



## Environmental Brexit

In June this year the UK voted to leave the European Union. The shape of our future environmental law will depend on what direction the negotiations with Europe take and whether the UK government wishes to retain EU - made laws. Unfortunately, we cannot predict the outcome of the negotiations and the relations with Europe, so that means that the end result remains obscure.

### The Complex Relationship With Europe

European and domestic environmental law form a tangled web. Most of our environmental laws and regulatory systems originate from Europe and our secondary environmental legislation simply transcribes European law.

On the other hand European Regulations such as "REACH" (Registration, Evaluation, Authorisation and restriction of Chemicals) do not need to be transcribed as they are directly applicable in the UK.

However, other European Directives allow scope for variations in implementing legislation in members states - a good example being the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 which implement the Water Framework Directive.

### Home Grown

There is also "home grown" environmental legislation such as the Climate Change Act 2008 which commits the UK to carbon reduction and works in parallel with European policy on emissions such as the Emissions Trading Scheme.

The Water Resources Act 1991 (in combination with the Environmental Permitting Regulations 2010) works in tandem with European directives such as the Integrated Pollution Prevention and Control Directive and arguably the Water Framework Directive. The Wildlife and Countryside Act 1981 implemented the Bern Convention and the Birds

Directive - and crosses over functionally with the Habitats Directive - but crucially stands in its own right on wider domestic conservation issues.

### Interpretation of Environmental Law

We currently look to Europe for clarification of environmental law. By way of example, the current version of the Environmental Permitting Regulations 2010 covers waste permitting. But definitions of key words in the Regulations such as "waste" refer out to the Waste Framework Directive - and much domestic case law on such definitions is closely bound up in the Directives. The interpretation of "waste operation" in the Environmental Protection Act 1990 at s 29 (13) takes us to the Environmental Permitting Regulations which in turn refers back to the Waste Framework Directive.

In fact, so much of our own domestic legislation has been amended to take into account key words in European Law that there is probably no domestic environmental statute that remains untouched.

### Access to Justice

Currently, our domestic courts, the European Commission and the European Court of Justice provide a forum for individuals and organisations to challenge domestic and community public bodies and secure remedies, under European law. Preliminary references can be made to the ECJ for clarification and interpretation of community law; enforcement and infraction proceedings by community bodies such as the Commission are brought against member states, and individuals can assert their European rights in actions against member states.



## European Economic Area - EEA

The UK could go it alone. But it is more likely to want to gain access to the internal market of the EU. In doing so it would need to sign up to the European Free Trade Association (EFTA) as a necessary first step in joining the European Economic Area (EEA) – which runs in parallel with the EU and whose members include all the current EU member states, as well as Iceland, Liechtenstein and Norway. Membership is not guaranteed, however, and would require the unanimous backing of EU members states as well as current members of the EEA.

Much has been made of what laws may well survive a split with the EU if we remained within the EEA. If we were permitted to join, a considerable amount of environmental legislation from the EU would continue to apply. That would include, for instance, the Urban waste Water Treatment, Nitrates Directive, Industrial Emissions Directive, Waste Framework Directive, End of Life Vehicles Directive, Mining Waste Directive, REACH and the Water Framework Directive. Crucially, the Birds Directive, Habitats Directive and Bathing Water Directive would not.

The picture is further complicated by the fact that even if the UK becomes a member of the EEA, some sections of Directives will not apply. For instance, elements of Article 4 of the Water Framework Directive which incorporates obligations to protect designated habitats under the Habitats Directive would fall away.

If there is some uncertainty over meaning (i.e. whether or not a provision of European Law is “acte clair”), whereas at present, the domestic courts can refer a case to the ECJ, the ECJ would cease to have jurisdiction upon leaving the EU.

EU policies on such matters as fishing (the common fisheries policy of CFP) would no longer apply.

Above all, out of the Union - even as a member of the EEA - there would be limited scope for influencing the drafting of European Law; the European Commission would not be able to pursue enforcement and infraction proceedings against the UK and the European Court of Justice would no longer have jurisdiction. The EEA does have a parallel court and an equivalent of the Commission – but it does not have the same strong enforcement role.

## The Full Brexit

With a full withdrawal from the Union and with trade deals outside the EEA, the result will be complicated. European legislation which was once “directly effective” – i.e. whether or not transcribed into UK law – will cease to apply. Where European legislation such as the Habitats Directive or the Water Framework Directive has been transcribed by secondary legislation then it will cease to be applicable law for the UK. But where European law is transcribed by Primary legislation (i.e. enacted by an Act of Parliament) it may still be enforceable without too much amendment.

What we will be left with will depend on how keen the UK is to draft its own alternatives to commit to nature conservation and so on. And we will also be left with much domestic legislation which will depend on European legislation and European jurisprudence for interpretation even if it survives the split.

## Transitional Measures

It may take a significant period of time before the UK is ready to trigger “Article 50” of the EU Treaty to start the process towards exit. With a deadline for the agreement of the final arrangements for leaving the EU within 2 years of the trigger point, there would need to be some clear thinking on the status and enforcement of European Law.

To leave the EU would require the repeal of the European Communities Act 1972 – the legislation which gives legal effect to European law and European laws in our domestic framework – but it will officially apply until the agreement is finalised and signed and the 1972 Act repealed.

Before that happens, however, there is the headache of how to deal with compliance with old and new legislation from Europe and the current court proceedings before the ECJ and in domestic courts where European law is relied upon, whilst the clock ticks with an uncertain deadline before Article 50 is engaged.

If there isn't time to sort out the difficulties of restructuring Environmental law in the 2 years without extension, interim measures will need to be adopted for domestic legislation to be rewritten to fill gaps and for primary legislation to effectively enact European legislation before it becomes defunct.

## International Treaties

The UK and Europe are signatories to international treaties such as the Aarhus Convention, Basel Convention (hazardous waste), the Bonn Agreement, OSPAR and the Bern Convention on habitats. Some of the conventions and international agreements are ratified at EU level as with the Bern Convention, implemented in Europe by way of the Habitats Directive from the 90s onwards, but also implemented directly under UK legislation through the Wildlife and Countryside Act 1981.

Both the UK and EU are signatories to the Aarhus Convention. But, in the UK, it is not implemented directly into domestic legislation. The EU transposes it into the Environmental Impact Assessment Directive by way of the Environmental Public Participation Directive. This means, for instance, that an individual or organisation, where the EIA Directive is invoked, can rely on certain provisions of the convention such as the right to access to justice which is not “prohibitively expensive” - or access to environmental information.

On a full Brexit, the force of the Aarhus Convention - which has informed the basis for the costs capping Environmental JRs under the CPR - will no doubt be undermined. But the Bern Convention’s application in the UK would continue through the force of the Wildlife and Countryside Act 1981.

## Waste

The triptych of environmental law in this field comprises the Waste Framework Directive, the Hazardous Waste Directive and the Directive on Shipment of Waste.

The Waste Framework Directive - as its name suggests - sets out goals for member states with reasonable flexibility to achieve targets for recovery and disposal without endangering human health or causing harm to the environment - including permitting, registration and inspection. On one side, this fuels the growing waste economy - but on the other hand, smaller businesses find the constraints of regulation an unnecessary expense.

Total withdrawal from the EU without membership of the EEA would require new legislation and a redrafting of the implementing regulations (Waste (England and Wales) Regulations 2011) and other dependent legislation such as the Environmental Permitting Regulations.

What that new legislation would look like cannot be predicted. We have a considerable export business already which relates to recycling, but if the UK wishes to continue trading with the EU

there is bound to be a requirement to comply with the basic principles of the Directive - as the UK would not be allowed to take an unfair commercial advantage in not complying with environmental laws.

## Planning

The two most important pieces of Environmental European legislation which limit the scope of planning and development in the UK are the EIA and Habitats Directives. The EIA Directive and the Habitats Directive are both transposed through UK Regulations and would cease to apply on a full “Brexit”.

If we remain within the EEA, however, although the Habitats Directive would cease to apply, the EIA Directive would survive the split as it is included in the current EEA agreement.

Whether or not there is a full split, it is likely that the UK government would wish to preserve some of the aspects of Environmental Assessment - perhaps through a new raft of domestic legislation.

There may also be a move towards the use of Sites of Special Scientific Interest designations under the Wildlife and Countryside Act 1981 to fill the gap if Natura 2000 sites designated under the Habitats Directive lose their status.

The parallel assessment regime of Appropriate Assessment for projects under the Habitats Directive sets a tougher threshold than the EIA - and it is likely that the present UK government will wish to find ways of limiting assessment to the EIA regime or a similar process.

The picture is further complicated by the increasing devolution of law making powers across the UK. In Wales the new Environment (Wales) Act 2016 introduces new positive duties towards sustainable management of the environment which could partially fill the gap in the process of taking environmental impacts into account if the EIA and Habitats Directives no longer apply. This also comes at a time when the Welsh Government is consulting on amendments to their EIA Regulations to comply with the 2014 EIA Directive from Europe. Whether those changes will ever come to fruition within the next few years remains to be seen - though the UK as a whole is committed to making the changes by 2017.

## Conclusion

Overall, we can speculate about what comes next – but the ultimate responsibility will fall to the politicians. Their negotiations with Europe will define our future Environmental Legislation.

One thing is certain: regulated activities and planning stand to be affected more than most but the uncertainty will continue until there is a clearer idea of what direction the UK will take.

Whatever is finally negotiated, there will be a need for more legislation either to replace what we currently have or to fill legislative gaps.

If you have any questions to ask about any of these issues, please contact Justin Neal at Aaron & Partners.

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