



## Summary

Scottish Environment LINK is the forum for Scotland's voluntary environment community. Our member organisations welcome the opportunity to respond to this White Paper. Our response is focused on matters related to our charitable objectives of environmental protection and the achievement of sustainability.

While both the UK and Scottish Governments have separate policy statements of admirable ambition – for example “to leave the environment in a better state for the next generation” (UK) or “to maintain or exceed EU environmental standards” (Scotland) – neither Government has committed to underpin these ambitions with legal certainty.

LINK believes that such a legal commitment would provide welcome assurance to the UK public, business, and civil society, and to partner governments within the UK and internationally that it will at least uphold existing levels of protection on the environment. This commitment should, however, be viewed as an agreed minimum standard with individual jurisdictions free to exceed it if they wish (i.e. it should represent a “floor”, not a “ceiling”).

However, the absence of any legally binding commitment not to regress leaves open the possibility of one (or more) of the governments in the UK reducing its regulations and securing competitive advantage through lowering costs to business. This would drive what may be called a “race to the bottom”.

LINK members therefore believe that:

- **the principles of mutual recognition and non-discrimination must be qualified to permit essential regulation in the public interest, including to protect and improve the environment.**
- **the principles of mutual recognition and non-discrimination must be qualified to operate alongside the application of other important legal principles.**
- **the principles of mutual recognition and non-discrimination must be subject to clear clarification as to how they will be applied in a manner consistent with the benefits that devolution has provided.**

These qualifications must be clear in both the legislation and its implementation. Common Frameworks may be a key means to ensure implementation and should, probably, be completed prior to considering any further action.

## Introduction

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with 40 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society. LINK and its members have engaged with the environmental implications of the EU referendum since the 2016 national vote. This response



represents the collective view of LINK's Governance Group. Members may also respond individually to raise more detailed issues that are important to their particular organisation; in addition, our partners in Wildlife and Countryside Link and Greener UK may also provide additional responses.

Our response is focused on matters related to our charitable objectives of environmental protection and the achievement of sustainability. To secure these outcomes, LINK and its member bodies seek to influence the development of public policy on matters that affect the environment. This White Paper is one such issue, as the operation of the UK Internal Market – and any legislation that governs it – has enormous potential to affect the ability of all the UK's governments to achieve their environmental ambitions, and of citizens and NGOs to hold those governments to account.

## The environment and the Internal Market

The world is facing two linked existential crises – climate change and biodiversity loss. Both these crises are human-induced and, to be addressed adequately, require urgent action, especially Government-led policy action. These challenges would be both important and difficult at any time. However, with 80% of our environment law being derived from EU law, the UK's departure from the EU ("Brexit") makes them even more important and difficult.

The human drivers of these crises—including agricultural management, urbanisation, resource and energy use, and the proliferation of invasive non-native species— are closely interconnected with our economic choices and the production, trade, use and disposal of goods on the market. The high degree of intra-UK market integration highlighted in the White Paper indicates that the choices we make—in terms of what and how we produce goods and how we regulate them—in one part of the UK will have significant impacts on the environment elsewhere on these islands. Conversely, there are also significant economic benefits from protecting the environment, good systems of regulation, sustainably producing and consuming goods, and sustainably managing land and seas, in addition to the potentially enormous public costs arising from failing to do so. In addition, high environmental standards and effective environmental regulation, appropriate to its context, are legitimate and important public policy objectives which should not be considered any less of a priority than regulating the UK internal market for the free movement of goods and services (itself a legitimate objective in its own right).

Ever since the EU referendum, LINK has consistently called for legal commitments from the UK government and devolved administrations to "non-regression" on environmental standards, protection, and governance. While both the UK and Scottish Governments have (separate) policy statements of admirable ambition – for example "to leave the environment in a better state for the next generation" [UK] or "to maintain or exceed EU environmental standards" [Scotland] – neither Government has committed to underpin these ambitions with legal certainty.

LINK believes that such a legal commitment would provide welcome assurance to the UK public, business, and civil society, and to partner governments within the UK and internationally that it will at least uphold existing levels of protection on the environment. Non-regression alone, however, is insufficient given the actions needed to prevent climate chaos and to secure nature's recovery - but it is a necessary starting point.

However, the provision of a simple, unqualified mutual recognition principle, in conjunction with a lack of binding legal commitment not to regress, leaves open the possibility of one (or more) of the governments in the UK reducing its regulations and securing competitive advantage through lowering costs to business. This would drive what may be called a "race to the bottom" rather than the preferable "race to the top".



## General observations

In general, the proposal to ‘re-create’ the pre-EU/EEC internal market within the UK (or to replace the EU single market in a post-Brexit UK) has some merit; and the two principles (mutual recognition and non-discrimination) should form a central part of any such proposal. However, the White Paper is – in LINK’s view – a missed opportunity to do this in a manner that is consistent with the other objectives of both the UK Government and the Devolved Administrations.

For instance, as the paper indicates, these proposals arise purely because of ‘Brexit’ and the UK Government’s need to address the consequences of leaving the EU. With 80% of the UK’s environmental regulation having an international or EU origin, these matters are of considerable importance to LINK. In LINK’s view, appropriate regulation, in the public interest, to secure environmental ambitions is welcome and should be supported. **Moreover, with so many environmental issues (also including agriculture, planning, marine issues, etc) being devolved matters, how such regulations vary or do not vary across the UK is important.**

However, the White Paper has a considerable focus on preventing unnecessary regulatory barriers (e.g. para 28), consistent regulation (e.g. para 76) or the alleged disbenefits of regulatory difference (e.g. para 79). This is unfortunate – it gives the impression that the UK Government is seeking to achieve both de-regulation and to ensure that any remaining regulation is uniform across the UK. **By contrast, the paper fails to recognise the public interest benefits of regulation (in securing e.g. the Government’s policy objectives in relation to the environment) nor the benefits of different approaches in different jurisdictions (subject to common minimum standards), such as the ability to innovate or the creation of a “race to the top”.**

Moreover, the overwhelming emphasis on de-regulation and uniformity contradicts other statements in the paper. For instance, para 31 and paras 41-43 describe the Government’s admirable environmental ambition while para 32 claims these proposals are consistent with devolution. While these passages may accurately describe intent, they are not consistent with the remainder of the White Paper and, moreover, they are purely statements of intent – no legislative underpinning for these assertions is proposed. No explanation is offered as to whether and, if so, how these contradictions are to be reconciled.

## The proposed principles of an Internal Market

The key proposal of this White Paper is summarised in para 28 as: -

“The Government will seek to introduce new legislation that will commit, to all citizens and businesses, free access to the economic activity across the UK. This will ensure continued market access across the UK, delivered through **the principles of mutual recognition and non-discrimination.**”

As the White Paper makes clear, these principles currently apply to the EU Single Market, of which the UK has been part for the previous few decades. In themselves, therefore, these principles are not controversial and can be supported. However, it must be noted that both in the UK’s pre-EEC Internal Market and in the EU’s Single Market, the principles were neither unqualified nor the only principles to apply.

First, the qualification of principles is even recognised by the White paper. Para 28 continues “Without such a legislative underpinning, unnecessary regulatory barriers could emerge between the different parts of the UK.” This indicates that some regulatory barriers may be “necessary” – LINK would agree



and believes that any regulatory barriers that arise from the pursuit of environmental ambition should be deemed “necessary”.

The White Paper also, in para 88, describing Common Frameworks, states that these “enable the functioning of the UK Internal Market whilst acknowledging policy difference”. If such policy differences can be acknowledged in Common Frameworks, they must also be acknowledged and recognised in the application of the principles of mutual recognition and non-discrimination.

Paras 50, 138 and 144 of the White Paper introduce the concept of ‘exclusions’ but, beyond generalities, do not detail what these will be or how they will operate. This aspect requires further explanation and may be a vehicle to provide for the qualification in relation to environmental matters.

In other parts of the White Paper, for example paras 134 and 135, ‘exceptions’ are suggested: -

“The non-discrimination principle will allow scope for such differential treatment where this is necessary, for example, to address a public, plant or animal health emergency” and

“and where for example, this is not justifiable on the grounds of a clearly stated policy objective.”

However, in neither of the above cases is it described how such exceptions would be implemented or legislated for – or the basis for determining the “necessity” or “justification” of the exception. In LINK’s view, the public interest in securing environmental objectives is such that, if necessary, this should be included within the range of such exceptions.

Accordingly, **LINK believes the principles of mutual recognition and non-discrimination must be qualified to permit essential regulation in the public interest, including how it is proposed to protect and improve the environment.** While LINK does not object to the principles themselves, more detail must be provided about where exceptions to these are justified. The inclusion of “necessary to secure environmental policy aims” as an “exclusion” (para 50 & 144) and/or as a necessary or justifiable exception may be the means to provide this qualification.

Secondly, as indicated above, these two market principles were not the only principles that applied to the EU Single Market. They are accompanied in EU law and policy, by generic principles such as proportionality and subsidiarity, as well as environmental principles (including the four referenced in the UK Environment Bill and Scottish Continuity Bill) and that of integration. **The introduction of these market principles must, therefore, be integrated with the application of these other legal principles. The White Paper neither acknowledges this, nor proposes how this might be achieved – this should be rectified.**

**LINK therefore believes that the principles of mutual recognition and non-discrimination must be qualified to operate alongside the application of other important legal principles. This qualification must be clear in both the legislation and its implementation.**

Finally, the White Paper talks frequently of the “market access rights of businesses”. This is logical in the context but also suggests that the creation of these principles, in statute, would create a new legal right for business to challenge any regulation that allegedly breached these rights. LINK does not object to such a right, in principle, indeed, the right to access to justice (and thus to challenge Government) should apply to all (business, NGOs and individual citizens). However, the existence of this right underlines the need to ensure that the principles are well drafted and well applied (and include the appropriate qualifications described above).



## Devolution

LINK has no position on devolution (or other constitutional issues) *per se*. However, we have recognised that the current arrangements have provided benefits to the environment – most notably, the creation of a “race to the top” (over minimum EU standards) and the opportunity for innovation. In addition, local decision-making has, in the view of NGOs, improved the opportunities for scrutiny, transparency and the participation of civic society. These benefits should not be lost by an undue haste to provide for uniformity and reducing regulatory differences. In this context, it should be noted that regulatory, and other differences, between the UK’s jurisdictions existed long before devolution in its current form and prior to the UK’s entry to the EEC.

**LINK is therefore concerned with the inherent contradictions within the White Paper** – on the one hand (e.g. para 32) it claims that devolution is unaffected but, on the other, para 51 states that: -

“an authority must regulate in a way that avoids differential and unfavourable treatment to goods or services originating in another part of the UK to that afforded to its own goods or services.”

Paras 76-94 of the White Paper takes this further. Here, there is a great emphasis on benefits of regulatory alignment and description of the alleged disadvantages of regulatory difference. No obverse opinion or assessment is presented: there is not even a recognition of the potential benefits of innovation or a “race to the top”, let alone any assessment of their value compared with the value of alignment.

Paras 112-115 of the White Paper continue this theme: -

“The absence of such a market commitment would bring a number of significant challenges. Firstly, an increased unpredictability in the potential for regulatory differences will emerge between parts of the UK as we exit the Transition Period. ...

“address the barriers that could arise from regulatory differences.”

In effect, these passages imply that the market principles will be applied to secure regulatory uniformity, thus contradicting the previous commitment on devolution. **While LINK does not have a position on devolution *per se*, we recognise the benefits it has provided to environmental policy making (innovation, race to the top, scrutiny, transparency, participation, etc) and wish to see these retained.**

Without a clear clarification as to how these will be applied in a manner consistent with the benefits that devolution has provided, LINK considers that the proposals in this White Paper risk creating a de-regulatory “race to the bottom”. Such an outcome would contrast with the principles of the EU single market (that these proposals seek to replace), where different approaches are permitted between or within Member States so long as **minimum** standards are met.

**LINK therefore believes that the principles of mutual recognition and non-discrimination must be subject to clear clarification as to how they will be applied in a manner consistent with the benefits that devolution has provided.**

## Common Frameworks

Paras 87-94 of the White Paper considers the issue of “Managing Regulatory Differences”, including by the use of Common Frameworks, with para 89 suggesting that such: -



“Frameworks will also maintain, as a minimum, the same degree of flexibility for tailoring policies to the specific needs of each territory as was afforded by the EU rules. In some policy areas, Common Frameworks will aim to establish and maintain common standards in order to maintain our high regulatory standards. Frameworks will be the vehicle for discussing and maintaining standards in relevant policy areas.”

This is welcome, and LINK notes the UK government’s commitment in the white paper to continue to work on and through common frameworks as the primary forum through which to manage regulatory difference across the UK. LINK and its members/partners have been in regular dialogue with both the UK and Scottish Governments on the issue of Common Frameworks over the last few years. We look forward to taking part in the Cabinet Office’s “stakeholder engagement process” as and when it begins later this year – although we note the considerable delay.

This process can facilitate dialogue and cooperation between the UK government and devolved administrations, ensuring that across a wide range of sectors, a common approach can be agreed, avoiding additional and unnecessary costs and burdens, while respecting and upholding the existing devolution settlements. Para 93 of the White Paper asserts that “a more robust legislative architecture” is needed to go beyond common frameworks alone. This assertion is based on three reasons – these reasons suggest that (a) the Common Framework process should be completed before determining what, if any, additional measures are necessary. **LINK therefore recommends that the UK government and devolved administrations prioritise completion of the Common Frameworks process before proceeding with any Internal Market legislation – as only when the former is complete will it be known what is necessary in the latter.**

Secondly, we note that Para 89 (quoted above) refers to flexibility in relation to specific needs of each territory. This is a feature of the EU Single Market which allows each Member State (and many sub-national polities) such flexibility. It is unclear how these Internal Market proposals seek to permit such flexibility – underlining again the need for the principles to be qualified.

## Trade deals

A codified form of Internal Market (to replicate the EU-wide Single Market) is often considered to be necessary in order for the UK as an entity (rather than as part of the EU) to conclude trade agreements with other nations or blocs. This is suggested by, for example, by Para 8, 9 and 15 of the White Paper’s introduction.

Whether the above is the case or not, LINK’s interest in those matters relates to their environmental consequences, and the extent to which such agreements impact on the freedom for all the UK’s Governments to regulate to secure their environmental ambitions.

In whatever form these proposals are implemented and/or any bi- or multi-lateral trade agreements are reached, LINK considers it important that environmental standards are protected. This underlines the case for a legal commitment to non-regression and for the market principles to be legislatively qualified as described above.

In addition, the engagement of sub-national legislatures in the discussion/approval of trade agreements provides enhanced scrutiny and transparency. This benefits the public interest, especially in relation to environmental and social matters, by the additional involvement of civic society. This is illustrated, for example, by the involvement of Canadian provincial authorities in the CETA discussions – and by the role of EU sub-national bodies (e.g. Walloon Parliament) in ratification. LINK therefore



believes that such matters should be developed in partnership with the devolved administrations/legislatures.

## Subsidy control

The UK government has indicated a preference to depart from the EU's framework for regulating state aid. The appropriateness of this and whether this is a matter that is devolved or reserved are not matters for LINK. However, whatever system of ensuring fair competition and avoiding excessive market distortion through direct and in-kind support for market actors by the state is adopted, it is important that it also does not undermine the environmental policy ambitions of any government.

While LINK does not take a view on the specific questions of how much state aid should be permissible or how state intervention might be adjudged appropriate, we acknowledge that, with regards to the environment, there may be areas or issues where state intervention in the market is necessary and the public policy objectives of such interventions are legitimate and proportionate. However, in developing and implementing such schemes for state intervention, all governments should ensure that: -

- No interventions that are environmentally damaging are permitted; and
- Interventions should be directed towards supporting a just transition and/or environmental protection/restoration.

While not strictly a 'subsidy', public procurement decisions (especially given the scale of the public sector) are, in effect, state interventions in the market. Such procurement decisions should be subject to conditions that mirror the above in relation to subsidies.

## Governance matters

LINK welcomes the acknowledgement (Part 3 of the White Paper) that a governance system is required to provide for advice and monitoring. This also needs to include the ability to adjudicate or to resolve disputes.

We note that the White Paper (at para 153) suggests this will build on existing collaboration between the UK Government and devolved administrations. It also states:

“These arrangements will require a close relationship with Common Frameworks, as set out earlier in the White Paper, and will also need to account for the Review of Intergovernmental Relations.”

This underlines the proposal (see above) **that the UK government and devolved administrations prioritise completion of the Common Frameworks process before proceeding with any Internal Market legislation – as only when the former is complete will it be known what is necessary in the latter.** It also highlights the lack of progress with the Review of Intergovernmental Relations, while the current dysfunction of such inter-government relations is illustrated by stakeholders' experience of working with multiple Governments to address issues raised by Brexit and by academic analysis<sup>1</sup>.

In addition, any proposed internal market and subsidy control regime must offer a rules-based system coupled with public accountability, independent oversight, and transparency. If the UK government is

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<sup>1</sup> <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devotion-After-Brexit-180406-FINAL-WEB-FINAL.pdf>



to legislate for a system to which it will also be subject, it must design in adequate and appropriate degrees of independence, alongside the participation of other public authorities, in order to assure domestic and international stakeholders of its effectiveness and credibility.

As a key stakeholder, LINK's priority is that any such system must be open and transparent to all, allow access for stakeholders to express views and for the decisions of Governments to be scrutinised by independent authorities. In relation to the environment, there is clearly a role for the proposed "watchdog bodies" (OEP, ESS, etc) to provide such scrutiny and advice – this should be clarified.

## Conclusion

The White Paper concludes (Para 151) that

"The two principles set out above – mutual recognition and non-discrimination – together constitute in the Government's view a legislative framework that will preserve the fundamental market access rights of businesses and citizens across the UK Internal Market. **This system will replace the effect of the rules and UK Internal Market mechanisms of the EU Single Market had within the UK.** Mutual recognition will ensure that goods and services are recognised across the UK without the need to comply with unnecessary additional requirements imposed by any part of the UK. Non-discrimination will ensure that no individual or business faces discrimination in a different part of the UK based on origin or residence." (emphasis added)

For the proposals in this White Paper to act as an effective "replacement" for the mechanisms of the EU Single Market, they need considerable clarification and adjustment. In particular:

- **The proposals must be accompanied by a clear, legally binding commitment to maintain environmental standards and agreed common minimum standards across the UK (while allowing individual jurisdictions to exceed these).**
- **The principles of mutual recognition and non-discrimination must be qualified to permit essential regulation in the public interest, including to protect and improve the environment.**
- **The principles of mutual recognition and non-discrimination must be qualified to operate alongside the application of other important legal principles.**
- **The principles of mutual recognition and non-discrimination must be subject to clear clarification as to how they will be applied in a manner consistent with the benefits that devolution has provided.**

## This response is supported by the following LINK member organisations:

Amphibian and Reptile Conservation  
Badenoch and Strathspey Conservation Group  
Butterfly Conservation Scotland  
Environmental Rights Centre for Scotland  
Hebridean Whale and Dolphin Trust  
Keep Scotland Beautiful  
Marine Conservation Society  
National Trust for Scotland





Nourish Scotland  
Plantlife Scotland  
Ramblers Scotland  
RSPB Scotland  
Scottish Coastal Archaeology and the Problem of Erosion (SCAPE)  
Scottish Wild Land Group  
Scottish Wildlife Trust  
Trees for Life  
Woodland Trust Scotland  
WWF Scotland

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