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Brexit Briefing: The Implications for UK Environmental Law

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Brexit Briefing: The Implications for UK Environmental Law

Executive Summary

- On 29 March, the UK Government triggered Article 50 of the Treaty of Lisbon meaning that the UK will leave the EU on 29 March 2019 at the latest (leaving aside the issue of whether the UK could withdraw its notice).
- The majority of environmental law in the UK derives from the EU. Although the UK's White Paper on the Great Repeal Bill states that the UK will ensure that "the whole body of existing EU environmental law continues to have effect in UK law", a third of environmental laws may not be transposed.
- International commitments have been an important driver of UK environmental law, but these will also need to be adjusted to reflect the UK's new status. There is potential for UK law to get "left behind" due to the speed at which much environmental law evolves.
- Environmental compliance is, however, non negotiable for the EU; a European Parliament Resolution adopted on 5 April 2017 stipulates that any future agreement between the EU and the UK should be conditional upon the UK adhering to the "the Union's legislation and policies, in, among others, the fields of the environment, climate change....".
- On 13 July, the Government published the Repeal Bill that will facilitate the UK's departure from the EU in 2019. The bill will convert the existing body of EU law into national law on the day of departure.



UK and EU environmental law

The EU is the driver for much of the UK's environmental policy: up to 80% of environmental regulation derives from the EU and up to 25% of all EU legislation relates to the environment. This means that untangling UK legislation from EU legislation will be a long and complex process.

EU law takes two main forms: directives which need to be enacted by the Member States into their own national law, in the UK by way of a primary Act of Parliament or a secondary statutory instrument, and Regulations which are "directly applicable" in the Member States, that is, they apply as written and the Member State does not need to enact a national law to make them effective. In the field of environmental law, both directives and Regulations are used.

Many UK implementations of EU environmental directives are statutory instruments enacted under the authority of the European Communities Act 1972. The Government has announced its intention to repeal this key piece of legislation via the "Great Repeal Bill". The bill must also therefore re-enact the statutory instruments based on the European Communities Act, which would otherwise also lose effect when the Act is repealed. UK law will become a snapshot of EU law as it exists on the day of the UK leaving the EU, though with the ambiguous caveat that EU legislation will be transposed into UK law "wherever practical".

Former Secretary of State for the Environment, Andrea Leadsom, said that around a third of all environmental legislation may not simply be "rolled forward" with just technical changes. It is not yet clear what will happen to this significant body of law in the short term. Mostly it will be after the exit that the UK government will conduct its substantive analysis of EU-derived legislation to determine what "fits" the new UK landscape and is aligned to national priorities, and it is at this point that the possibility of divergence from EU policy increases. Areas where the UK has previously opposed stricter European controls such as renewable energy, where it has fallen behind EU targets such as air pollution, or where it currently acts under a European umbrella, such as emissions reductions, could all be put on a different track from that mandated by the EU.

Policy indicators

Discussion of environmental policy was notable by its absence in the Referendum campaign and subsequently. Some of the most important comments have been drawn out by oral evidence provided to Parliamentary committees. The House of Commons Environmental Audit Committee (EAC) launched a major enquiry into "The Future of the Natural Environment After the EU Referendum" less than a month after the referendum decision. The inquiry focused on terrestrial biodiversity and environmental issues linked with land management and agriculture, but comments of wider interest were made by those contributing to the inquiry and the report itself, published in January 2017.

In September 2016, as part of that inquiry, representatives of the Department for Environment, Food and Rural Affairs (DEFRA) and the Brexit Department were questioned about the Government's environmental policy intentions but resisted any commitment on areas for change or the likelihood of the contentious air quality standards being upheld. While this is not too surprising given the Prime Minister's intention not to "reveal her hand" ahead of the formal opening of the negotiations with Brussels, it provides little comfort to those fearful of a return for the UK to being the "dirty man of Europe".



DEFRA has consistently repeated the Conservative party manifesto pledge, that it intends to “leave the environment in a better state than we found it”. What this means in practice is expected to be revealed when DEFRA publishes its 25 year plan on the Natural Environment which has been delayed since July 2016 and is not now expected until the second half of 2017.

Major speeches by the Prime Minister have not addressed environmental policy. In November 2016, Government Minister, Robin Walker, said during a speech that “We will use the unique opportunity exiting the EU affords to design the most effective framework in the UK for driving environmental improvement - delivering on our goal to put Britain at the vanguard of tackling global environmental challenges, from conservation to climate change”. On the other hand, some commentators have interpreted the Prime Minister’s statement that she wants to “remove as many barriers to trade as possible” as signalling that environmental and product safety standards could be some of the first to be culled.

In line with the Prime Minister’s comments, during a House of Lords Energy and Environment Sub-Committee hearing in November 2016, a Government representative from the Department of Business, Energy and Industrial Strategy said that there are “no plans to set nationally binding targets in key areas such as renewable energy and energy efficiency”. Historically, UK national legislation and the UK’s preference expressed during EU law-making has been against the setting of legally binding targets (the Climate Change Act being the notable example where national legislation does set targets), preferring flexible means of achieving objectives on economic grounds.

In December 2016, Greener UK, a group of major environmental NGOs with a combined membership of almost 8 million launched the “MP’s Pledge for the Environment”. It offers some specific benchmarks for maintaining or improving the environment in the UK, in contrast to the general comments mostly made by the Government. At the time of writing, some 210 MPs have signed the pledge, representing a little under a third of all UK MPs. Though clearly not legally binding, this level of support is a sign that Parliament will not have free rein to strip back environmental laws, even if it wanted to.

The EAC inquiry’s final report calls for the enactment of a new Environmental Protection Act, to guarantee the same or better environmental protections and to ensure that legislation which cannot be “cut and pasted” is captured effectively. It should also guard against the creation of “zombie legislation” – laws which exist in principle but in practice have little or no governance structure or enforcement mechanisms since these exist only at EU level. The report further cautions against the trading away of environmental protections, food safety standards and animal welfare as part of the Brexit negotiations or subsequent trade deals.

The Government’s Brexit White Paper published on 2 February 2017 makes only brief reference to environmental policy, and did not reveal anything new about the Government’s intentions for this policy.



Keeping pace with EU environmental protections

Environmental protection is an area of law that moves more quickly than most, due to evolving policies, scientific and technical advancements, and the need to reflect international arrangements. For these reasons, it is not ideally suited to the Great Repeal Bill mechanism which results in a snapshot of EU law as it exists on the day of the UK leaving the EU.

As an example, the European Institutions have been debating a resource-efficiency proposal, the Circular Economy Package, since 2014. The European Parliament would like the Circular Economy Package, and specifically the Directive on Waste, to be the legal basis for EU ecodesign regulations to include mandatory resource-efficiency requirements beyond the energy efficiency requirements to which they are currently confined. If this happens, EU product legislation could rapidly overtake UK legislation; the UK Green Alliance has described this as the UK becoming “a museum for EU law”. UK products will not be able to access the EU marketplace unless they adhere to these advancing EU standards, regardless of whether the UK stays in the single market or not (with “not” being the more likely option).

Differing standards between the UK and the EU act as non-tariff barriers for UK exporters to the EU, for all types of product from meat to televisions, and may encourage new market entrants to the UK, from nations with higher standards, raising competition further. On the other hand, if UK standards are lowered, it will make the EU less inclined to enter into any kind of mutual recognition agreement with the UK whereby products compliant with UK rules may be deemed compliant with EU rules and vice versa. The EU is also likely to concern itself with any other mutual recognition arrangements the UK might conclude, in order to prevent products not compliant with EU standards from entering the EU via the “back door”.

International arrangements

Via its EU membership, the UK is party to several international agreements on environmental matters, notably around climate change (such as the UN Framework Convention on Climate Change and its associated protocols and agreements) but also, for example, on the right to information and access to justice in environmental matters (the Aarhus Convention), hazardous substances (the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides) and waste (Basel Convention on Transboundary Movement of Hazardous Waste). The two main issues here are how the UK will honour its commitments under these agreements, and how it will manage its participation post-Brexit.

Most of these international commitments are implemented in the UK via legislation derived from the EU. This will need to be copied across to the UK statute book via the Great Repeal Bill, and even where this “cut and paste” is deemed not “practical”, logically these regulations would need to be prioritised for transposition as the UK’s international obligations will not fall away at the moment of Brexit. At a minimum, adjustments will be needed in cases where the UK is reporting responsibility as the EU currently reports on behalf of its Member States and in future the UK will need to report on its own behalf; similarly, some agreements (such as the Paris Agreement on Climate Change) require a financial contribution that is currently paid by Member States through the EU, and the UK will need to negotiate a new national contribution. The question of governance and



accountability for international obligations is inextricable from the same question for EU obligations – it is yet to be determined how the UK will replace the EU mechanisms.

Certain agreements are “mixed” in that the UK is a signatory both via its EU membership and also as a country in its own right. These apply where the agreement in question covers matters both of EU and national competence, and the process of unravelling these agreements in a post-EU UK is expected to be particularly complex.

It was often said by “Remainers” during the Brexit campaign that Britain would lose its influence in the negotiation of international agreements if it left the EU. This might be viewed as a particular risk in climate change or environmental matters where the UK has traditionally been a strong voice. How the UK handles its national environmental policy is likely to have a strong bearing on how far it can continue to assert itself as a leader on the global stage.

Specific aspects of environmental policy

Climate change

Independent of the EU, the UK has its own, legally binding, ambitious commitments to reduce carbon emissions via the Climate Change Act 2008, and its Fifth Carbon Budget will reduce emissions to 57% of 1990 levels by 2030. EU programmes to reduce carbon emissions - such as the EU Emissions Trading Scheme - will be impacted by Brexit. The Government may need to introduce new requirements, schemes or incentives for emissions reduction in order to stay on track to meet its reduction targets.

Theresa May’s cabinet has organised itself to lower the priority of climate change. This is a significant change from previous governments as the UK has traditionally been a loud voice in favour of tackling climate change. The responsibilities of the “Department for Energy and Climate Change” have been rolled into the new “Department for Business, Energy and Industrial Strategy”, said to indicate the cross-cutting rather than stand-alone nature of energy and climate policy though sceptics may not be convinced by this explanation.

By contrast, in November 2016 the UK delivered on a commitment to ratify the Paris Agreement by the end of 2016, following on from the EU’s ratification in October.

Energy

The EU is in the advanced stages of establishing a single market for gas and electricity, aimed at ensuring low-cost and reliable supply for consumers across the EU by enabling supply from other countries. EU legislation in the field regulates access to this single market and includes safeguards against distortion of the energy market from a competitive perspective as well as protection measures for energy consumers.

Renewable energy is one area where the UK has not always agreed with EU policy and has acted to prevent further increases to renewables targets set by the Renewable Energy Directive, and indeed looks likely to miss existing 2020 targets. Exit from the EU



should be complete by that time, and therefore the UK ceases to be answerable to the EU if it fails to meet the target.

The withdrawal of the UK may actually stimulate renewables markets in other EU countries - the UK will no longer contribute to the EU-wide renewables targets, meaning that the remaining 27 countries can expect their “burden-sharing” targets to be revised upwards to take account of the reduced number of countries contributing to the overall target.

The European Commission is proposing higher targets for renewable energy. The timetabled date for entry into force of the revised Directive across EU Member States is 30 June 2021. The UK expects to have definitively left the EU by that time, and a directive not yet on the EU statute books is unlikely to be copied across to UK national legislation via the Great Repeal Bill. If the UK wants access to the EU internal energy market, of which this new directive will be an important driver, it may have to accept the terms in any event.

On the other hand, the UK Government looks set to evolve its energy policy to drive industrial growth, particularly by minimising business energy costs, according to the industrial strategy green paper released in January 2017. Energy storage is likely to play a significant role, and is an area where the UK could potentially pull ahead of the EU, with neither yet having an established plan for promoting or regulating this energy storage technology. A roadmap is likely to provide more detail, later in 2017.

Chemicals

On completing its major inquiry into the future of the natural environment after Brexit, the EAC almost immediately launched an inquiry into “the Future of Chemicals Regulation After the EU Referendum”. In 2006, the EU put in place a comprehensive chemicals management regime, known as “REACH”. The cost of compliance for the chemicals industry has been estimated at up to €5bn, with much of this already having been expended in the earlier stages of implementation of the law. Legislation is in the form of a large number of directly applicable Regulations which do not need national legislation in order to be effective and which will almost certainly fall into the category of EU legislation which cannot easily be cut and pasted into UK law.

The structure of the legislation itself is complex, with one major regulation amended with alarming regularity, several supporting regulations on matters such as fees and testing, and a very large number of guidance documents. REACH is administered via a European body and only EU companies can participate in certain aspects of it. Any person wishing to import chemicals or chemical-containing products into the EU must however comply with its provisions, where necessary incurring the cost of engaging specialist EU service providers to undertake the necessary procedural steps.

The chemicals industry is estimated to be the UK’s largest manufacturing exporter and loss of the European market, said to be worth €673bn, could have serious consequences for the UK economy. Despite this, the UK Government is keeping its options open, not ruling out a divergent policy on chemicals regulation post-Brexit.



Preparing for Brexit

The Repeal Bill

On 29 March, the UK Government gave formal notice to the European Council that it intends to leave the European Union, in line with Article 50 of the Treaty of Lisbon. The ultimate consequence of this is that the UK will leave the EU on 29 March 2019 at the latest (leaving aside the issue of whether the UK could withdraw its notice). The immediate consequence was that both the UK and the EU published papers revealing key points of their strategy in the Brexit negotiations and providing some indications of what a post-EU UK may look like.

Prime Minister May's Article 50 letter to EU Council President Donald Tusk did not mention the environment, energy, or climate change. It reiterated the intention to convert the body of existing EU law into UK law, wherever practical and appropriate. The Government intends to "avoid any cliff-edge", minimising disruption and providing as much certainty as possible.

The UK's White Paper on the Great Repeal Bill, published just after the Article 50 notification, repeated that the Government is committed to improving the environment within a generation. The White Paper states that the Great Repeal Bill will ensure that "the whole body of existing EU environmental law continues to have effect in UK law". Subtly different from previous statements, it seems a safe assumption that this will be qualified by "wherever practical and appropriate". DEFRA have said that up to a third of environmental laws cannot easily be copied and pasted in this way.

The European Council sent draft negotiating guidelines to the 27 remaining Member State governments on 31 March. The guidelines state that any future free trade agreement must "encompass safeguards against unfair competitive advantages through, inter alia, fiscal, social and environmental dumping". In this statement, the Council highlights environmental matters as an important factor in the negotiation of a future agreement, but it does not naturally follow that the Council will require the UK to adhere to the EU's environmental standards, as other arrangements could theoretically constitute satisfactory "safeguards".

On 5 April, the European Parliament adopted a resolution on Brexit negotiations. Critically, the EP believes that any future agreement between the EU and the UK should be conditional upon the UK adhering to the "the Union's legislation and policies, in, among others, the fields of the environment, climate change...". At the moment, we have no indication that the UK intends to do anything other than maintain EU standards, but this resolution makes clear that the EU sees environmental compliance as non-negotiable. The EP resolution is not binding, but the EP retains the right of veto over any proposed "divorce" agreement in 2019.

Both the draft negotiating guidelines and the EP resolution mention the EU's opposition to sector-specific agreements; this is in line with previous position of the EU that, for example, the financial sector would not be allowed to trade on preferential terms.

In parallel to preparing for Brexit, the UK Government must also continue to engage fully with the EU decision making process – the Commons Select Committee on European Scrutiny noted recently that "the European Union is not standing still while the UK negotiates Brexit". Several key pieces of environmental legislation are moving through



The Repeal Bill is published

the European institutions – a Regulation on conflict minerals was recently agreed and expected to apply from 1 January 2021, and a package of draft legislation on the circular economy continues to evolve. The pressure that these competing workstreams place on all UK government departments should not be underestimated; DEFRA may feel the pressure more than most, being responsible for a particularly high number of laws stemming from the EU and several complex EU Regulations which will cease to have effect unless transposed.

On 13 July, the Government published the much-anticipated Repeal Bill that will facilitate the UK's departure from the EU in 2019. The bill will convert the existing body of EU law into national law on the day of departure. We know from previous Government statements that a significant amount of EU environmental law is likely to be difficult to transpose directly via the Repeal Bill's mechanisms, with estimates of up to one third being unsuited. Even where it is transposed, the potential for divergence is already clear: the UK will not be bound to follow any future pronouncements of the European Court on EU legislation, even though the same legislation will be on the UK statute book, and the Supreme Court is not bound by EU case law at all.

Perhaps with the intention of reassuring interested parties that environmental protection remains a priority, the Government has also published a factsheet on environmental protections and the Repeal Bill:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627999/Environmental_protections_factsheet.pdf

The factsheet provides high level assurances rather than detailed statements about how the Government will approach environmental law during the negotiation process and afterwards. It promises that the same environmental protections will be in place after the UK leaves the EU. It reiterates DEFRA's mantra that the Government will leave the UK environment in a better state than they inherited it. There is the suggestion of a bold environmental policy going forward: the Government will "drive environmental improvement with a powerful and permanent impact". Furthermore, and as expected, the Government commits to honouring all of its international environmental commitments (though how these will be extricated from those fulfilled jointly with the EU remains to be seen).

The factsheet ends with a list of the current and prior Governments' achievements in the environmental field, such as cleaner rivers, beaches and air, and reduction in total emissions from some of the most hazardous organic pollutant chemicals. Most if not all of these improvements have been driven by EU legislation.

Some commentators, NGOs and experts, particularly in evidence heard by Parliamentary committees before and after the referendum, called for the UK to fill any potential void in environmental law with an Environmental Protection Act. The factsheet dismisses this in the short term, stating that the existing body of EU environmental law once transferred to national law will continue to offer "real environmental benefits", and that "over time", the Government will develop the legislative framework in an outcome-driven direction.



Enforcement and accountability have also been important issues, with a recurring fear expressed by experts that without the EU Commission holding the UK's metaphorical feet to the fire on environmental matters, the UK Government would be free to let protections slide or fail to enforce EU-based policies where it has previously been more reticent, such as air pollution. The Repeal Bill itself does foresee the possibility of functions of EU entities being exercised instead by public authorities "whether or not newly established or established for the purpose". A UK environmental court or specialist enforcement body, however, does not appear likely; the factsheet states that the UK already has a "strong legal framework for enforcing environmental protections", including powers for regulators and judicial review (recently made less accessible due to elimination of the cost cap for environmental cases). Ultimately, according to the factsheet, Parliament will hold the executive to account and "Parliament is ultimately accountable to the electorate". Leader of the Green Party, Caroline Lucas, described the lack of enforcement provision as an "environment-shaped hole" in the proposal.

What should companies be doing now?

- With so many question marks remaining over the shape of the UK's relationship with the EU, things are largely business-as-usual.
- Considering recent Government indications that the UK is unlikely to remain in either the Single Market or the Customs Union, companies may wish to consider how this will impact their supply chain.
- It is worth remembering that although the exit will be achieved within 2 years, a lasting trade arrangement may take many years more, leading to uncertainty and potentially a difficult trading period between 2019 and conclusion of an agreement. On the other hand, the UK Government will be seeking favourable trading agreements with other non-EU countries, potentially opening up opportunities for UK companies to target new markets. Rules on trade in services, rather than products, may not be so clearly defined.
- It is too early to say whether Brexit will lead to an overall reduction in environmental protections in the UK; the Government has given some assurances that the bar will not be lowered. If legal standards are reduced in the name of removing trade barriers and encouraging competitiveness, companies may wish to consider how this will impact their CSR priorities.
- For now, the best defence against negative repercussions of Brexit on a company's business is to stay abreast of developments and be prepared to respond appropriately. The Government has said repeatedly that it will not provide a running commentary on the negotiations, but it is possible to determine the general direction of travel, at least.



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