

The Brexit Papers



Environmental Law

Paper 22



Bar Council Brexit
Working Group
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**THIRD
EDITION**



Brexit Paper 22: Environmental Law

Summary

Repatriating environmental policy on departure from the EU is a task that cannot be underestimated in terms of its complexity and scale. Many environmental issues cannot readily be contained within national borders. In addition, protection of the environment requires that international and national environmental obligations are complied with, through an effective system of domestic enforcement.

The Bar Council urges the Government to take the following steps:

- Commit to long-term stability of environmental policy through creation of enforceable domestic commitments and an independent domestic enforcement mechanism, underpinned by the judiciary, to replace the effective system of independent supervision and enforcement at EU level that will no longer apply after Brexit
- Maintain environmental standards and consistency of environmental policy and legislation by ensuring consistency with EU environmental standards, unless objective scientific reasons exist to depart from such standards, and recognising the need to avoid negative impacts on environmental protection in future trade agreements, and
- Agree to re-create in new treaty provisions the cross-border environmental obligations currently linking the UK and the EU27.

Current impact of EU environmental law

1. At present, almost all aspects of domestic environmental policy are bound up with EU policies and legislation, embedded in EU accountability, governance and legal structures. Nearly the whole of the UK's modern environmental law derives from EU and international instruments. Transferring responsibility for environmental legislation from the EU to the UK, as a result of Brexit, will have profound implications.

2. EU environmental legislation draws on a range of policy goals and Treaty provisions. The European Commission states¹ that environmental legislation comprises over 200 “major legal acts”, a figure that excludes product standards, labelling and other relevant internal market legislation, as well as the energy sector, agriculture and fisheries.
3. In most areas, the EU institutions and individual Member States share the power to adopt environmental legislation. In specific areas, notably marine conservation, the Member States have passed legislative power to the EU. According to DEFRA “over 1100 core pieces of directly applicable EU legislation and national implementing legislation have been identified” that relate to policy areas within the Department’s remit.²
4. There has always been significant overlap between European environmental and economic policy. Under the EC Treaty before amendment by the 1986 Single European Act, environmental measures were introduced with the aim of harmonising national laws that affected the functioning of the common market. Differing environmental regulations among Member States presented an obstacle to trade.
5. Later, a high standard of environmental protection became an object of the Treaties in its own right. That was an important step forward at a time when the international community (of which the UK is of course part) was setting increasingly ambitious binding environmental standards. By acting in concert, the Member States could maximise their contribution to meeting these internationally agreed goals. Developments such as the conclusion of the Paris Accord on climate change mean that effective and co-ordinated action by European nations – including the UK – remains as important as ever.
6. States are subject to obligations under international agreements, but each State also benefits from the obligations contracted by the others. Thus, the UK benefits from numerous cross-border obligations under international environmental instruments; some made between the EU Member States, some between the EU and third states. We will inevitably cease to benefit from these obligations after Brexit unless they can be replicated in new treaty

¹ European Commission, ‘European Neighbourhood Policy and Enlargement Negotiations’: https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en [accessed 21 March 2017]

² House of Lords, Select Committee on the European Union, Energy and Environment Sub-Committee, Brexit: Environment and Climate Change, DEFRA supplementary written evidence ECB0016, <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-environment-climate-change/Brexit-Environment-Climate-Change-Written-Oral-Evidence-Volume.pdf>

arrangements. For example, on the highly topical issue of air quality, whilst we may after Brexit maintain or even enhance domestic standards, we will lose our legal right to benefit from, and to secure enforcement of, comparable standards binding on other Member States under EU legislation.

7. EU law is interpreted by the CJEU and enforced by the Commission. The Commission can bring infraction proceedings which may result in the CJEU levying fines on Member States for breaches of EU law. Despite the UK's agreement to the high international standards which have driven much EU environmental legislation, successive UK governments have been slow or reluctant to properly implement key European measures. That has resulted in highly critical judgments of the CJEU: for instance, in relation to designation of protected habitats³ and discharge of untreated waste from inadequate sewerage facilities⁴. One consequence of EU law has been to enable the UK's own courts to require the Government to adhere to the standards it has agreed. It was the CJEU which ruled that the British courts have power to compel the UK Government to publish more stringent plans for the control of air quality to ensure in compliance with EU and domestic air quality targets.⁵

The importance of public machinery to enforce environmental standards

8. In most areas of law there are clear economic interests that will protect themselves, if necessary by going to court. This is not necessarily the case for the environment. In any one dispute, there may be no identifiable party with a justiciable interest in favour of environmental protection. Hence the importance of effective public machinery for enforcement of standards.
9. Areas where legal protection of environmental standards is particularly significant include:
 - Implementation of the Paris Accord
 - Maintaining and improving biodiversity
 - The circular economy and the UK's approach to waste policy
 - Water quality
 - Sustainable policies on agriculture and food, and
 - Air quality.

The particular risks of Brexit

³ *R v. SSE ex p RSPB*, C-44/95, [1996] ECR I-3843 -- the *Lappel Bank* case.

⁴ *Commission v UK*, C-301/10, 18.10.12; and almost identical findings nearly 5 years later in *Commission v. UK*, C-502/15, 4.5.17.

⁵ *R (Client Earth) v Secretary of State for Environment, Food and Rural Affairs*, C-404/13, 19.11.14.

12. The Government has stated that following Brexit, the UK will no longer be subject to the jurisdiction of the Commission or the CJEU. It will therefore be for domestic courts to enforce public authorities' and Ministers' compliance with environmental legislation. At present, there is no suggested mechanism – in the Government's White Papers on the Brexit process or elsewhere – to secure accountability to the extent that the Commission and the CJEU currently do. Consequently, there is a risk that there will be no independent and effective body to ensure that the Government meets environmental obligations.
10. This concern is magnified when considering the emphasis likely to be placed on trade and economics over the next few years. These policy interests have the potential directly to compete with environmental interests, particularly where different jurisdictions can have different environmental standards. The *Lappel Bank* case⁶ is a good example of the UK seeking to introduce – wrongly, as the CJEU found – economic considerations into a decision that should have been based solely on environmental factors. The cases on discharge of untreated sewage⁷ also involved the UK Government wrongly relying on the alleged resource implications of improvements as an excuse for failing to comply with the plain requirements of the law.
11. The Government has told the House of Commons Environmental Audit Committee that EU principles, such as the precautionary principle and “polluter pays”, will be imported into domestic law, at least in the short term.⁸ But in the longer term, there is a risk of growing regulatory misalignment with our European neighbours. It has been suggested that the Government would like to see the UK move towards a “risk-based approach” rather than committing itself to these European policies. Given the sheer scale of environmental law that will be affected by Brexit, subsequent shifts in UK policy risk giving rise to instability, legislative gaps, and uncertainty about environmental standards.
12. Many environmental policies, for example those relating to climate change, require policy stability across a long-term horizon. Furthermore, environmental policy impacts on economic stability. There are obvious risks to trade and investment if businesses trading with, or between, the UK and EU27 face diverging environmental standards for their products.

Recommendations long term

⁶ Above, footnote 3.

⁷ Ibid..

⁸ Response to Q289, Environmental Audit Committee, oral evidence on the future of chemicals regulation 7 March 2017,

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/eu-chemicals-regulation/oral/48515.pdf>

13. The UK Government should:

- 13.1. Ensure effective enforcement of environmental protection and standards through the creation of an effective, independent domestic enforcement mechanism, underpinned by judicial oversight and availability of sanctions for non-compliance
- 13.2. Co-operate with the EU and other organisations to ensure long-term environmental protection, especially in areas of activity that have a transboundary impact and require a united global approach
- 13.3. Recognise that development of UK environmental law and guiding principles is at risk if insufficient emphasis is placed on environmental protection during subsequent trade negotiations, and
- 13.4. Adopt a long-term approach to environmental protection, with due consideration of binding targets, consistent with the approach currently taken by the UK as set out in the Climate Change Act 2008.

Recommendations for a transitional arrangement

14. The UK Government should:

- 14.1. Ensure that UK courts continue to recognise past and future decisions of the CJEU prior to the UK's departure from the EU, and subsequently take an approach consistent with EU law as it stands at the date of Brexit
- 14.2. Align UK and EU environmental standards to assist the maintenance of cross-border trade
- 14.3. Continue to participate in, contribute to and influence the development of EU schemes for environmental protection, at least until the process of Brexit is complete and preferably afterwards
- 14.4. Ensure, so far as possible, medium-term stability and investor confidence in the environmental sector by avoiding legislative gaps and uncertainties in environmental protection, and
- 14.5. Recognise that the Great Repeal Bill is not an appropriate mechanism for altering the UK's approach to environmental regulation, either in the transition period or for the longer term. If the Government wishes to alter

policy post-Brexit, it should do so through new primary legislation with full Parliamentary scrutiny.

Brexit Working Group

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For further information please contact:

*Philip Robertson, Director of Policy or
Luke Robins-Grace, Senior Public Affairs and Communications Adviser
The General Council of the Bar of England and Wales
289-293 High Holborn
London WC1V 7HZ
Direct line: 020 7242 0082
Email: PRobertson@BarCouncil.org.uk
LRobins-Grace@BarCouncil.org.uk*