworkforyou.com/ni/?id=2016-06-27.3.63>

⁷² <https://citizensassemblyni.org/>

Recommendation 9: That the All-island Consultative Forum be established as directed by the GF/BA.

The All-island Consultative Forum in Strand 2, Article 19 offers a similar opportunity on an all island basis. This could be invaluable in terms of development of coherent environmental policy through dialogue with civil society. This body has never been utilised, but the recently held “All-Island Civic Dialogue on Brexit”⁷³ offers an important example of how it could be modelled.

While the GF/BA did not demand the creation of such a forum (but rather provided for it), the 2006 St Andrew’s Agreement⁷⁴ states: “The Northern Ireland Executive would support the establishment of an independent North/South consultative forum appointed by the two Administrations and representative of civil society”.

The Centre for Cross-Border Studies in their Briefing Paper “The Belfast/Good Friday Agreement and (post-Brexit) cross-border environmental cooperation” highlighted the concerning lack of platforms for civic dialogue, particularly in the absence of a functioning Assembly and Executive⁷⁵.

Such civic fora offer important opportunities for the expression of more complex moderate identities⁷⁶ outside the political binary institutionalised in the GF/BA construction of the Assembly and Executive^{77, 78}.

⁷³ <https://www.dfa.ie/brexit/brexit-negotiations/ireland-and-northern-ireland/all-island-dialogue-process/>

⁷⁴ <https://www.gov.uk/government/publications/the-st-andrews-agreement-october-2006>.

⁷⁵ Soares, A., June 2019, “The Belfast/Good Friday Agreement and (post-Brexit) cross-border environmental cooperation”. Centre for Cross Border Studies.

⁷⁶ Dybris McQuaid, S. (2009). What Difference Does it Make?: The Construction of Liminal Plurality in Northern Ireland. *Nordic Irish Studies*, 8, 97-119. Retrieved January 15th, 2019, from <https://www.jstor.org/stable/25699527>

⁷⁷ Graham, T. (2018, May/June). From the Editor: The Good Friday Agreement twenty years on. *History Ireland*, 26(3), 1.

⁷⁸ Strand 1. E.g. Art 5 (i) & (ii), and Art 15: Key decisions of the Assembly and the election of First Minister and Deputy First Minister must take place according to parallel majority in each of the categories of Unionist and Nationalist.

Recommendation 10: That a Good Friday/Belfast Agreement Mechanism be established on a legislative basis with responsibility for monitoring implementation of the Good Friday/Belfast Agreement, interpreting its meaning, and with a function of continuously mapping ongoing North-South co-operation.

Another possibility proposed by Brennan et al. is for an all-island governance mechanism that can hold both governments to account, which they suggest should focus on environmental protection issues. The model of the Aarhus Convention Compliance Committee is suggested⁷⁹. There would appear to be much merit in this suggestion, but this writer would argue for a broader all-island mechanism, charged with monitoring and facilitating cross-border cooperation under the GF/BA generally, not just focussed on environmental issues. This could take the form of a Treaty Body attached to the Good Friday Agreement, or one established by separate Treaty, or by legislative arrangements. It could be charged with ensuring compliance with the GF/BA and identifying and promoting the regulatory changes required to enhance cross-border co-operation in both jurisdictions. The environment, as one of the areas of cooperation identified in the GF/BA, would naturally fall within its remit.

⁷⁹ Brennan, C., Dobbs, M., Gravey, V., & Ui Bhroin, A. (2018). Policy Paper: The Future of Environmental Governance in Northern Ireland. *Brexit and Environment*, p.24. Retrieved from <https://www.brexitenvironment.co.uk/download/4083>