



Effects of a Brexit on Environmental laws - Habitats, Waste, Chemicals and Air

Introduction

With many of its national laws implementing European Union (EU) law, the UK is sure to face complex legal questions if it decides to extract itself from the EU.

Receiving answers to such questions is particularly pressing in the environmental arena, where the UK's laws are closely entwined with decision-making in Brussels and where concerns are being voiced about the risks that a "Brexit" might result in lower standards of environmental quality. However, very little has been revealed about the degree to which the UK Government would depart (if at all) from the principles and obligations set out in today's EU environmental laws.

Any analysis of the potential impacts of a Brexit on the UK's environmental laws, therefore, requires some speculation and assumption-making. Notably, it requires consideration of the potential legal arrangement that could be put in place to govern the UK-EU relationship after a Brexit.

This article briefly discusses three of a number of potential alternative arrangements. Namely: joining the European Free Trade Association (EFTA), joining the European Economic Area (EEA) or devising a bespoke set of trade agreements such as those between Switzerland and EU Member States.

Linked to the shape of an alternative legal arrangement with the EU is the effect of a Brexit on the UK's existing national laws. The question of whether and how UK laws derived from EU legislation will continue to apply is considered in outline.

Finally, notwithstanding the uncertainty of the UK's future legal relationship with the EU and its continued application of EU laws, this article explores the potential effects of a Brexit on national environmental laws with a focus on habitats protection, waste management, chemical regulations, and air quality.

The Exit Provision in the TEU

In his Bloomberg speech delivered in January 2013, David Cameron pledged that the terms of the UK's relationship with the EU would be renegotiated and a referendum held on the UK's continued membership of the EU if the Conservative Party won the general election. This announcement came forty years after the UK's accession to the European Economic Community (EEC) and twenty-one years after the creation of the EU - years during which the UK actively participated in developing the common

trade policies that underpin the free movement of goods, services, capital and labour between Member States.

After the Conservative Party was elected in May 2015, pressure from party members led the Government to commit to an in/out referendum by 2017, regardless of any negotiations with the EU institutions. This referendum is now scheduled to take place on 23 June 2016.

The pledge to withdraw from the EU, if the outcome of the in/out referendum dictates it, is made on the basis of special "exit" provisions found in the Treaty of the European Union (TEU). Indeed, Article 50 of the TEU enables a Member State to leave the Union after a period of negotiation with the European institutions on the terms of this withdrawal and the nature of the future legal relationship between the Union and the exiting Member State. Whether this route will be taken is, of course, the subject of much media speculation.

Alternative relationship

Currently, the UK is a full member of the EU. This carries with it a variety of rights and benefits, including the freedom of UK citizens to travel to, and work in, other Member States, an absence of tariffs on UK goods exported to other Member States, recognition of many UK qualifications in the EU, and a right to participate in EU law-making. EU membership also requires the UK to contribute to the EU budget and implement and enforce EU laws at a national level.

Leaving the EU would bring change to this set of rights and obligations. The extent of that change, and the extent to which EU environmental laws would continue to have an influence in the UK, will in part depend on the type of alternative arrangement brokered with the EU.

EFTA

The UK could opt for one of several types of alternative arrangements, but it seems more than likely that it will – at least – seek to re-join the European Free Trade Association (EFTA). As a member of the EFTA, the UK would benefit from the right to operate within a tariff free trade area which includes the EU Member States as well as Iceland, Liechtenstein, Norway and Switzerland. Strictly speaking, EFTA members who are not also part of the EU or the European Economic Area (EEA) do not have access to the European single market and cannot be

involved in the policy decisions made by the EU. However, all of EFTA's current non-EU members have gained some measure of access to the single market, either by joining the EEA or entering into bi-lateral agreements with other EU Member States. It is plausible that the UK will seek similar access to the single market.

EEA

Members of the EEA (such as Norway) are required to comply with many EU laws, including many EU laws pertaining to environmental and safety standards. They also have some ability to contribute to decision-making at EU level – in so far as they are consulted on proposals likely to impact on them – but cannot cast a vote. The Common Agricultural and Fisheries policies and policies on security and justice do not apply to the EEA.

The “Swiss” model

Following in Switzerland's footsteps by concluding bi-lateral agreements with the EU to gain access to the single market would require extensive negotiation with other EU Member States, and there is no certainty that such an agreement would exonerate the UK from compliance with EU laws. In addition, the European Commission has expressed frustration at the bi-lateral agreement concluded with Switzerland and is thought to be unlikely to offer something similar to the UK .

Thus, while the UK would not technically be required to comply with EU laws as a member of EFTA only, it is likely to seek access to the single market by joining the EEA or attempting to conclude bi-lateral agreements with the EU member states. In that case, it is also likely to be required to comply with some EU laws, particularly those setting environmental standards.

Untangling the laws

Since the European Communities Act 1972 came into force, the UK has had to implement EU Directives into national law and make EU Regulations directly effective, resulting in a vast number of national laws based upon or reflecting EU law. How these laws might be affected by a Brexit depends in great part on the preferred legal relations entertained with the rest of the EU.

One option: untangling EU-derived provisions from purely UK-derived ones in the UK's statutes and case law, and replacing any EU-derived laws by national measures, would be unthinkably complex. Nevertheless, this is one of the options for legal reform that the UK would face prior to “Brexit Day”.

An alternative to such a wholesale review and overhaul of existing national laws might include an assumption that all law in force immediately prior to Brexit Day continues to apply after the UK's withdrawal from the EU. This would seem the most straightforward approach at first glance. But questions arise as to the practical application of this course of action.

Having withdrawn from the EU, the UK would no longer be a party to its various treaties, including the TEU. It would have no obligation to transpose new EU laws into national legislation (save to the extent that, if it has joined the EEA, EEA-relevant laws would apply). How, then, would UK legislation based on legislation from the old order be interpreted by the national

Courts? The wording of UK statute would, presumably, no longer need to be stretched to meet the demands of EU law. Disagreements over the interpretation of EU-derived UK laws could, presumably, no longer be referred to the CJEU. Assuming EU Directives could continue to be referred to in order to interpret UK legislation, which version of the Directives would apply? Would it be the Directive as it was immediately prior to Brexit Day, or the version in force at the time a reference is required, taking account of any changes since Brexit Day? Similarly, would decisions handed down by the CJEU post Brexit be able to be relied on by UK Courts after Brexit Day? The answers to such questions will determine the landscape within which the legal profession will operate in the event of the UK's withdrawal from the EU. However, the current uncertainty in this respect makes attempts to predict the impact of a Brexit on the UK's environmental laws somewhat speculative.

The UK's Environmental Laws after Brexit

Environmental law in the UK is greatly influenced and continues to be shaped by EU Directives. These Directives often prescribe measurable objectives, targets and thresholds, as opposed to the UK's traditionally “discretion-driven” legislation. Having environmental objectives imposed from above means that EU Member States operate in accordance with a common set of environmental obligations that can be enforced by the EU's institutions. As a result, pressure (in the form of threats of sanctions) is exerted on Member States to implement EU Directives on environmental matters.

Withdrawal from the EU would, in theory, give the UK Government greater freedom to set its own environmental standards and obligations and would remove the threat of sanctions. The extent to which this is likely to materialise is considered below in respect of four particular areas.

Laws on habitats protection

The Habitats Directive and the Wild Birds Directive are the main EU environmental policy instruments relating to habitats protection, and play an important part in shaping urban development in the UK. These Directives require Member States to contribute to a coherent European ecological network by designating Special Areas of Conservation (SACs) for habitats and species listed in the Habitats Directive, and Special Protection Areas (SPAs) for habitats classified under the Birds Directive. Development likely to impact on the integrity of these areas is subject to restrictions.

The UK has its own, long running tradition of laws designed to protect the countryside, including through the Site of Special Scientific Interest (SSSI) regime which has been in place since 1949. Such a head-start enabled the UK to adapt to the requirements of the Habitats and Wild Birds Directives, as suggested by the fact that many of the areas designated as SSSIs are also designated as SACs or SPAs. Protection of natural areas has long been a feature of the UK's legislation, so it is foreseeable that natural areas deemed worth preserving will continue to be specially managed and protected in the event of a Brexit. However, questions remain over the form and

extent of this protection. Under the aegis of the EU Directives, protection of the UK's SACs and SPAs is relatively impervious to changes in political parties and their respective priorities. Without the obligation to comply with the objectives of such Directives, however, the UK Government would have more scope to alter the level and type of protection over SSSIs and other natural areas. In fact, making protection of natural areas more flexible was a recommendation in Defra's "Progress on implementation of the Habitats Directive Implementation Review", which found that implementation of the Directives somewhat stifled the ability to develop nationally significant infrastructure. It is also notable that EEA members, whilst bound by some EU legislation, are not bound by the Habitats and Wild Birds Directives. So, even as a member of the EEA, the UK would no longer be subject to judicial review proceedings such as that brought in 1993 by the RSPB .

Clearly, any government seeking to repeal national legislation protecting areas of natural importance in the UK is likely to face strong opposition. In addition, much of the EU-derived legislation transposed into UK law has also provided the means by which to comply with international treaty obligations, some of which require special protection of habitats. Thus, if the UK were somehow to repeal all EU legislation pertaining to the conservation of natural areas, it would risk breaching other obligations under international law.

A complete dilution of the UK's habitats protection laws immediately following a Brexit is, therefore, improbable. However, the absence of obligations under the Habitats and Wild Birds Directive would certainly provide the ability to devise less stringent habitat conservation regimes in the future.

Waste Management

The UK's waste sector is one which has been particularly influenced and driven by EU legislation. Diversion from landfill, recycling rates and the principle of the Waste Hierarchy are the guiding principles of today's waste industry, and all derive from policy made at EU level. Indeed, the view expressed by waste industry professionals is that EU regulation has been responsible for the UK's improved standards and achievements in this sector, and that these goals and targets would not have been met otherwise.

Waste management was a particular feature of the Balance of Competences Review: Environment and Climate Change, published by the Government in February 2014 and describing itself as "an open minded debate around EU competence on the environment".

Whilst the final report acknowledged some tension between environmental standards and competitiveness, EU targets on waste were seen as providing much needed certainty for investors and were a factor of growth in this area. In particular, the Chartered Institute of Waste Management highlighted the success of the EU waste market and the clarity provided on end of waste criteria. Some areas for improvement were certainly identified in the review, such as the complicated European Waste Catalogue and the difficulty for SMEs to comply with

waste regulation, but the overall message was that EU-based waste management was effective.

In light of the industry's general view that waste policy is best set at EU level, it might be assumed that the UK would pursue waste management policies similar to those currently in force in the EU, at least in the short term. Compounding this assumption of harmonised practice between the UK and the EU is the importance of access to the single market for English and Welsh recycle exporters who, in 2014, exported a record 2.37 million tonnes of Refuse Derived Fuel to 12 Member States.

It is more difficult to predict whether successive UK governments would be able or willing to comply with the rest of the EU's recycling and waste reduction targets in the medium to long term. This uncertainty has been described by a House of Commons Library report as potentially "undermin[ing] economically efficient decision-making in the sector due to the long-term planning needed for waste infrastructure investment".

Questions also arise around the future application of national law passed to implement EU legislation in the waste sector. The definition of "waste" in the Environmental Protection Act 1990 is a striking example of how intertwined national and EU waste laws can be. Section 75(2) of the Act defines waste as "anything that is waste within the meaning of Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council on waste [i.e. the Waste Framework Directive]." As discussed above, the type of changes (or lack of) to the UK's national legislation after Brexit has not yet been determined. The UK could opt to continue referring to the Waste Framework Directive to inform the definition of "waste" in national legislation, but whether changes to the underlying Directive or relevant EU case law will continue to be taken into account is currently uncertain. This direct reference to an EU Directive within national legislation is just one example of the potential legal complexities of a Brexit.

Chemicals

The current EU regime surrounding chemicals requires substances manufactured or imported into the EU in quantities of 1 tonne or more to be registered with the European Chemicals Agency (ECHA) and tested for safe use. This obligation is contained in the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation, known as the "REACH Regulation". In addition, the European Classification, Labelling and Packaging (CLP) Regulation provides a standardised system to classify and label chemicals. This enables hazards presented by these chemicals to be made obvious to customers and consumers.

If it withdrew from the EU, the UK would no longer be legally obliged to adhere to the requirements laid out in these directly effective EU Regulations. However, given the high proportion of the UK's chemicals exported to the EU (56.6% according to some sources) this sector would undoubtedly suffer from seeing its exports kept out of the EU for non-compliance with EU norms. In fact, the Balance of Competences Review of February 2014 found that EU regulation on chemicals standards was "seen by many businesses as important in providing a

level playing field across the Single Market". In seeking to retain the credibility awarded to its chemicals exports, the UK may, therefore, wish to continue independently to comply with the REACH and CLP Regulations. This is the route that Norway and the other EEA members have adopted, despite their inability to determine EU-wide policy on chemicals.

Air Quality

Air quality is an area in which the UK (along with other EU Member States) has struggled to meet EU standards and has been held to account for it. In a recent case which went to the CJEU and ended in the Supreme Court in April 2015, ClientEarth successfully challenged the UK Government for failing to meet air quality standards set by the EU's Air Quality Directive. The Supreme Court held that the Government should prepare effective plans to cut illegal levels of air pollution in the country.

As a result of the Supreme Court's ruling, DEFRA drew up plans for new measures to improve air quality in the UK, consisting essentially of clean air zones to be created in five English cities by 2020. This response was deemed by ClientEarth to fall short of the action needed to meet the Court's judgment, which had ordered compliance with EU air quality standards as soon as possible. On 18 March 2016, the NGO lodged a further claim against the Secretary of State for the Environment, seeking to strike down the government's air quality plans and requiring more ambitious measures to be taken.

Separately, the EU Commission has threatened to impose a hefty fine on the UK for breach of the Directive.

Having withdrawn from the EU, the UK would no longer be obliged to comply with the measures imposed by the Air Quality Directive. It would be difficult for NGOs such as ClientEarth to challenge the UK's breach of standards set at EU-level, and the EU Commission would have no right to fine the UK for it. Air quality is not a commodity, so there would be no risk to trade of having different air quality standards in the UK and in the rest of Europe. Sceptics would say that a Brexit would leave little to compel the UK Government to comply with costly EU air quality regulation, or to implement equivalent national legislation.

Nevertheless, the UK would continue to be bound by a number of international treaties on air pollution to which it is a signatory. The Geneva Convention on Long-Range Transboundary Air Pollution (LRTAP), for instance, has been extended by a number of protocols containing legally binding targets for pollutants such as sulphur dioxide and nitrogen oxides. The Montreal Protocol contains obligations to phase out major ozone depleting substances. Under these international agreements, the UK would be bound to comply with certain air quality standards.

Conclusion

Habitats protection, waste management, chemicals and air quality are only four of a myriad of sectors likely to be affected by a withdrawal of the UK from the EU. Whilst it is tempting to hazard a guess as to the effects of such a historic divorce on these and other sectors, more questions than answers will arise until the intended terms of a Brexit are clarified. It can be said with some confidence, however, that deeply entrenched environmental policies conferred by years of EU integration are unlikely to change drastically from one day to the next. Nevertheless, if one intention of a Brexit is to reduce the perceived burden of complying with environmental norms imposed by Brussels, then developments in this field post-Brexit will heavily depend on the appetite of successive national governments for prioritising the environment.

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