

Is the scope for environmental gain on the wane after the referendum result?

29/06/2016

Environment analysis: With a large amount of environmental legislation in the UK based on EU law what does the referendum result mean for the future of the UK's environment? Simon Tilling, partner at Burges Salmon and an expert in EU environmental law and regulation, explains.

What is the process for withdrawing from the EU?

On a superficial level, the process for withdrawing from the EU is quite clear and is contained in article 50 of the Treaty of the European Union (TEU) as amended by the Treaty of Lisbon. TEU, art 50 provides that any Member State may decide to withdraw from the EU. To do so, it must notify the European Council of its intention, triggering a period of negotiation for the arrangements for withdrawal. The Treaties cease to apply once agreement is reached or after a period of two years from the notification, whichever is the sooner, and although the period can be extended, that can only happen with the unanimous approval of the European Council.

Under the legal framework, the timing of the notification is within the control of the withdrawing Member State, and this has become something of a political issue.

Of course, there is a lot to be resolved in negotiating the arrangements for withdrawal, and that is what creates the uncertainty, because there is no precedent for how a negotiated withdrawal works in practice.

What practical steps will the UK government take given the result to leave the EU?

Given the resignation of the Prime Minister, the desire by Mr Cameron for his successor to deal with the withdrawal negotiations, the desire by EU figures to get on with it and the general uncertainty over the mechanisms in practice, it is difficult to give an answer to this question. Until TEU, art 50 is triggered, the question is more of a political nature than a legal one.

What are the short-term implications for environmental law of the result to leave the EU?

In the short term, not a great deal. EU environmental laws will continue to apply until the agreement for withdrawal has been concluded or the two year time period has expired, unless the UK government unilaterally breaches those treaties in the meantime, which is not likely. Even after withdrawal, many European laws have been transposed into UK legislation and will continue to be binding. It is in the medium and longer terms, after withdrawal, that the implications for environmental law arise.

What are the likely scenarios/options for the withdrawal agreement and what could this mean for our relationship with environmental law stemming from the EU?

The options for post-withdrawal relations range from retaining close integration, for example through remaining in the EEA, to severing ties completely and relying on World Trade Organisation (WTO) rules.

If the UK wishes to benefit from access to the single market as a member of the EEA then it will be expected to comply with a great number of EU environmental and product stewardship rules. If the UK proceeds with bilateral agreements then the extent of co-operation with EU environmental and product stewardship rules is a matter for negotiation. The WTO model means that the UK would have a greater degree of autonomy in setting its own environmental laws, but access to the EU market will be significantly reduced.

Even if the UK proceeds with the WTO route, the UK has decades of European environmental law which has already been implemented into UK law and will continue to be binding. Those regimes will continue to evolve within Europe, through legislative amendments and through interpretation by the Court of Justice of the European Union, and the UK will need to decide on a case-by-case basis whether to amend the domestic legislation to keep pace with the European

version or proceed with its own version. Indeed, because control over environmental laws has been devolved, Scotland, England, Wales and Northern Ireland may all proceed in different ways on this issue.

Following withdrawal, whether new EU environmental law applies in the UK will depend entirely on the agreement governing the UK-EU relationship. If the UK proceeds with the WTO model, the EU environmental laws would have no impact, but of course UK manufacturers would still need to comply with EU product stewardship laws—for example rules governing hazardous substances in products—in order to sell their products into the EU market.

A great deal of environmental law originates from international treaties, such as the:

- o United Nations Economic Commission for Europe Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters
- o United Nations Environment Programme Stockholm Convention on persistent organic pollutants
- o United Nations Framework Convention on Climate Change (the Paris Agreement)

In practice, the EU has taken the lead in implementing these international commitments to ensure consistent application across all Member States, but the UK, as a signatory in its own right, will need to continue to comply with its treaty obligations outside of the EU.

What are the likely longer-term implications of each scenario on environmental law and policy?

If the UK retains close integration and agreement is reached that allows access to the single market, then the UK will need to comply with many environmental law provisions, but will have a reduced ability to influence environmental law and policy within the EU and no voting rights or rights of veto.

If the UK opts for a WTO model then the long term implications for environmental law and policy may be much more significant. The UK will have a policy choice whether to continue to mirror EU environmental law and policy or proceed on its own path. However, as already mentioned, the UK will continue to be bound by a number of international treaties. There is also an economic incentive to continue to mirror EU product stewardship rules, for example on chemicals, electrical goods, toys and numerous other products, because compliance with these rules is essential in order to sell those products on the EU market.

What areas of environmental law are most likely to be affected by the outcome?

I predict that the four areas of environment law to be most affected will be air quality, water quality, waste regulation and habitats protection.

For air quality and water quality, the EU has set binding targets for Member States to meet, and these have proved difficult to reach in practice. The UK government is subject to legal proceedings for non-compliance with air quality standards under the Air Quality Directive 2008/50/EC. Following withdrawal, the UK government could be free to set its own standards, for air quality and for water. It is also free to set its own waste policy and targets for landfill and may decide to pursue a different road to the EU. On habitats protection, the Habitats Directive 92/43/EEC or the Wild Birds Directive 2009/147/EC are unlikely to continue to apply, whatever the agreement reached for post-withdrawal relations, and so the UK will be free to set its own rules here too, should it wish to do so.

On the other hand, because UK manufacturers will want to continue to sell products into the EU, we may find that the UK mirrors EU product stewardship rules governing the environmental standards for products, because diverging rules creating a different regime for the UK market could create a non-tariff barrier to trade. Many of these regimes apply within the EEA for this reason.

What affect does the decision have on the practice of environmental law in the UK? What should lawyers be advising their clients?

Lawyers need to understand the changes that may come in the future and help their clients to plan ahead. Take the example of chemicals regulation. Under the EU Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation (REACH), businesses manufacturing or importing chemicals for the EU market at a volume greater than one

tonne must register their products with the European Chemicals Agency by 2018. There is a lot of work to do between now and 2018. REACH applies within the EEA but would not do so if the UK adopts the WTO model. Further, if UK manufacturers want to export more than one tonne to the remaining 27 EU Member States after withdrawal, the product still needs to be registered within the EU. Chemicals regulation is an area where the UK has participated in EU decision making rather than creating its own rules, and therefore post-withdrawal, if the UK does not continue to utilise the EU rules, the UK will need to adopt its own rules and create a new framework for chemicals regulation in the UK. All of this generates legal questions and the most versatile and adaptable environmental lawyers will be in demand to assist both businesses and the public sector to understand and address the changes.

Simon Tilling practices in the area of UK and EU environmental law and regulation. He advises on operational compliance, regulatory investigations, enforcement and criminal defence, regulatory appeals, tribunal hearings, judicial review and environmental civil claims. He also has expertise in product stewardship and international supply chain compliance for European regimes, including the Biocidal Products Regulation, REACH, and the Waste Electrical and Electronic Equipment (WEEE) and Restriction of the Use of Certain Hazardous Substances (RoHS) regimes.

Interviewed by Jane Crinnion.

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