

Brexit and environmental law

Sarah Holmes *Legal Director, Bond Dickinson LLP*

Global and national awareness of the economic, social and wider impacts of climate change, resource availability and pollution has largely developed over the past 40 years, which is coincidental with the UK's period of membership of what is now the European Union. In the early years of membership, the UK was known as 'the dirty man of Europe'. That is no longer the case. Much of the environmental regulatory framework that has delivered so much of this benefit derives from the body of European environmental law that has developed not simply to set a level playing field for businesses trading within the Single Market, but to achieve the EU's longer-term vision of a safe and sustainable society.

The future direction of environment and energy policy and law in an independent UK would be heavily influenced by new trading arrangements, international treaty obligations, devolution and the political make-up of the governments and administrations in the UK. As the referendum draws closer this article looks at potential implications of a Brexit (Britain+exit) vote for the extensive body of environmental law that applies in the UK.

Environment, trade and the potential for change

The question to be posed to voters in the forthcoming referendum is binary: in or out? Voters will not have an opportunity to select their preferred option for a post-Brexit UK. If the majority vote is in favour of Brexit then it will be up to the incumbent government to determine the nature of future relationships. It is conceivable that negotiations could span successive governments, depending on the length of time taken to negotiate the withdrawal agreement. Furthermore, through its membership of the EU, the UK trades with other countries under more than 50 trading agreements. These, as well as replacement EU trading arrangements, would need to be the subject of separate, new trading agreements unless the UK relied upon its membership of the World Trade Organization. Where would this leave environmental law in the UK?

The extent to which Brexit could deliver sovereignty for the UK in terms of environmental law would not be known for some time after a referendum vote in favour of Brexit. Much would depend on the nature of replacement trading arrangements with the European Union, which could range from retention of access to all or part of the Single Market to leaving the Single Market altogether and instead negotiating new free trade arrangements with the EU. All options have different implications for UK environmental law.

The terms that the post-Brexit trading arrangements with the EU would determine include:

- The level of access the UK retained to the Single Market, whether free or market restricted movement of manufactured goods, agricultural and fishery products, and services. This would be influential in the extent to which the UK should expect to continue to comply with EU environmental law.
- The extent to which there would be free movement of people between the UK and the EU, including within the environmental services sector.
- How much the UK contributed to the EU budget for access to the Single Market and/or paid in tariffs for access to agreed EU markets – and reciprocal provisions for trading partners.
- The extent to which existing and future EU environmental laws would apply to the UK and be enforceable by the EU (note that all exports to the EU must comply with product quality standards).
- The extent to which the UK would have representation in future EU environmental law and policy.
- The extent to which the UK could negotiate its own trading agreements, including any environmental provisions, with other nations.

The replacement trading arrangements would be negotiated separately from, and are outside the scope of, the withdrawal treaty. In the absence of agreed UK–EU trading arrangements if Brexit takes effect, the World Trade Organization's General Agreement on Tariffs and Trade (GATT) would apply.

The EU, the UK and the environment

Under the EU subsidiarity principle, action should only be taken at EU level when objectives cannot be sufficiently achieved by Member States acting alone. The growth of EU environmental law reflects the cross-border nature of many environmental issues and the desirability of preventing countries from seeking competitive advantage by allowing harmful environmental practices. EU environmental law has developed to set common rules for product standards, to require that polluting activities are regulated through permits and to set targets (eg improving air quality, reducing landfill of waste, reducing greenhouse gas emissions and raising bathing waters standards) to influence investment and behaviour. This, in turn, has enabled environmental objectives to be included in competition and trade arrangements and has provided longer-term strategic frameworks and market scale to encourage investment in innovation, new markets and technologies, as well as the generation of employment and economic growth.

The European 7th Environment Action Programme is currently guiding EU environment policy for the period

to 2020. It focuses on the protection, conservation and enhancement of the EU's natural capital, turning the EU into a resource-efficient, green and competitive low-carbon economy, whilst also safeguarding citizens from environment-related pressures and risks to health and wellbeing. Proposed legislation and amendments to existing EU legislation are focused on the following 'enablers' to help deliver these goals:

- better implementation of legislation
- better information by improving knowledge base
- more and wiser investment for environment and climate policy and
- full integration of environmental requirements and considerations into other policies.

The UK has not been alone in challenging the EU on unnecessary burdens from EU legislation. A number of environmental directives, including the Habitats Directive, have been and are under scrutiny by the European Commission as part of its Regulatory Fitness and Performance Programme, strengthened following the launch of the EU Better Regulation Agenda in May 2015.¹ Some changes to EU environmental law have been proposed and more are expected.

The UK is active in the development of EU environmental policy and law. In the recent EU consultation on the Circular Economy package of measures, the UK made clear that Commission proposals should be 'developed with Member States, allow flexibility, ensure that costs are justified by expected impacts, avoid unnecessary burdens on business and create an environment that welcomes innovation, improves resource productivity and helps increase business competitiveness'. In some areas of environmental law the UK has gone further than the minimum standards required by European law. The UK Government's Better Regulation drive has identified a number of provisions for relaxation, for example from 1 April 2016 the removal of the requirement to register premises in England that produce hazardous waste.²

Independently of EU environmental law, the UK became the first country in the world to introduce legislation to set legally binding carbon reduction targets. The Climate Change Act 2008 and the Climate Change (Scotland) Act 2009 are examples of UK environmental laws that do not rely on the European Communities Act 1972 for their effect and so would not require legislation to remain effective post-Brexit.

UK environmental law post-Brexit

Whilst the nature of the UK's trading relationship with other countries will be determined by future agreements, it is possible to consider the likely status of the different EU environmental legal and policy instruments post-Brexit, together with the scope for changes to be made to environmental laws within an independent UK.

The Treaty on the Functioning of the European Union, Article 11

The Treaty on the Functioning of the European Union (Treaty) would cease to have effect two years after the UK gives notice of its intention to leave the EU, unless either an extension is unanimously agreed by all Member States or the withdrawal treaty between the UK and the EU has been completed. Notice of withdrawal could be given some months after the referendum to give time for the EU and the UK to prepare for the complexities involved. The withdrawal treaty (which is separate from any new trading agreement) would need to be approved by a qualified majority of the Council and of the Parliament of the EU (55 per cent of EU country votes, which must represent at least 65 per cent of the total EU population).³ Pending withdrawal, the UK would be subject to EU environmental laws including new provisions, amendments to existing laws, enforcement action by the European Commission and judgments of the Court of Justice of the European Union (CJEU).

Article 11 of the Treaty requires that 'environmental protection requirements must be integrated into the definition and implementation of the Community policies in particular with a view to promoting sustainable development'. However, Article 11 does not apply to domestic legislation in Member States, so would make no difference to law-making in the UK post-Brexit. Article 11 would continue to apply to policy and law developed by the EU post-Brexit.

EU regulations

EU regulations on product standards for goods exported to the EU would need to be complied with. EU regulations are immediately enforceable in Member States without the need for national legislation. All would cease to apply in the UK on withdrawal from the EU. Under any departure situation the UK would need to legislate if it wished to set the same binding standards for goods within the UK market as for products exported to the EU. Alternatively, UK jurisdictions could choose to relax product standards so that different (lesser or greater) standards were applied for goods produced or imported for consumption within the relevant UK jurisdictions. It would be possible for different UK jurisdictions to require different product standards. One example of an EU product regulation is Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), which prohibits the entry into the Single Market of any chemicals, substances and products that do not meet specified requirements. Other EU regulations control hazardous substances in electrical products, vehicle emissions and fuel quality.

¹ http://ec.europa.eu/smart-regulation/better_regulation/documents/c_2015_3261_en.pdf.

² <https://www.gov.uk/government/organisations/better-regulation-delivery-office>.

³ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/144960.pdf.

EU directives

Compliance with EU directives would depend on future trading arrangements with the EU. Most EU environmental law takes the form of directives, which are binding as to the result to be achieved but leave Member States a choice of form and methods. Some EU product standards, eg packaging and packaging waste, are set out in directives and, like EU product regulations, would need new UK laws if the standards were to be maintained within the UK market. Directives are usually transposed in the UK by statutory instruments. Along with an array of competences that include urban planning, housing, economic development and agriculture, forestry and fisheries, responsibility for environmental policy and law is devolved to each of Scotland, Wales and Northern Ireland, who can act independently albeit within the common framework of EU law. Some transposition instruments, such as the Energy Savings Opportunity Scheme Regulations 2014, apply across the UK. In contrast, England, Scotland, Wales and Northern Ireland have separately transposed the EU Waste Framework Directive, with some differences between jurisdictions; England is the only UK jurisdiction not to have the power to regulate for the separate collection of food waste.

Most – but not all – environmental directives are transposed under section 2(2) of the European Communities Act 1972. Some of the UK environmental laws refer to EU directives for definitions and other provisions, for example the definition of waste in Article 3.1 of the Framework Directive on waste. Legislation would be needed to avoid legal vacuums and to ensure that the UK complied with its existing international environmental treaty obligations, although these are generally less demanding. The sheer scale of environmental law within the UK and its reliance on EU law would make a law-by-law assessment of changes a significant and time-consuming task.

It is reasonable to assume that the UK would not be permitted access to the EU Single Market under conditions that would enable it to gain a competitive advantage by reducing environmental (and other) standards. If the post-Brexit UK sought access to the Single Market along the lines that Norway does then the incorporation of future EU environmental law to which the UK would be subject after Brexit would need to be addressed, as would the status of decisions of the CJEU on relevant environmental law. If the UK was required to comply with existing and future EU environmental law then logically the CJEU would remain the highest authority for the interpretation of such laws, whether made before or after Brexit. The new trading arrangements would need to address whether the UK would be able to seek rulings from the CJEU itself.

If a post-Brexit UK sought to trade with the EU through one or more free trade agreements then it would not be subject to EU environmental law. Brexit would provide an opportunity for successive governments and administrations within UK jurisdictions to form their own environmental policies and agendas, revoking or amending or retaining existing environmental laws accordingly. There would be a period during which the withdrawal treaty

would be negotiated and the UK would remain a Member State of the EU, in principle required to implement and apply EU law. Prior to withdrawal, legislation would be needed to avoid vacuums in existing environmental laws on the revocation of the European Communities Act 1972.

Whilst the CJEU would no longer have jurisdiction in respect of the interpretation of EU environmental law, it is not clear what status judgments of the CJEU would have in respect of EU derived environmental law retained in a free trade agreement Brexit. Although the UK would no longer be subject to EU environmental law, much of such law is incorporated within UK law and already the subject of judgments of the CJEU that UK courts have applied where relevant. It may be that a distinction would be drawn between those cases where UK courts have already applied CJEU judgments and those cases where it has not, although the rationale for such a distinction would not appear logical. Environmental law would not be the only area of law to confront such issues, and Parliament would need to introduce legislation to minimise the potential for economic and environmental damage during the transition from EU Member State to independent state.

International treaties

UK obligations under international treaties would be unaffected but where the UK relies on EU legislation to comply, eg on climate change, new UK legislation would be required. Following Brexit the UK's emissions reductions commitments under the UN Framework Convention on Climate Change would need to be removed from the EU obligation and a UK nationally determined contribution (NDC) submitted to the UN. Depending on the terms of the trading agreement(s) reached with the EU the UK may or may not remain subject to EU renewable energy and energy efficiency targets, and may or may not participate in the EU emissions trading scheme. Withdrawal from the latter would require transitional arrangements for participants to be agreed.

EU environmental policy

The UK would lose influence over EU environmental policy, which is developed by the European Commission in consultation with Member States. The UK has been active and relatively effective in contributing to the development of EU environmental law and policy. The trading agreement between the EU and the European Economic Area (EEA) allows EEA Member States to be consulted on proposals but their views have no formal influence. A new trading arrangement with the EU could include provisions for consultation with the UK.

Sovereignty

The extent of true UK sovereignty over environmental law and policy will depend on new trading arrangements. Following Brexit UK jurisdictions could be empowered to develop their own environmental visions and associated policy and legislation, to the extent compatible with inter-

national treaty obligations and new trading agreements with the EU, as well as with other countries. The EU has strict controls on the growing of genetically modified crops, using the precautionary principle to require detailed, evidence-based evaluations on a crop-by-crop basis. Subject to the terms of any trading agreements, an independent UK could decide to take a different approach – more lenient or stricter – although this could lead to different approaches within the UK if devolved administrations disagreed with each other.

The much criticised (and currently undergoing some reform) EU Common Agricultural Policy and Common Fisheries Policy would cease to apply within the UK on withdrawal from the EU. As agriculture and fisheries are devolved competences, future UK policies would need to be negotiated domestically, along with replacement funding streams. Tariffs to be applied to agricultural and fishery products exported from the UK to the EU, and vice versa, would be the subject of the future trade agreement(s). Reciprocal agreements with other countries would be needed to permit UK fishing boats to operate in their waters, including any controls over sustainability of fish stocks.

Devolution

Devolution within the UK poses particular challenges for a post-Brexit situation. Unless a joint UK environmental regulatory framework is established post-Brexit to set common standards and to provide longer-term stability, the loss of the common EU environmental law framework could lead to greater divergences between regulatory regimes in UK jurisdictions, seeking differentiation and/or competitiveness, whether in the interests of encouraging new investment or in reducing regulatory requirements. For example, the waste law aspects of developing a circular economy are devolved. Wales and Scotland are actively promoting circular economy policies in contrast to Defra's decision to 'step back' from implementing any new policies concerning waste and recycling in England. It is conceivable that businesses operating across UK jurisdictions may face more red tape post-Brexit owing to the need to navigate a greater array of differences between UK jurisdictions, freed from the common framework provided by EU environmental law. By way of comparison, policy areas within the UK that are devolved and not within the competency of the EU include education and town and country planning.

Town and country planning

EU law has little influence over town and country planning in the UK, which under the subsidiarity principle is largely left to the competences of Member States. Two aspects of environmental law that do have an effect on development control within Member States concern the provision of environmental information to inform consenting decisions and the attainment of specified standards, for example in respect of air quality, water quality, habitats and species.

The process of environmental impact assessment (EIA), now set out in Directive 2011/92/EU, is intended to ensure

that prior to the grant of development consent for certain projects that are likely to have significant effects on the environment the decision-maker is presented with full information on such effects, gathered during a process in which the public is consulted along with statutory consultees. Revisions to the 2011 EIA Directive are set out in Directive 2014/52/EU, which is required to be transposed by 16 May 2017. Following Brexit, it would be up to each of England, Scotland, Wales and Northern Ireland to retain as much or as little of the EIA process as they wished in their respective planning systems. Since it would be extremely unlikely that a withdrawal treaty could be negotiated so quickly, with only a year to go until transposition of the 2014 EIA Directive is required it is likely that the requirements would fall to be transposed even in the event of a Brexit vote.

Protections afforded by the Habitats Directive and the Wild Birds Directive are seen by some as vital for the protection of habitats and species across the EU but by others as impediments to development. The Habitats Directive prohibits the grant of consent for any development that would adversely affect the integrity of a European site of nature conservation importance (forming part of the pan-EU Natura 2000 network). It is the only legal provision within any UK planning regime where the outcome of an assessment is capable in law of determining whether or not consent can be granted. Post-Brexit, it would be up to individual UK jurisdictions to decide whether they retained the substance of these directives.

The balance of competences between the EU and the UK

Between December 2012 and December 2014 the Coalition Government conducted a review of the UK's relationship with the EU. This led to the publication of 32 reports.⁴ The review was not undertaken to predetermine or prejudge proposals for changes to the EU or about the appropriate balance of competences. Many stakeholders were consulted.

The Executive Summary to Report 10 on Environment and Climate Change stated that:

... the Government has recognised the need for an open-minded debate around EU competence on the environment and climate change within the context of finding an appropriate balance and exploiting synergies between the need for economic growth and a sustainable approach to the future. Whilst there can be tensions between environmental standards and competitiveness, the evidence paints a more nuanced picture in which some sectors of business welcomes some degree of cross-EU environmental regulation. For example, EU targets on waste and on climate change were seen by many as providing greater certainty for investors and an important spur for growth in the rapidly expanding environmental and low carbon services and products sector. In addition, EU regulation on chemicals and other environmental

⁴ The reports are available at <https://www.gov.uk/guidance/review-of-the-balance-of-competences>.

standards was also seen by many businesses as important in providing a level playing field across the Single Market.⁵

An overview

Environmental law at international, EU and UK level has evolved from controlling point source pollution in the 1970s and 1980s to setting up mechanisms to intervene in markets and change behaviour. Whilst a post-Brexit UK would remain subject to international treaty obligations, these are not generally as demanding as EU obligations and lack the more robust enforcement framework that applies to Member States who fail to comply with EU law. Further, citizens have relied on EU environmental law to seek to protect and improve air quality, water quality and decision-making quality in the UK.

Environmental lawyers will recall the trumpeting of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage as the first piece of legislation to seek to protect the environment for its own sake and not simply because of a connection to ownership of property and other assets. If the UK remains within the EU or, following a Brexit, the Single Market, then the application of EU environmental law will continue, although there would be a need for transitional legislative arrangements to be put in place. In contrast, a post-Brexit UK that relied on free trade agreements with the EU would not be subject to EU environmental law. Such a position would give rise to the need for substantive UK legislation in the short term in order to determine the direction of travel for environmental protection and development in each of England, Scotland, Wales and Northern Ireland.

The challenges of campaigning for change in a referendum with a binary vote include the impossibility of presenting a manifesto with commitments. Further, with no elections of individuals there is no mechanism to hold anyone to account. This means that it is not possible to do more than identify potential outcomes for environmental law in the event of a referendum vote in favour of Brexit. To this is added the reality of negotiating agreements: trade agreements between nations are little different in principle to commercial contracts. Parties will seek to negotiate the best outcome for themselves, using tactics that will assist them the most. Each will have different strengths and weaknesses. Playing fields are not level to start with and can change as negotiations progress.

The process for withdrawal from the EU set out in Article 50 of the Treaty on European Union (TEU) does not include the process for negotiating new trading arrangements. It is conceivable that the pressures that

would be focused on the UK as the Article 50 two-year period, or unanimously agreed extension, approached could be used by one or more Member States, whether seeking to secure concessions from the UK or from other Member States whose need or wish to enter into a trading agreement with the UK is greater. It makes it even harder to predict the future of environmental law in an independent UK: would a UK government with less commitment to environmental standards that sought a free trade agreement rather than entry into the Single Market nonetheless be willing to accept some level of conformity with EU environmental law in order to secure other objectives?

There has been no suggestion that environmental standards would generally strengthen in an independent UK, although the publication in March 2016 of a code of practice entitled 'Household Recycling in Scotland' by Zero Waste Scotland⁶ goes beyond the ambitions of the EU Action Plan for the Circular Economy.⁷ Indeed, the extent to which devolution has taken place over recent years adds complexity: the Treasury holds crucial purse strings but there is considerable scope for different environmental law and policy to develop further within the separate UK jurisdictions without the common legislative and policy framework currently provided by the EU.

Whilst it is not possible to assess with any degree of confidence the future of environmental law and policy in an independent UK it is clear that a Brexit vote would give rise to a need for a new and significant domestic legislative programme. Environmental law would be one of many areas on which the UK Government as well as the Scottish Government, the Welsh Assembly Government and the Northern Ireland Executive would need to bring forward legislation to avoid vacuums, to ensure that regulators retained the ability to apply and enforce the law, and to provide the certainty and confidence in regulated markets such as waste and energy that investors and operators require to continue to trade and operate. In the longer term, there would be a need to develop independent policy framework within the UK for the legislative framework to pursue. In the absence of confidence in a long-term strategic framework such as that provided by EU environmental action programmes, environmental law and policy could become more politicised and so prone to changes as governments change across the UK jurisdictions.

Whether an entity will fare better in the environment of an independent UK or a UK within the EU will be determined by many factors in addition to environmental considerations. Whatever the outcome of the referendum, it will remain the case that those entities likely to be most successful are those best able to adapt to their wider social, economic and environmental surroundings.

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf at 6.

⁶ <http://www.zerowastescotland.org.uk/content/scotland-and-circular-economy-report>.

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1453384154337&uri=CELEX:52015DC0614>.