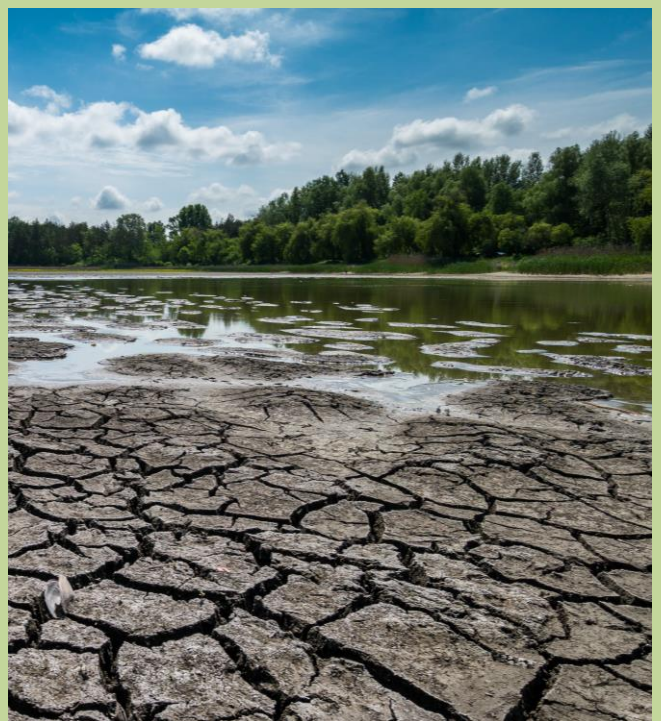




Establishing an EU 'Guardian for Future Generations'

Report and recommendations
for the World Future Council

September 2015, London



Disclaimer: The arguments expressed in this report are solely those of the authors, and do not reflect the opinion of any other party. IEEP is grateful to the World Future Council for supporting the preparation of this report. For more information about IEEP's work on environmental governance, please contact Martin Nesbit at Mnesbit@ieep.eu or Andrea Illés at Ailles@ieep.eu.

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1 Executive summary

Many of the challenges which require a response at European level involve the interests of future generations. Issues as various as environmental legislation aimed at implementing the principles of sustainable development; policy and legislation on Member States' fiscal balances; policy responses to demographic change, including pensions and health care provision; and a range of other policy challenges, all implicitly or explicitly involve action which has implications not just for current generations (including those below the current voting age), but for those not yet born. However, policymakers will tend to (and should) respond to the wishes and views of current electorates, which means that they will be sensitive primarily to the interests of current generations.

Moreover, as the principles of better regulation gain greater political traction, analysis of costs and benefits will become more prominent in policymaking; yet it is a recognised feature of standard cost/benefit analysis techniques that they favour the interests of current generations, by using discount rates which place a high value on the consumption or investment options available to actors now, rather than those available to future actors. There is therefore a high likelihood that the interests of future generations will be compromised, in the absence of specific mechanisms to redress the balance.

This report investigates the potential for establishing a new role at EU level which would act as a guardian for the interests of future generations. A range of approaches could be considered; we have focused on a role which provides independent advice and analysis to policymakers and legislators on the impacts of new legislative proposals, and which also has the power to review existing areas of, or gaps in, policy which potentially have significant impacts on future generations.

We examined a number of existing examples of similar roles in individual countries, both within the EU and beyond, which are aimed explicitly at protecting the interests of future generations, or more broadly at implementing the principles of sustainable development. A clear message is that statutory or treaty-based independence from Government is an important element in allowing such bodies to provide unbiased advice (which may in some cases be uncomfortable for governments). Of course independence does not, in itself, guarantee relevance, still less an impact in the policy-making process.

We then examined a number of options for establishing a Guardian for Future Generation at EU level, setting out some of the lessons from experience of using such mechanisms to establish other roles at EU level. The role needs to be independent from the main European institutions. While a treaty or specific legislative provision is clearly the most effective way of guaranteeing independence, there are risks in waiting for the political conditions to allow progress in this direction. In the short term, we recommend including provision for a Guardian for Future Generations role in the Inter-Institutional Agreement on better regulation proposed by the European Commission. In the longer term, such a role should be established more formally, either in co-decided legislation, or (ideally) through Treaty change at the next appropriate opportunity.

2 Background to the report

2.1 The Commission from the World Future Council

The World Future Council commissioned IEEP to prepare a report and recommendations for policymakers on the best way to ensure the establishment of a formal 'Guardian for Future Generations' role at EU level. In particular, we were invited to develop practical, credible options for creating and formalising a role. Our brief was not to focus on the detailed rationale behind establishing a Guardian role – although in practice we think that the rationale is relevant to the best approach to securing political support for it. We have investigated a range of options for establishing the role, and have assessed the benefits, drawbacks, and deliverability of each.

2.2 Our approach

As a first step in our work, **we looked at a number of the existing similar roles across EU jurisdictions and elsewhere**, with a view to identifying the rationale behind them, how political support and practical legal commitment was secured for their establishment, and their effectiveness in practice in ensuring that the interests of future generations are better considered in legislation and policy. The results are set out in section 3 of this report.

We also recognised that setting out a clear rationale for the Guardian for the Future role was an important element in finding the right way for its establishment at EU level, and securing sufficient support for it. **Section 4** in this report therefore **identifies how existing EU institutions and practice fails to address the interests of future generations**; why this leads to poor decision-making; and how this impacts not just on environmental issues, but on a range of other social and economic issues.

Section 5 of the report **identifies some of the factors that need to be taken into account in establishing a role of this kind**: in particular ensuring practical support for the role (including the administrative costs necessary for its functioning), ensuring that it is as effective as possible in improving the relevance of EU legislation and policy to future generations, and that it is integrated well into the EU law- and policy-making machinery.

Section 6 then **identifies a range of options for establishing the role**, assessing in each case the steps likely to be necessary for addressing the factors set out in Section 5, and provides a short summary in each case of practicability, impact, and potential for securing wide support.

A summary and conclusions section then provides a series of recommendations for policymakers, which are also set out in an accompanying one-page 'Summary for Policymakers'.

3 Lessons learnt from existing ‘Guardian for Future Generations’ roles

This section identifies a selection of cases where roles similar to the Guardian for Future Generations have been established in jurisdictions in the EU and elsewhere. It identifies in each case the mechanism by which they were established, the political conditions which led to their establishment, the nature of the role, and its effectiveness in addressing the needs of future generations. We have focused on roles which have a formal legal status and are independent institutions, rather than those which are an administrative creation; although we also include at the end of this section a short account of experience with some purely administrative Guardian roles.

3.1 Hungary

Discussion on the establishment of a Commissioner for Future Generations began as early as the early 1990s in Hungary; nevertheless the Hungarian Act LIX of 1993, which created the institution of Parliamentary Commissioners, did not create a role in this area.¹

The momentum behind the idea accelerated in 2000 when a Hungarian NGO, Protect the Future!, put forward new proposals. A bill on the establishment of the role² was proposed by Protect the Future! board member Dr László Sólyom, who had recently completed his term as first president of the Hungarian Constitutional Court, and who was later to become President of Hungary. The bill was built on the Act LIX of 1993 and also took into consideration the constitutional right to a healthy environment and the right to physical and mental health. In order to win political support the NGO launched an extensive campaign and established the ‘Representation of Future Generations’ initiative. Each year the NGO published an annual report analysing Hungary’s key environmental problems, thereby creating an evidence base to inform the work of the commissioner for future generations when the role was finally established.

In 2001 two MPs within the Socialist opposition submitted the bill to the Parliament. However, the bill was not put forward for discussion in plenary session. It was resubmitted in 2002, following the Socialist Party’s success in elections in 2002, but again failed to be submitted for a plenary discussion, and it appeared that momentum was fading.

It was 2007 when finally cross-party support was achieved. The act on parliamentary commissioners was amended³ and in 2008 the unique office of a **Commissioner for Future Generations** was created. Dr Sándor Fülöp, a lawyer, was elected by the parliament with a

¹ The Act LIX of 1993 established three Commissioner roles: the Commissioner for Civic Rights, the Commissioner for Data Protection and the Commissioner for National and Ethnic Minority Rights.

² Protect the Future! (2000) The rights of future generations (only available in Hungarian: [A jövő nemzedékek jogai](#))

³ [Act CXLV. Of 2007 on the amendment of the Act LIX of 1993 on the Parliamentary Commissioner for Civic Rights](#)

two-thirds majority vote for a six-year term (at the recommendation of the president, who by this point was László Sólyom, the initiator of the idea). The primary task of the Commissioner was to protect the constitutional right to a healthy environment. The Commissioner monitored and evaluated the enforcement of legal provisions which ensure the sustainability of the environment, and investigated citizens' complaints on environmental issues.⁴ Overall, the office had three functions: (i) it worked as a complaint office, (ii) undertook legislative advocacy and (iii) acted as a think tank, proactively identifying issues of concern.⁵

The Commissioner's office was a multidisciplinary team including lawyers, economists, scientists and engineers; and this multidisciplinary approach was applied throughout the work of the Commissioner's office. Another key success factor was the establishment of a close relationship with the civil sector and with the public. Furthermore, the office's careful balancing between cooperative and confrontational strategies proved to be effective.⁶

The Commissioner in this institutional set up was in place until 2012 and some of the key achievements of the office included the following:⁷

- Safeguarding Hungary's agricultural gene pool and preventing its sale;
- Preventing the privatisation of state-owned forests and securing a forest law with strong nature conservation provisions;
- Halting the privatisation of public water utilities;
- Protecting thousands of hectares of green areas from construction plans;
- Supporting the protection of the Danube's ecosystems and ecosystem services; and
- Safeguarding the right of public participation in decision-making

In 2010 the right-wing party, Fidesz, won the elections. When Hungary's new constitution, the Fundamental Law, came into force in 2011 the previous institutional set up of the commissioner roles was changed. The former independent commissioner offices were merged into one single office and the office of the Commissioner for Fundamental Rights was created. Within this institutional structure two deputy commissioner roles were created, one of which is the Deputy Commissioner for Future Generations. However, the deputy commissioners have more limited power and resources compared to the previous set up. As a result of these institutional changes Dr Fülöp resigned and a new Deputy Commissioner for Future Generations, Dr Marcel Szabó, was elected for a six year period.

At present, the Fundamental Law recognises the need to protect natural resources and states that: 'natural resources, in particular agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets are

⁴ [Parliamentary Commissioner for Future Generations archived website](#) (Accessed on 17 August 2015)

⁵ Interview with Dr Sándor Fülöp, former Hungarian Commissioner for Future Generations, 31 August 2015

⁶ Interview with Dr Sándor Fülöp, former Hungarian Commissioner for Future Generations, 31 August 2015

⁷ 2011 Annual Report of the Commissioner for Future Generations (Available only in Hungarian: [Beszámoló a jövő nemzedékek országgyűlési biztosának 2011. évi tevékenységéről](#))

part of the nation's common heritage, and it is every person's and the State's obligation to protect, sustain and preserve them for future generations'.⁸

Some of the key points that emerge from the Hungarian role are that (i) even in the absence of initial cross-party support, a role for future generations can be established if there is a strong civil society movement behind the idea; (ii) given the complexity of issues around future generations there is a need to apply a multidisciplinary approach and to establish a wide internal and external network with professionals, civil society and citizens; and (iii) in order to ensure continuous political support there is a need to carefully balance cooperative and confrontational strategies, and to pick battles carefully in order to maximise effectiveness. Finally, it is important to ensure the office's independence from other commissioner offices, which is not the case in the current institutional set up in Hungary, in order to avoid conflicting short-term and long-term approaches.

3.2 Wales

The creation of the Welsh Commissioner for Future Generations is an interesting example of how a Guardian role focused on sustainable development can be established in law at sub-Member State level; and in some respects the creation of the role is a response to the fragility of purely administrative arrangements not supported by a constitutional or legislative basis.

The Welsh Assembly has powers to legislate in Wales on a defined range of devolved policy areas. The Welsh Government is the executive branch of devolved government in Wales, and is accountable to the Assembly. When the Sustainable Development Commission, an administrative body covering the whole of the UK, and with one commissioner appointed by the Welsh Government to represent Welsh interests, was closed down by a newly elected UK government in 2011 (partly as a cost-cutting measure, and partly because of the belief of the new UK Government that it was not appropriate for non-elected bodies to offer advice on policy⁹) the Welsh Government initially appointed¹⁰ the Welsh member of the defunct UK Commission as a new 'Commissioner for Sustainable Futures'. The Welsh Government then went much further in 2014, proposing legislation to the Welsh Assembly, which was to become the 'Well-being of Future Generations (Wales) Act 2015'¹¹. The legislation was in part informed by a national conversation, led by the Commissioner, under the banner 'The Wales we Want'¹² to establish a consensus around the goals to be included in the legislation.

The Act imposes a sustainable development duty on public bodies in Wales, and requires public bodies to report on their performance of that duty; it establishes a Commissioner for

⁸ Article P of the [Hungary's Fundamental Law](#)

⁹ See the discussion in section 3.4 for more information

¹⁰ See Sustainable Development Commission press release of 15 March 2015, '[Working together for a sustainable future - new arrangements in Wales](#)'.

¹¹ See '[Well-being of Future Generations \(Wales\) Bill \[as passed\]](#)' on the Welsh Assembly website.

¹² In line with the UN's 'The World We Want' initiative.

Future Generations, to advise public bodies on how to meet their sustainable development duty; and it requires the Auditor General for Wales to examine how well public bodies perform their sustainable development duties.

The Act is to some extent ambiguous in defining sustainable development; initially, it is described as ‘the process of improving the economic, social, environmental and cultural well-being of Wales;. However, it is then made clear that public authorities should take action which is in line with ‘the principle of sustainable development’. Sustainable development is in turn defined more closely in accordance with the Brundtland definition, as requiring bodies to act in a manner that: ‘seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs’. Public bodies must, moreover ‘take account of the importance of balancing short term needs with the need to safeguard the ability to meet long term needs, especially where things done to meet short term needs may have detrimental long term effect.’ The action public bodies should take in meeting their sustainable development duty includes setting objectives for their contribution to six defined ‘Well-being goals’¹³.

The most directly relevant aspect of the legislation for this report, however, is the creation of the role of a ‘Future Generations Commissioner for Wales’, whose role is more firmly focused on the needs of future generations. The Commissioner is required to ‘act as a guardian of the ability of future generations to meet their needs’, and to ‘encourage public bodies to take greater account of the long-term impact of the things that they do’; and ‘for that purpose’ to provide advice to public bodies on their delivery of well-being objectives. Since the legislation only came into force in 2015, it is too soon to assess its effectiveness, or the impact that it has had on decision-making in public bodies. However, the process which led to the establishment of the role can be studied.

Key points which emerge are that (i) there was broad cross-party support for the principles of the legislation in the Welsh Assembly, notwithstanding the presence of the two parties involved in the coalition at UK level which had in 2010 chosen to disband the UK Sustainable

¹³ **A prosperous Wales:** An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.

A resilient Wales: A bio-diverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).

A healthier Wales: A society in which people’s physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood.

A more equal Wales: A society that enables people to fulfil their potential no matter what their background or circumstances (including their socio economic background and circumstances).

A Wales of cohesive communities: Attractive, viable, safe and well-connected communities.

A Wales of vibrant culture and thriving Welsh language: A society that promotes and protects culture, heritage and the Welsh language, and which encourages people to participate in the arts, and sports and recreation.

A Globally responsible Wales: A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.’ – Well-Being of Future Generations Act, p 4.

Development Commission; (ii) the UK government's disbanding of the Sustainable Development Commission had created a shared understanding of the fragility of a purely administrative structure, not backed by legislation; (iii) Welsh politics has a more prominent strand of environmental and social awareness than mainstream UK politics; and (iv) an element of conscious exceptionalism – demonstrating Wales's more advanced position on sustainable development, in contrast to the UK Government – played a role in securing broad support. It is also notable that the Commissioner role seems to have been a less controversial aspect of the legislation during its passage through the Welsh Assembly than the creation of a new duty for public bodies (which was criticised on the grounds of lack of clarity).

3.3 Canada

A non-EU example of an independent institution with similar roles to the Hungarian and Welsh examples is the Canadian **Commissioner of the Environment and Sustainable Development**. The role was established in 1995 and it is located within the Office of the Auditor General. The Commissioner's role is to provide independent analysis and recommendations to the Members of the Parliament on the federal government's efforts to promote sustainable development and to protect the environment. Within this role the Commissioner conducts performance audits of the federal department's management of environmental and sustainable development issues and monitors the federal government's sustainable development strategies. Furthermore, the Commissioner oversees the environmental petition process, within which citizens can hand in requests in relation to environmental issues.¹⁴ The legislation establishing the Commissioner role¹⁵ describes sustainable development notably loosely, as a 'Continually evolving concept based on the integration of social, economic and environmental concerns, and which may be achieved by, among other things' a list of specific issues, the eighth and final of which is 'respect for nature and the needs of future generations'.

The Commissioner publishes annual reports which summarise the performance audits and provides information on the environmental petition processes. The performance audits are capable of being briskly critical of Government progress and policy: for example, the chapter on climate change mitigation in the 2014 report¹⁶ concludes that:

'progress in addressing four key issues from our last audit has been unsatisfactory. While the Government of Canada has recognised the need to urgently combat climate change, its planning has been ineffective and the action it has taken has been slow and not well coordinated.'

However, the way in which the Commissioner's role is defined - largely in terms of balancing economic, social and environmental concerns, rather than in a more explicitly long-term

¹⁴ [Office of the Auditor General of Canada website](#) (Accessed on 17 August 2015)

¹⁵ [Consolidation of the Auditor General Act 1985](#), as last amended on June 26, 2011

¹⁶ Office of the Auditor General of Canada (2014) [Fall Report of the Commissioner of the Environment and Sustainable Development](#)

perspective - can be seen as a weakness. The role of the Commissioner in examining petitions is unusual in comparison with similar offices. In 2014, the Commissioner received 16 petitions, which mainly concerned the management of fisheries and the impacts of toxic substances on human health. It could be interesting to examine further the impact of the petitions role, and whether it makes the Canadian federal government more responsive to the concerns of groups of individual citizens.

3.4 Administrative roles

Even though the Hungarian and Welsh Commissioners can be considered the most prominent and successful roles in the European Union there are other examples around Europe where similar nonetheless more limited roles were created. Some of the examples below are parliamentary bodies while others are governmental units.

The **Committee for the Future in Finland**¹⁷ was established in 1993. The Committee for the Future is a permanent committee with Members of the Parliament and thus its role is relatively limited. The Committee deliberates with the Parliament only if requested and submits comments to other committees on policies which have an impact on the future. Furthermore, the Committee conducts future studies and research on technological development.

The **Parliamentary Advisory Council on Sustainable Development (PACSD) in Germany**¹⁸ is a parliamentary committee that operates in the Parliament as an official body. It was created in 2004, and includes seventeen permanent and seventeen substitute members of the Parliament, appointed according to standard party representation arrangements. The Advisory Council monitors and supports the Federal Government's sustainability policy at national, EU and international level. It was the PACSD itself which initiated the requirement for a sustainability impact assessment to be added to legislation impact assessments; these assessments are now monitored by the PACSD at parliamentary level.

Between 2001 and 2006 a parliamentary **Commission for Future Generations** was in place **in Israel**. The commission had the authority to intervene on any bill that it considered would have an impact on future generations, and to provide an opinion on the bill. The committee focused not only on environmental related legislation but other areas, including science, education, health and planning and construction. When the commission's head, Judge Shlomo Shoham, retired in 2006 no new commissioner was appointed and the commission effectively terminated its work. Later in 2010, a bill officially abolished the commission. The underlying reasons for the commission's abolition appear to have been twofold: (i) operational costs were considered high and (ii) Members of the Israeli

¹⁷ [Committee for the Future of Finland website](#) (Accessed on 18 August 2015)

¹⁸ [Parliamentary Advisory Council on Sustainable Development of Germany website](#) (Accessed on 18 August 2015)

Parliament, the Knesset, thought that the commission had too much authority to interfere with the Parliament's work.¹⁹

At the international level Malta already in 1992 at the United Nations Conference on Environment and Development (UNCED) proposed a role for a Guardian for Future generations. Twenty years later it continued its efforts at the national level and in 2012 Malta passed its Sustainable Development Act.²⁰ The Act established the role of a high-level committee on the **Guardian of Future Generations in Malta**, which at its establishment was subject to the Ministry for Tourism, Culture and Environment. The chairperson, Mr Michael Zammit Cutajar, was appointed by the Prime Minister and the Committee also have other experts in social, economic and environmental sciences.²¹ Within its capacity the Guardian had a mandate amongst others to promote sustainable development in national policy and legislative processes, to develop a scientific research network, to develop audits of sectors which are linked to sustainable development, to propose goals and actions to the government and to consider the requests of the public on sustainable development related matters. Nevertheless, following a change of Government in 2013, in April 2015 the committee members all resigned as a result of the lack of financial and staff support²² and the current status of the committee is unclear.

In 2011, the Swedish Government appointed the **Commission on the Future of Sweden**. Compared to the above examples the Commission's scope is broader; the four main areas on which the Commission was tasked to focus on were (i) demographic development, (ii) sustainable growth, (iii) integration, gender equality and participation, and (iv) social justice and cohesion.²³ The key goal of the Commission is to identify the key challenges that Sweden will face in 2020-250, to carry out research on these issues and to provide a solid background for policy making processes.

The **United Kingdom** established a **Sustainable Development Commission** in 2000, as part of a wider programme of sustainable development action of the incoming (1997) Labour government, which included a Deputy Prime Minister role focused on sustainability issues. The creation of the SDC was announced in the 2009 White Paper 'A Better Quality of Life'²⁴, which suggested that its role would be 'to monitor progress on sustainable development, and to build consensus on action to be taken by all sectors to accelerate its achievement'. The SDC was established as a Non-Departmental Public Body, which on the one hand meant that it had formal operational independence from Government ministries, but on the other hand meant that it had no formal statutory status; it reported to the UK government, and also to the devolved administrations in Scotland, Wales and Northern Ireland, and was chaired from 2000 to 2009 by the former director of environmental NGO Friends of the Earth, Jonathan Porritt. In addition to its role in providing (generally gently phrased and

¹⁹ [The Knesset Research and Information Centre \(2013\) Official Bodies that Deal with the Needs of Future Generations and Sustainable Development: Comparative Review](#)

²⁰ [Sustainable Development Act of Malta, 2012](#)

²¹ Times of Malta (2012) [Government appoints Guardian for Future Generations and Sustainable Development](#)

²² Times of Malta (2015) [Commission members resign for lack of support](#)

²³ Commission on the Future of Sweden (2013) [Future challenges of Sweden](#), Final report

²⁴ 'A better quality of life - strategy for sustainable development for the United Kingdom – 1999'

cooperative) analysis of Government Departments' 'Sustainable Development Action Plans', it also intervened publicly in a wide range of Government policy areas, often in response to consultation papers, and often setting out sharp disagreement with Government policy. The Commission also launched some ground-breaking policy work on its own initiative, including the publication of the report 'Prosperity without Growth'²⁵, which challenged orthodoxy on the centrality of economic development to the role of Government.

While the absence of statutory independence did not prevent the SDC from being critical of Government policy, there is some evidence that it was careful in choosing its opportunities to do so; and that it aimed to work cooperatively with Government Departments in persuading them to take their Sustainable Development responsibilities seriously. The absence of statutory status did, however, make it relatively straightforward for a new Government in 2010, with less of an interest in sustainability policy (and a general disapproval of unaccountable advisory bodies), to remove funding from the SDC. Although there was some interest from the devolved administrations in maintaining an institutional role in this area, it was not possible for them to do so at UK level. The debate sparked in Wales led to the creation of a Commissioner for Future Generations (described in detail at paragraph 3.2 above).

The **United Kingdom's Committee on Climate Change**, while it is not a broad sustainability body, nevertheless provides an interesting counter-example to the fate of the Sustainable Development Commission. Established under the Climate Change Act 2008, which set innovative economy-wide targets for UK greenhouse gas emissions, and a long-term objective for emissions reduction by 2050, the Committee has used its independence to issue a number of sharply critical reports on Government policy, in particular noting the risks of short-termism in the energy sector, and the likely incompatibility with a medium- to long-term cost effective approach to achievement of the 2050 targets. Although it has a role as Government advisor which is similar in nature to the SDC's, it is tied to the delivery of specific legislative targets (advice on setting and meeting future carbon budgets for the UK), and is accompanied by a duty to report to Parliament on the UK's progress towards achievement of emissions targets. While its subject-specific focus means that it is not comparable with broader sustainable development/ future generations remits, it remains in existence 5 years after the abolition of the SDC, and continues to exercise influence on the public debate on greenhouse gas emissions, ensuring that long-term challenges are considered in an evidence-based way.

3.5 Conclusion on the lessons of existing examples of 'Guardian' roles

The experiences and examples outline above, while they are not all directly relevant to the challenges of establishing a Guardian for Future Generations at EU level, allow us to draw some useful lessons on how such roles are established, and how to maximise their chances of success.

²⁵ 'Prosperity without growth? The transition to a sustainable economy', Jackson, T, Sustainable Development Commission, 2009

In the Hungarian example **the persistence of civil society** finally achieved cross-party support; and the extensive work done by the NGO, Protect the Future!, provided an important background for the office once it was finally established. In contrast, in Wales there was a **broad cross-party support** for the Welsh 'Well-being of Future Generations Act'. Even though the abolition of the UK Sustainable Development Commission triggered the creation of the Welsh Commissioner for Future Generations the new post became much more than a purely administrative body and thus has the potential to have a greater impact than its former UK counterpart.

Furthermore, the Welsh example showed that the creation of the Commissioner's office was backed by **sound legislation** not only from the point of the establishment of the role itself but also in terms of the support for a future-focused sustainable development approach (see the reference to the Welsh public bodies duty on sustainable development imposed by the Well-being of Future Generation Act). Even though the Hungarian Fundamental Law points to the need to protect natural resources and thus creates a strong legal basis for the needs of future generations by the time the law came into force the institutional set up of the office of the Hungarian Commissioner for Future Generations was changed, and was therefore not well-aligned with the objectives of the Fundamental Law.

The **way in which sustainable development is defined** has implications for the impact of the role. In Canada a reference is made to the commonly used shortcut interpretation of sustainable development as requiring an integrated approach to economic, social and environmental concerns; while the Welsh Act recognises a future-focused approach towards sustainable development, which in turn serves as a better basis for the guarding of the interests of future generations. It is also interesting to note the broad scope of the Commission on the Future of Sweden, which covers demographic developments, sustainable growth, integration, gender equity and participation, and social justice and cohesion, as well as environmental aspects of sustainability. Even though this broader approach has the potential to provide a more overarching view of the key concerns for future generations it can create challenges and in order to understand the interlinkages of the different areas a multi-disciplinary approach towards the identified problems is essential.

The **importance of creating an independent office** which is not a parliamentary body or a governmental unit is apparent from the Finnish, German, Maltese and Swedish examples. Amongst these examples Finland's Committee for Future has the most limited role as it can only act if it is requested by the Parliament; the German Parliamentary Advisory Council's scope seems to be primarily procedural as well. Even though the Maltese Guardian of Future Generations is subject to one of the Ministries within the Government, it has a mandate to consider the requests of citizens on sustainable development issues. The experience of the UK's Sustainable Development Commission, established as a semi-independent advisor within Government, but without legislative backing, is instructive. It was abolished on the arrival of a new Government in 2010, ostensibly as a cost-cutting measure. There are some potential advantages to being part of the governmental machinery, if it means that governments trust the messages delivered by a watchdog. However, the risk of an organisation being disbanded if it becomes unpopular with the

government of the day is arguably likely to lead to its advice being expressed in ways which avoid controversy, even in cases where robust argumentation may be necessary.

While most of the guardians and similar bodies have an advisory role some of them also act as an **ombudsman**, i.e. they have the authority to respond to the requests of the public. In this sense, the Hungarian Commissioner for Future Generations operates as a traditional ombudsman office where the citizen's complaints are investigated. The Canadian approach to examine **petitions** is an interesting example and can help the guardian in identifying the most pressing problems.

Finally, a worrying trend identified across EU Member States and beyond is **a tendency for these institutions, once established, to face subsequent challenges to their status**, either being weakened (in the case of Hungary and Malta), or abolished (in the UK and Israel). The pattern usually involves **changes to status in the aftermath of changes of political control** at national level, apparently in part influenced by a perception that the bodies concerned were 'someone else's initiative' (with the underlying threat that they might be more critical of the new Government's policies). In the absence of detailed evaluations of the impact of the Guardian roles established, it is difficult to draw clear conclusions on the causes – it could be a sign of both success (political relevance of the body's activities, and thus an impact on the new Government's freedom of manoeuvre in addressing short-term political challenges) and lack of success (failure to ensure sufficient wider society understanding of the importance of future generations issues to prevent abolition), as well as of a broader recent tendency towards cuts in public expenditure and administrative simplification. One clear lesson emerging, however, is the importance of broad, cross-party support for a Guardian for Future Generations role.

4 The current situation at EU level: what problem do we need to address?

This section offers a general commentary on the legislative and policy-making process at EU level, and the grounds for identifying a gap. In the time available for preparing this report, it has not been possible to carry out a detailed literature review; however, the authors believe that there is a potentially rich field of analysis for environmental and behavioural economics research on this subject. The primary purpose of our analysis here, however, is to identify key elements of the analysis underpinning the need for a Guardian role which can be of value in developing a broad coalition of support for its establishment.

4.1 The EU policymaking process and future generations

The legislative and policymaking process at EU level is complex, and reflects the progressive development of the areas of European competence, the inter-Governmental nature of the EU's origins, and the gradual recognition of the importance of a European level democratic process (in addition to the democratic processes reflecting Member State positions). Essentially, legislation is proposed by the European Commission (Europe's executive arm), sometimes on the basis of requests from either the Member States (in the form of the European Council, or in the form of influential groups of Member States), or of the European Parliament. It is then co-decided by the Council (representing the Member States, and acting generally by a Qualified Majority which in practice requires more than a simple majority of Member States), and by the European Parliament (representing, through direct election, the European population). In many fields of legislation, opinions are also submitted by the European Economic and Social Committee (representing the social partners, nominated by the Member States), and by the Committee of the Regions (representing the interests of regional and local government). The legislative process is rich in checks and balances, aimed at avoiding the marginalisation and over-ruling of significant viewpoints or interests, which, in turn, makes it relatively slow to respond to new challenges. It is also deeply rooted in democratic traditions, with both the Council and the Parliament representing separate expressions of the public will (indirectly, in the form of Member State governments on the one hand, and directly on the other); and a variety of interests represented by the EESC and the COR. Almost by definition, the interests and points of view represented through this democratic structure, as in similar political processes at national level, are those of the current voting populations. Where there is scope for institutions such as the Commission to take a longer-term view, it is often represented negatively as a degree of detachment from political reality and public opinion.

The concept of the rights of future generations and inter-generational equity is inherent to the **Brundtland definition on sustainable development** as development which 'meets the needs of current generations without compromising the ability of future generations to meet their own needs'. However, in practice, policymakers in the EU and elsewhere often treat sustainable development as being about a balance between achieving social, economic, and environmental impacts (with environmental impacts implicitly forming a

proxy for 'the needs of future generations'). The Treaty on European Union, for example, refers to:

'the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.'²⁶

While it also refers to the EU promoting 'solidarity between generations', this is clearly in the context of existing generations of voting age, since it goes on to refer to promoting 'protection of the rights of the child'. The interests of future generations are thus not directly written in to the Treaty's treatment of sustainable development, and only indirectly included through the reference to sustainable development.

Policymaking at EU level reflects this lack. The **Commission's procedures for impact assessment of new legislative proposals** call for 'a robust assessment of their economic, social and environmental impacts and of who will be affected'. They go on to clarify that 'Impacts should be assessed from the point of view of society as a whole, although distributional effects and cumulative burdens on individual parties should also be proportionately assessed and considered'²⁷. While the guidelines note that the choice of discount rates can reflect the fact that different impacts occur at different times, there is no indication that the interests of those not currently present need to be considered, or that the choice of discount rates could encompass the very low rates which would be needed to ensure that the interests of future generations are given weight. In practice, the Commission tends to use conservative discount rates in its Impact Assessments, which (implicitly) reflect the interests only of current participants in the democratic process (if discount rates are used to choose between the enjoyment of benefits now, or at some point in the future, the choice is implicitly relevant only to current actors; future generations by definition cannot enjoy benefits now).

Box 1: Discount rates in cost benefit analysis

Cost benefit analysis is often used to help policymakers understand the relative merits of different investments or regulation. Generally, the decisions being made require some up-front cost (in the form of Government spending, or regulatory burdens on business) in order to achieve societal benefits later.

Assuming (a big if), those costs and benefits can be accurately measured and compared, we need to reflect the fact that spending money or other resource on one thing (for example, an energy efficiency investment) means that we forego using that money or other resources on something else (for example, a new hospital). We therefore need some means of comparing future benefits with present costs, reflecting the fact that having money to invest

²⁶ Treaty on European Union, article 3.3

²⁷ [Commission Staff Working Document: Better Regulation Guidelines. COM\(2015\) 215 final, SWD\(2015\) 110 final](#)

now is more valuable than having the same money to invest in the future (in our example, the hospital would be able to spend the intervening years saving lives).

This means that cost benefit calculations apply a discount rate to future costs and benefits, so that they are smaller in comparison to current costs and benefits. The size of that discount rate can have a powerful effect on long-term decisions. The assumed present value of a future benefit worth €100m in 20 years' time would be €54m using a discount rate of 3%, but only €29m using a discount rate of 6% - making an investment costing €40m to deliver those future benefits therefore would look like a good idea at a 3% discount rate, and a poor investment at a 6% discount rate.

Higher rates tend to assume a higher value to society in the form of consumption and the use of a discount rate favours, by definition, the interests of current generations over the interests of future generations. Some economists have tried to tackle this problem by using a very low discount rate, which implies that the benefits to be enjoyed in the future have almost the same value as those enjoyed in the present (for example, the Stern Review on the economics of climate change used a very low social discount rate of 0.1%).

Positions adopted in Council and European Parliament can also be expected to reflect the interests and preferences of the current voting population; indeed, it would be concerning if they failed to do so. Current voters (and politicians) tend, however, to frame much of their action as being relevant to protecting the interests of future generations. A more robust mechanism for assessing and protecting those interests has the benefit of throwing light onto the nature of the decisions made on trade-offs.

Even within environmental policy, the interests of future generations can be treated in very different ways. Some environmental issues – for example, air quality standards, or water standards – have a direct relevance to current populations, because of the health impacts; they have a more limited impact on future generations, particularly where environmental damage can be confidently considered reversible (for example, the potential for improvements to air quality over the next 20 years mean that today's air quality standards are likely to have limited impact on the interests of future generations). In cases where there is a trade-off in emissions between current damage, and impacts on greenhouse gas emissions (for example, in the case of diesel vehicles; or in the case of reducing noise emissions from aircraft with a penalty in terms of fuel efficiency) there is a conflict between addressing today's environmental needs, and addressing those of future generations.

The interests of future generations become more directly relevant when, rather than considering limit values with an impact on today's environment, policy addresses the total load of human impacts on the environment in order to avoid tipping points and catastrophic loss. Limitations on the total volume of greenhouse gas emissions are a case in point; action to protect species loss or irreversible habitat loss is another. The complexity of decision-making from a political point of view is much greater when dealing with what have been

described as ‘volume control’ challenges²⁸, where the cumulative environmental impact of today’s society needs to be addressed in order to preserve options in the future, than when dealing with quality control of point source emission limits – where there are trade-offs to be made, but usually between different actors present now (for example, urban residents breathing polluted air, and vehicle manufacturers), and able to influence today’s political debates. It is in these areas, where decisions and actions made today can have non-linear impacts of a sometimes unpredictable nature on the interests of future generations, where reliable and robust evidence on the choices available can have the most benefit on the quality of decision-making, and the level of public debate.

4.2 Dealing with the interests of future generations

In many cases, of course, current generations are willing to make sacrifices to protect the interests of future generations; action on climate change is a case in point, where the main benefits of action will accrue to future generations, rather than the current population. Much of the rationale for climate action is implicitly or explicitly based on an approach to discounting which reflects the interests of future generations²⁹.

In a recent, potentially historically important, court case in the Netherlands **the interest of current and future generations in relation to climate change** impacts provided a basis for a ruling against the Government (see box below).

Box 2: The Dutch court case on the Government’s failure to reduce carbon emissions

In June 2015, a court in Hague ruled that the Dutch Government’s current climate change policy, a plan to cut emissions by 14-17 per cent compared to 1990 levels by 2020, is unlawful and ordered them to increase their efforts and cut greenhouse gas emissions by 25 per cent within five years. According to Urgenda, the environmental foundation behind the case, the State was acting unlawfully as it failed ‘to prevent the Netherlands from causing (more than proportionate) damage, from its territory, to current and future generations in the Netherlands and abroad.’³⁰

This was the first time when a climate liability suit was brought under tort law and human rights and legal obligations in relation to climate change were determined at the level of a

²⁸ See Haigh, N (2003) Sustainable Development in the European Union Treaties and in National Legislation: Some Conclusions, In: Fitzmaurice, M and Szuniewicz, M Eds. *Exploitation of Natural Resources in the 21st Century*. The subject is dealt with in more depth in a chapter in his forthcoming collection of essays ‘EU Environmental Policy: Its journey to centre stage’, Routledge, London 2015.

²⁹ See, for example, the extensive treatment of the subject in the Stern Review on the Economics of Climate Change (2006), which notes that while ‘Climate change will have serious impacts within the lifetime of most of those alive today’, ‘Future generations will be even more strongly affected, yet they lack representation in present-day decisions’, and devotes an Annex to discussion of how to reflect this inter-temporal challenge in discount rates for the evaluation of policy options.

³⁰ [English translation of the full verdict](#)

state. The case sets a precedent that is expected to trigger action in other countries as well; a similar case in Belgium is already under preparation.

Prior to the court case, in March 2015, an international group of independent experts on international human rights, and environmental law, launched the Oslo Principles on Global Climate Change Obligations. Based on existing tort law, human rights law and environmental law, the principles state that even if no international climate change agreements are in place, national governments have a legal obligation to tackle the detrimental impacts of climate change.³¹ The reasoning behind the principles relies in part on the interests of future generations, although it side-steps the question of whether the interests of future generations already impose ‘additional obligations’ which are enforceable on governments and other relevant actors.

Similar inter-generational trade-offs are also relevant to **policy (and politics) on nuclear power**, and the public finance considerations relevant to pensions policy choices, given the long timescales necessary for analysis of the full impacts. Politicians also tend to signal their interest in protecting future generations – for example, the European People’s Party platform for the 2014 European Parliament elections stated that ‘We have an obligation towards future generations to hand over the same or even better opportunities than we enjoy by defending freedom and democracy, ensuring solid public finances and preserving a healthy environment.’

However, there are other interests at play, and the electoral consequences of imposing costs on current voters in order to protect future generations can be significant, particularly if public debate is characterised by short-term point-scoring and appeals to individual interests. Impacts on future generations are often both diffuse and hard to conceptualise. There are therefore clear risks that, without some form of institutional mechanism aimed at throwing light onto the choices involved, difficult decisions necessary to protect the interests of future generations may be postponed, or may be taken on a more short-term basis.

4.3 Meeting the EU’s international obligations

The interests of future generations have been long embedded in United Nations work on environmental and other issues; the subject was already an important focus of discussion at the United Nations Conference on Environment and Development (UNCED) in 1992. Key outcomes of the conference included the adoption of the **Rio Declaration on Environment and Development**³² and the opening for signature of the **UN Framework Convention on Climate Change (UNFCCC)**³³. In both documents future generations are an inherent part of the key principles. The Rio Declaration states that ‘the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’. Although more specific in its sole focus on climate change, the UNFCCC’s principle on future generations has a stronger impact given its legally binding

³¹ [The Oslo Principles on Global Climate Change Obligations](#)

³² Report of the United Nations Conference on Environment and Development (1992) [Rio Declaration on Environment and Development](#)

³³ [United Nations Framework Convention on Climate Change 1992](#)

nature, to which the EU is a party, and its influence on the later adoption of the Kyoto Protocol. Article 3 of the UNFCCC reads as follow:

‘The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.’

More recently, 20 years later in 2012 at the United Nations Conference on Sustainable Development, also known as Rio+20, participating parties adopted the nonbinding document, ‘**The Future We Want**’³⁴. The work document starts with the renewing of earlier commitments and with a specific emphasis on the need to ‘to ensure the promotion of economically, socially and environmentally sustainable future for our planet and for present and future generations.’ The outcome document also called for the establishment of **Sustainable Development Goals (SDGs)**, which would replace the Millennium Development Goals (MDGs) expiring at the end of 2015.

Following the Rio+20 conference’s request, in 2014 the UN General Assembly's Open Working Group on Sustainable Development Goals published its proposal on SDGs³⁵. The proposal suggested 17 goals, which cover issues linked to poverty, hunger, health, education, climate change and oceans and marine resources. The proposal refers to ‘The Future We Want’ outcome document and its requirement to ensure sustainable development for both current and future generations. A final document was later prepared for adoption in the UN Sustainable Development Summit, which will be held at the end of September 2015.

³⁴ [UN \(2012\) The Future We Want](#)

³⁵ [UN Open Working Group Proposal for Sustainable Development Goal](#)

5 Factors to take into account in establishing a Guardian for Future Generations

5.1 Ensuring relevance

It will also be important to ensure that **the Guardian role is not viewed as simply an environmental lobbyist**. While the main result of a failure of decision-making processes to consider impacts on and interests of future generations is on sub-optimal decisions in relation to environment protection, or on excessive consumption of non-renewable resources, it is by no means the only relevant area. A focus exclusively on environmental issues could lead to parties or political interests with a currently limited emphasis on environmental values to dismiss its relevance. Other potentially important issues include (i) **fiscal policy** – particularly in times of economic downturn, and when Government deficits reach levels where optimistic assumptions about future growth rates are necessary in order for current generations to be able to pass on an affordable debt burden to future generations; (ii) **energy security** – in particular in relation to consumption of non-renewable energy sources in preference to investment in lower-carbon domestic options which are not reliant on imports and (iii) **infrastructural investments** – in particular linked to the risk of long-term lock in effects of transport and energy infrastructure. For instance, national projections of future energy consumption can influence long-term energy infrastructure planning and if not correctly predicted can result in infrastructural developments which are against long-term low-carbon planning. Further issues are linked to (iv) **pensions policies**; (v) **education policy**; (vi) **demography policies and measures**; and (vii) **social policy**.

Another important and recently more widely emerging aspect is linked to **human rights**. According to a 2013 **UN report on Intergenerational solidarity and the needs of future generations**³⁶:

'Article 1 of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights, are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. The basis for our moral obligations towards future generations is thus argued to be the equal concern and respect that we owe to all humans, regardless of where and when they may have been born.'

The link between human rights obligations and the environment were also examined by the United Nations Special Rapporteur, John H. Knox, who has reported on human rights threatened by climate change impacts.³⁷

³⁶ UN (2013) [Intergenerational solidarity and the needs of future generations](#)

³⁷ See UN (2013) Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox and UN (2013) Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Focus report on human rights and climate change, Available at: <http://srenvironment.org/>

5.2 Achieving broad support and buy-in

The Hungarian and Welsh examples of the guardian for future generation roles showed the importance of broad support based on two linked elements: **(i) the role of civil society and (ii) broad institutional and cross-party support.**

In order both to establish an office for an EU level guardian and to ensure its relevance, it is inevitable to achieve the support of the main EU institutions and a broad consensus among political groups is necessary. Civil society advocacy can play a crucial role in developing that broad support and consensus. Research can provide important background to illustrate and better communicate the need for such an EU institution and the risks created by its absence, while campaigning activities can increase public awareness and ultimately send a strong message to EU decision-makers. A coordinated campaign to support the creation of an EU guardian role could be an element in encouraging wider understanding of the impact of human activity now on the conditions for human society in future.

Once a Guardian role is established, a continuing close relationship with civil society needs to be ensured. In addition to an internal multidisciplinary team supporting the guardian, an external network of leading professionals working in the field, such as scientists, economists and lawyers, can also enhance the office's legitimacy and support buy-in. A close working relationship with the European Environmental Agency (EEA) would, for example, be important.

Essentially the office of the EU guardian should be independent from other EU institutions, as well as from other lobbying activities and thus seen as a non-partisan organisation. A careful balancing strategy between cooperative and confrontational approaches towards all stakeholders could help to achieve this while ensuring EU-wide support.

5.3 Effective Integration into the EU policy-making process

Achieving both broad relevance, and wide political and institutional buy-in, to a Guardian role will go some way towards ensuring that it has an impact on policy outcomes. It will, however, also be important to ensure that it is appropriately integrated into the EU policy-making process. We would therefore recommend that a mix of functions is adopted, to enable the Guardian to intervene effectively at a range of points in the policymaking cycle:

Advising on policies and legislative proposals while they are being developed – for example, through input to Commission impact assessments, and through contributions to Commission consultations. The Commission could enhance the effectiveness of this function by committing to an explicit response to Guardian observations on draft proposals when publishing a formal proposal.

Advising the co-legislators on published proposals, offering views on the impacts on the interests of future generations, and recommendations for change to improve those impacts. It would be important for this function to be able to respond promptly to the publication of proposals, in order to ensure that its interventions are early enough to shape the debate in Council and Parliament.

Assessing the performance of the European institutions in protecting the interests of future generations; for example, by reporting once every two years on the adequacy of the treatment of future generations in recent policy and legislation, and on the extent to which any gaps identified in the *acquis* are being addressed.

Reviewing broader impacts on future generations, and the scope for improving the protection of their interests, through the commissioning of own-initiative reports on relevant subjects (for example, on demographic pressures).

Our analysis of existing roles suggests that there is no shortcut to improving the way the interests of future generations are treated in the legislation and decisions that emerge from the policymaking process: policymakers and elected representatives need to be convinced of the arguments. The democratic process is necessarily based on a response to the views of existing voters. However, a combination of roles could be effective in ensuring that the interests of future generations are presented clearly to policymakers; and that there is wider public scrutiny of the extent to which the EU decision-making process lives up to repeated statements of ambition on sustainable development and protecting future generations.

5.4 Delivering the objectives of a Guardian for Future Generations

Critically, however, the factors above are a means to delivering the underlying purpose of a Guardian role. The World Future Council has set out a number of principles which are relevant.³⁸

One of the key characteristics of a strong role for a Guardian is to ensure that the Guardian's office has legal **independence** and is not attached to any governmental units. This ensures that the Guardian is not influenced by changing governments and can have a long-term vision. Furthermore, the budget of the Guardian's office should be also independent.

Transparency is also an essential feature for a robust role for a Guardian. The office should report regularly about its work and has to make sure that it is easily **accessible** for all stakeholders, in particular that there is a direct access for citizens through a petition process. With regards to transparency, it is also important to ensure that the office has a clear mandate and has the highest **access to information**.

Finally, it is important that the Guardian's office has a large public support and thus has a strong **legitimacy**. The way in which the office is established has an important effect on this aspect, for instance whether the creation of a role is initiated by civil society organisation or it is established by a government decree. It is also important to ensure that the process under which the actual Guardian is selected is widely supported.

³⁸ [World Future Council \(2014\) Guarding our Future: How to include future generations in policy making](#)

6 Options identified

This section sets out a broad range of options for the establishment of a Guardian role; examines the precedents for the use of those options; and assesses how well each would address the factors identified above, and the scope for modification to improve the prospects for addressing those factors.

6.1 Treaty change

In principle, the most attractive approach to establishing an EU-level Guardian for Future Generations role is to enshrine it in the founding treaties of the EU. **There is precedent for the creation of new roles by the Treaties; a good example is the creation of an EU Ombudsman by the Maastricht Treaty in 1992** (with the first ombudsman taking office in 1995). The box below sets out some of the background to the creation of the Ombudsman role.

Box 3: The establishment of the European Ombudsman³⁹

A resolution to establish a European Ombudsman office was first passed by the European Parliament in 1979, but the idea was opposed by the European Commission and the Council. Establishment of the institution was only agreed in 1992, under the Maastricht Treaty. The office itself was established in 1995.

At the time of drafting of the Maastricht Treaty, the importance of human rights was prominent and the creation of the European Ombudsman position aimed to strengthen the rights of EU citizens. The value of the ombudsman approach had started to be widely recognised throughout EU and candidate Member States; and within EU institutions there was greater acceptance of the need to better control the institutions' compliance with EU law. While competing visions for an ombudsman were discussed during the Maastricht negotiations – a Spanish proposal based principally on ensuring the respect of rights at national level, and the ultimately preferred Danish proposal which was focused more narrowly on monitoring the compliance of the EU institutions – the idea itself was regarded as less controversial than previously, and initial Commission concerns that such a body was superfluous had been overcome.

A treaty change would have the advantage, noted above in relation to institutions at Member State level, of making it significantly more difficult to change or remove the institution; which in turn would help to guarantee the independence of the guardian, and provide them with the scope to be as critical of the EU institutions as he or she felt the substance of their investigations demanded. However, the conditions for Treaty change are demanding; the ombudsman role was included as an additional element in a negotiation which was already planned, and commonly accepted as necessary. The appetite among the institutions and the Member States for a wide-ranging renegotiation of the EU treaties is

³⁹ [European Ombudsman \(2005\) The European Ombudsman: Origins, Establishment, Evolution](#)

currently very low; even in the event of a negotiation being required, for example to deal with a voluntary or involuntary exit of a Member State from part or all of its EU engagement, it is likely that significant pressure would be exerted to limit the number of issues under discussion.

Moreover, the simple fact of a body being set up under the EU's founding treaties does not guarantee its relevance in policymaking or decision-making. Both the European Economic and Social Committee and the Committee of the Regions are given an important consultative role under the treaties; but in practice, their influence on legislation is very limited, except in isolated areas of policy-making (for example, structural and cohesion funds for the Committee of the Regions).

6.2 Adapting an existing EU role

In principle, a much quicker route to the creation of a Guardian for Future Generations could be through adapting an existing role. We have considered two possible institutions which may be relevant; the European Ombudsman, and the Fundamental Rights Agency. A third, the European Environment Agency, is referred to briefly in section 6.3 below – however, our assessment is that it would not be an appropriate home for a Guardian for Future Generations role, because it would be too focused on purely environmental issues, and its advice on impacts on future generations would be difficult to separate and distinguish from its advice on environmental impacts.

6.2.1 The European Ombudsman

The Hungarian example discussed above was initially developed with similarities to an ombudsman function in mind. There are, however, potentially significant conceptual differences between an ombudsman role, as formulated for example in the European Ombudsman role established by the Maastricht treaty, and a Guardian for Future Generations.

The ombudsman is an impartial, quasi-judicial investigator, who is called into action by the presentation of a complaint by an individual citizen or group of citizens in relation to maladministration in the EU institutions; **there is no specific policy-making role**. While the ombudsman does have a power of launching own initiative investigations (a power which the current ombudsman has said she plans to use more), these will, by the nature of the role, focus on areas where there are concerns about the administrative standards being applied, rather than on the nature of the policies adopted at EU level. The Guardian for Future Generations role, by contrast, will need to be closely focused on the substance of the policies and objectives being pursued by the EU, and questions of whether the interests of future generations are adequately reflected in new legislation, or where there are existing policy failures or policy gaps which adversely affect the interests of future generations. The role therefore demands close involvement in the policy-making process, and in political choices. While a Guardian could not substitute for, or stand in the way of, democratically expressed decisions through the European legislative process, he or she would have a duty

to point out when, in his or her view, those choices failed adequately to take into account the interests of future generations.

A further hurdle in the way of expanding the EU Ombudsman role for this purpose would be that, as noted above, it is currently defined by the Treaty; the difficulty associated with removing Treaty-based offices also extends to amending them or adding to their responsibilities.

6.2.2 The Fundamental Rights Agency

The European Fundamental Rights Agency (FRA), one of the EU's decentralised agencies, was established in 2007. The FRA is an independent institution which collects and analyses data on a range of fundamental right issues, in principal all rights listed in the Charter of Fundamental Rights, and thus assist EU institutions and Member States in safeguarding EU citizen's fundamental rights. The agency was established by the Council Regulation (EC) No 168/2007.⁴⁰

The agency's work is guided by a five-year multi-annual framework, which also defines the nine thematic areas on which the FRA focuses. The three key work stream of the agency are the following:

- Conducting large-scale surveys within the EU;
- Undertaking comparative legal or social research; and
- Preparing handbooks for legal practitioners.

The **Charter of Fundamental Rights of the European Union**⁴¹, which is referred to in the regulation establishing the FRA, was agreed in 2000 and has had legal effect since the Lisbon Treaty's entry into force in 2009. The charter covers seven areas: dignity, freedoms, equality, solidarity, citizen's rights, justice and general provision. Under the chapter on solidarity Article 37 states that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.' There is also a reference to future generations, in the preamble, which notes that the 'enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations'; however, this reference is expressed as a limitation on the exercise of the broader rights covered by the Charter. **Given the focus of the FRA on the Charter**, and the challenges and risks that would be involved in reopening and renegotiating the Charter, **it would be difficult to adapt the FRA to incorporate a Guardian role in relation to the rights of future generations.**

⁴⁰ [Council Regulation \(EC\) No 168/2007 of 15 February 2007 on establishing a European Union Agency for Fundamental Rights](#), OJ L 53 1-14, 22.2.2007.

⁴¹ [Charter of Fundamental Rights of the European Union \(2000/C 364/01\)](#)

6.3 Separate legislation

A legislative approach to establishing a Guardian role could either take the form of a stand-alone piece of legislation focused on creating the body, or of provisions included in a piece of legislation incidentally creating an institution to support the implementation of that legislation. We address each in turn below.

6.3.1 Stand-alone legislation

Using a separate, stand-alone piece of legislation to establish a new body has some advantages. The process of co-decision, while sometimes cumbersome, nevertheless ensures that a new institution has support from all three main institutions (Commission, European Parliament, and Council), which in turn would help to ensure that some attention is paid to the Guardian's advice in the future deliberations of the institutions. Legislation would also create a degree of obligation on the institutions to ensure that they provided adequate funding. Finally, the hurdles involved in the legislative process would make it difficult to abolish or severely limit the Guardian's role in future.

An example of an independent EU body created by a stand-alone EU legislation is the above discussed European Fundamental Rights Agency, which was established by the Council Regulation (EC) No 168/2007.⁴² Article 16 of the regulation stipulates that the FRA should operate in complete independence nevertheless the agency has no legislative powers and no quasi-judicial competencies like an ombudsman. The brief history of the establishment of the FRA is presented in the box below.

Box 4: The creation of the European Fundamental Rights Agency

In 1997, the European Monitoring Centre on Racism and Xenophobia, the FRA's forerunner organisation, was established in order to address the need to deal with human rights issues not only during accession procedures, which was the case earlier.⁴³ Later in 2003 after a meeting of the representatives of Member States within the European Council the Monitoring Centre's scope was extended and it became the Human Rights Agency. The Commission in 2004 issued a Communication on amending the regulation on the establishment of the Monitoring Centre and creating the Fundamental Rights Agency. The Communication was followed by a large public consultation and in 2007 the FRA was established by the Council Regulation (EC) No 168/2007. After its establishment it was argued that the FRA has covered a significant gap in the monitoring of fundamental rights throughout the EU, which was previously done via a less coherent and fragmented process.⁴⁴

Another prominent example is the **creation of the European Environment Agency (EEA)**, which was established by Council Regulation 1210/90/EEC⁴⁵. The EEA is similar to FRA in

⁴² [Council Regulation \(EC\) No 168/2007 of 15 February 2007 on establishing a European Union Agency for Fundamental Rights](#), OJ L 53 1-14, 22.2.2007.

⁴³ Morad J. (2013) [EU Fundamental Rights Agency: the missing link?](#)

⁴⁴ Ibid.

⁴⁵ [Council Regulation \(EC\) No 1210/90/EEC of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network](#)

being an independent agency of the EU. Towards the end of the 1980's the EU's institutions increasingly recognised the need for high quality, comparable environmental data in designing European legislation; this was also reflected in the emerging criticism of the European Commission's environmental proposals for a lack of a sound scientific or cost-benefit basis.⁴⁶ Even though there was agreement on the need to establish an environmental agency, there were divergent views on its precise role, including for instance on whether to grant regulatory and inspection powers to the agency.⁴⁷ In the end the regulation which established the EEA in 1990 was based on the idea of a networking, monitoring and reporting agency. Nevertheless, when the regulation was amended in 1999 a policy function was also given to the EEA, and the EEA has been able to use its analysis and research to influence political debate at EU level, including through the identification of issues to highlight in its regular State of the Environment Reports.

An important similarity between the establishment of the two bodies is that there was broad institutional and cross-party consensus on their value. This, together with an active and supportive agenda in the Commission leading to the tabling of legislative proposals, was vital to making progress. While there are clear attractions, as noted above, to the use of stand-alone legislation, these initial requirements are not yet met in the case of a Guardian for Future Generations role.

6.3.2 Using separate sectoral legislation

In theory, it would be possible to include the establishment of a new body as an additional element in a piece of sectoral legislation. Examples of legislation creating both a framework for regulation of a particular activity or product, and an organisation to implement or help enforce that legislation, include the **European Chemicals Agency**⁴⁸, and the **European Medicines Agency**⁴⁹. Both have a primarily technical role in coordinating and managing the risk assessment of marketing authorisations. The focus of such bodies is necessarily very specific, and this route would not be appropriate to the broad remit required for a Guardian for Future Generations role.

A slightly more attractive route would be to use the very broad environmental scope of legislation to establish a **European Environmental Action Programme**. Priorities for EU environmental policy have been set out in a series of formally adopted action programmes, beginning in 1972. The most recent, the 7th Environmental Action Programme, was adopted in 2013⁵⁰. Since the entry into force of the Lisbon Treaty, the environmental action programmes have had a specific legal base in the form of article 192 (3), which allows for the adoption by co-decision of 'general action programmes setting out priority objectives to

⁴⁶ Zito A. R. (2009) European agencies as agents of governance and EU learning, *Journal of European Public Policy*, 16(8)

⁴⁷ Ibid.

⁴⁸ ECHA, established by Regulation 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

⁴⁹ Created by Regulation 2309/93 as the European Agency for the Evaluation of Medicinal Products; subsequently renamed European Medicines Agency by Regulation 726/2004.

⁵⁰ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'

be attained'. However, securing agreement to a Guardian role through this route would in the first place have the weakness that it was explicitly focused only on environmental policy, rather than the broader range of societal and economic impacts on future generations; and in the second place, the treaty base for action programmes specifies that the measures necessary for their implementation will be adopted separately, under the normal environmental legislation provisions of the treaty. Finally, it is unlikely that the action programme will be revised significantly before it comes to an end in 2020.

6.4 Inter-institutional agreement

One option that merits further consideration is the use of an Inter-Institutional Agreement (IIA). This is a mechanism which is used to commit two or more of the key EU institutions, and usually all three of Commission, Council and European Parliament, to a course of action, or to a particular procedural approach. For example, IIAs are used for the implementation of the multi-annual financial framework; the current IIA on 'budgetary discipline, on cooperation in budgetary matters and on sound financial management'⁵¹ is aimed at facilitating the annual budgetary procedure by laying down ground rules, and complements the provisions of the MFF regulation itself. Less successful Inter-Institutional Agreements in the past have included the 1999 IIA on common guidelines for the quality of drafting of Community legislation (whose influence in practice can be judged from a quick scan of most pieces of legislation adopted in the subsequent years). IIAs between two institutions include the Framework Agreement on relations between the European Parliament and the European Commission⁵², which outlines expectations on how the Commission as an institution, and individual Commissioners, work with the EP, including for example EP involvement in international negotiations, the submission of 'political guidelines' by a newly-elected Commission President, and so on.

The IIA as a mechanism has had a formal Treaty basis (article 295) since the Lisbon Treaty. Article 295 states that:

'The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.'

There are disadvantages to using an IIA. It would, in the first place, be difficult for an IIA to identify the funding necessary for establishment of a Guardian for Future Generations; this would need to be established separately (although in practice this could be achieved by one or more of the institutions committing part of their administrative budget to this objective). It is also potentially vulnerable to one or other of the institutions choosing to pull out of the IIA, depending on its binding nature, the length of time for which an IIA is made binding, and the (as yet untested) limits of the 'binding nature' of article 295 IIAs. It is also unlikely that there would be sufficient institutional and political will to develop an IIA on the issue of a

⁵¹ [INTERINSTITUTIONAL AGREEMENT](#) of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management (2013/C 373/01)

⁵² OJ L 304, 20.11.2010, p. 47.

Guardian for Future Generations in the absence of an immediate pressing political or practical need.

However, there are some advantages to an IIA; and an immediate opportunity. Among the advantages are the extent to which the issue would receive serious attention within all three institutions – arguably significantly more so than in the normal legislative process for sectoral acts. An IIA also more clearly involved a voluntary commitment to a particular approach on the part of all three institutions.

The immediate opportunity is the current proposal, outlined by Commission Vice-President Timmermans, for an IIA on Better Regulation⁵³, designed particularly to gain greater traction in the Parliament and Council for impact assessments on legislation, and for ex post evaluation of existing legislation. As this report identifies, one of the weaknesses of the process of impact assessment is that it often fails to address explicitly the impacts on future generations; and implicitly considers only the interests of current generations in the way that most cost benefit assessment is carried out. Given that the proposed IIA is now due to be negotiated through Parliament and Council, one possible approach would be to (i) ensure that there is an explicit reference in the IIA to the importance of addressing the interests of future generations, in both current proposals, and evaluations of the adequacy of the existing EU acquis and (ii) press for Council and Commission agreement to the establishment of a specific office which would be consulted on the development of legislative proposals, on impact assessments, and on evaluations, and whose reports would be made public to inform wider stakeholder discussion, as well as the legislative process.

6.5 An ad hoc administrative arrangement

Finally, it should be noted that it remains possible to establish a function identifying issues relevant to future generations, and providing advice and analysis on those issues, through simple ad hoc administrative arrangements. One approach would be to secure funding for such a body from philanthropic sources, and for it to operate as an entirely independent institution with no formal role. A role within the EU's administrative machinery could also be achieved through decisions of the relevant institutions to allocate funding. Either the Commission's Regulatory Scrutiny Board, or secretariat roles in the European Parliament or the Council, could be strengthened by the explicit inclusion in their remit of tasks relating to the interests of future generations, or by creating separate cells charged with the task; and this could be achieved much more quickly than legislative routes.

However, our analysis of experience at national level underlines the weaknesses of such an approach; notably, that it creates uncertainty about the institution's longevity, which in turn can limit the freedom and fearlessness with which it expresses its views and draws attention to weaknesses in existing or proposed policy. This generic weakness of purely administrative arrangements is compounded in this case by a specific problem in relation to the EU institutions. Part of the purpose of establishing a Guardian for Future Generations would be its capacity to inform and advise debate on policy in and between all 3 major EU institutions.

⁵³ COM(2015) 216 final: [Proposal for an Interinstitutional Agreement on Better Regulation](#)

Setting up a new function which works only for one of the institutions would be sub-optimal.⁵⁴

One question that follows from this is whether a weaker Guardian for Future Generations role established through this route is better than nothing. Arguably, any development which improves the scope for adequately reflecting the principle of solidarity with future generations in EU policymaking is a step in the right direction. The only circumstances in which this would not be the case would be if a new mechanism or role was likely to be both (i) weak and ineffective and (ii) used by reluctant voices as an excuse for not establishing more effective arrangements. We therefore recommend that any moves to reflect the needs of future generations through purely administrative arrangements are subject to an explicit agreement that they are an experimental, learning step on a path towards a more formal arrangement.

⁵⁴ Although it should be noted that the Commission, in its proposals on better regulation referred to above, suggests making the work of its Regulatory Scrutiny Board available to the Parliament and Council

7 Summary and conclusions

The EU's decision-making structures do not adequately reflect the interests of future generations. While the Commission has, in comparison to many national governments, demonstrated a capacity for long-term, strategic thinking, its impact assessment processes do not address issues of inter-generational equity. **There is a risk that increased emphasis on short-term costs, and on cost-benefit analysis, creates an even greater structural bias against future generations.** A guardian role, with a brief to alert policymakers to issues which engage the interests of future generations, is therefore more necessary than ever.

In principle, in establishing a new independent role with a legitimate place in decision making, **Treaty provisions are to be preferred.** They would provide a more visible signal of collective endorsement of the principle of solidarity with future generations, and a greater guarantee of permanence for the new body, enabling it to provide advice fearlessly. Even if a Guardian role has a Treaty basis, however, its impact on policymakers would not be guaranteed; it would be important to ensure that the role effective in practice, with a strong emphasis on the legitimacy of its interventions and on communication of its findings. The institutions (and individual post holders) should be pressed to commit to pay attention to its advice; commitments could be sought in confirmation hearings for new Commissioners.

In the absence of early Treaty negotiations, other opportunities should be taken to press for the creation of a new role. **Stand-alone legislation has potential benefits,** including a degree of security for the longevity of the institution, and securing the agreement of all three institutions. Similar caveats to those identified for Treaty change would apply on the need for ensuring continued relevance. However, the limited emphasis placed on sustainable development issues by the Juncker Commission suggests that in the short term formal legislative proposals are unlikely. A long-term campaign by civil society organisations, demonstrating the relevance and importance of such a role, is therefore likely to be needed.

In the meantime, opportunities should be taken to push for the establishment of such a role through a less legally secure, more opportunistic route, provided broad buy-in from the institutions and political groups can be secured, and provided it is established in the perspective of moving to a Treaty change or relevant stand-alone legislation in due course. **Introducing provisions into sectoral legislation looks unlikely to be attractive,** given the problem that the scope of the role would be limited by the scope of the legislation. Adapting the Commission's proposal for **an Inter-Institutional Agreement on better regulation appears to be a potentially attractive vehicle for short-term progress,** particularly given the risks of adopting an IIA which *fails* to address long-term sustainability issues. We therefore recommend that groups interested in establishing a Guardian for Future Generations make a concerted push to amend the Commission's proposal in this direction.

As a fall-back, ad-hoc administrative arrangement (for example, an EP secretariat role reviewing proposals from the Commission, or suitable changes to the Commission's Regulatory Scrutiny Board) would be of value. However, they are unlikely to create broad buy-in from the institutions, and could weaken the case for a more formally established and independent body. We therefore recommend that any such approach is positioned as a step in the perspective of moving to a Treaty change or stand-alone legislation in due course.

