

The Brexit Papers



Environmental Law & Regulation

Paper 28



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BREXIT PAPER 28: ENVIRONMENTAL LAW & REGULATION

Enforcement of the 'level playing field' after UK withdrawal from the EU: The loss of the EU Commission as regulator in environmental law and other areas

1. A critical issue in the negotiations over a future relationship between the UK and the EU after any transition/implementation period will be the maintenance of a 'level playing field' of regulation to ensure that free trade can be preserved between the UK and the EU. The EU will want to ensure that the UK commits to maintaining high standards across a range of areas, notably environmental law, employment law and regulatory law more generally.
2. This paper examines these questions in the field of environmental law before making some more general comments on the wider issues for UK law and regulation. The main issue is the extent to which national regulatory authorities can replicate the international supervisory role currently played by the EU Commission (the Commission) within the EU legal order.

The role of the Commission in relation to environmental regulation

3. The Commission monitors the extent to which Member States comply with the commitments they have made under EU law. It has enforcement powers under Art 258 Treaty of the Functioning of the European Union ("TFEU").
4. Under this procedure, the Commission can issue a formal notice stating that it considers the Member State is in breach of its obligations, followed by a Reasoned Opinion, and finally application to the Court of Justice of the European Union (CJEU). Since the Maastricht Treaty amendments, the CJEU has power to impose a financial penalty on a Member State that does not comply with its judgments, a power that was promoted by the British Government at the time.
5. Although these enforcement powers apply to all areas of EU law, the Commission has been especially active in this area – in 2015 the highest number of infringement actions were opened in the environmental field. This is largely because, unlike other fields (e.g. competition, employment rights, internal market), where private actors are likely to take the initiative when the law is infringed, the environment may be "unowned". Environmental Protection organisations may be committed to the cause, but they vary in strength and coverage and do not have the resources to assume responsibility for systematic enforcement.

6. Thus, in most jurisdictions, including the UK, public bodies (government departments, local authorities, agencies) have a particular responsibility for environmental protection. The problem is they often face conflicting policy priorities and financial constraints, giving rise to a risk that environmental obligations may not be effectively enforced.
7. In July 2017, the *UK Environmental Law Association* (“**UKELA**”) produced a briefing paper entitled “*Brexit and Environmental Law – Enforcement and Political Accountability Issues*” (“**the UKELA paper**”) identifying the following characteristics of the current regime overseen by the Commission:
 - In the absence of its own environmental inspectorate, the Commission relies upon implementation reports sent by Member States as well as its own studies and issues highlighted in MEPs’ questions. It has also developed a citizens’ complaint procedure under which anyone can alert the Commission of a potential breach without any cost. These procedures allow the resolution of many cases without initiating formal legal proceedings against Member States.
 - In 2008, the Commission launched a new scheme (the EU Pilot Scheme, now including all Member States) under which complaints could be sent to Member States for resolution without formal registration by the Commission.
 - This is done by means of a query sent to a Member State giving it 10 weeks to reply, following which the Commission has 10 weeks to assess the response. If there has been no satisfactory voluntary resolution the Commission may start infringement proceedings. In 2015, three quarters of cases under the Pilot Scheme were resolved without further action.
 - The Commission not only ensures national law fully reflects EU environmental law but also ensures that it is applied in practice. Many of its infringement proceedings against Member State bodies arise from ineffective national implementation.
 - The cases that go to Reasoned Opinion Stage or to the CJEU tend to be those that the Commission itself has initiated.
 - The UKELA paper noted that, of 34 CJEU cases brought by DG Environment against the United Kingdom, 30 resulted in judgment against the UK in whole or in part.
 - As well as the CJEU’s role, there is the European Environment Agency (‘**the EEA**’) which is tasked with providing sound, independent information on the environment. Its work includes producing and publishing independent assessments of progress in the implementation of the EU’s environmental action programmes, the guiding frameworks for EU environmental policy.
 - Finally, EU citizens can petition the European Parliament (the EP) over concerns about the application of EU law which affect them directly. The EP cannot refer perceived infringements to the CJEU, but it can ask the Commission to investigate petitions on its behalf, using the processes described above.

8. The main point that emerged from the UKELA paper was that the Government's then stated intention, that legal accountability through existing national mechanisms, including judicial review, would suffice to ensure "*the whole body of existing EU environmental law continues to have effect in UK law*" failed to address or reflect the Commission's role.
9. It maintained that the existing UK procedures could not replicate the features of legal and political accountability which the Commission has brought to date in the environmental field and ensure the Rule of Law is upheld. It therefore proposed some form of new supervisory body be created to fill the institutional/supervisory gap and drew attention to the way other countries addressed this issue.

The proposed new UK environmental regime

10. On 10 May 2018, DEFRA published a consultation document entitled *Environmental Principles and Governance after the United Kingdom leaves the European Union ("EP&G")*, proposing the setting up of an independent body or "watchdog" post Brexit "*to hold government to account on the environment*" [44] as well as proposing a series of environmental principles to be reflected in legislation. During the consultation period, the European Union (Withdrawal) Act 2018 ("EUWA") was passed on 26th June 2018.
11. Section 16 of the EUWA appears to reflect the EP&G proposals. It provides that there is to be a draft Bill (within 6 months of the Act's passing) consisting of, *inter alia*:

"provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill)"
12. This is intended to deal with the loss of the Commission's supervisory role set out above. When the UK ceases to be a Member State (subject to the terms of the transitional arrangements if ratified), its obligations under EU law will cease, the EU Commission will no longer have any enforcement functions against the UK and the citizens' complaint procedure will disappear.

The proposed new powers and function of the new UK "watchdog"

13. The EP&G proposes that the new body should be an independent watchdog with three core functions:
 - General scrutiny and advice
 - Hear individual complaints
 - Enforce government delivery of environmental law.
14. The first is stated to be akin to the Committee on Climate Change [81]: to express an "*independent opinion*" [86]; to lay reports before Parliament [86]; to conduct and publish an annual assessment of national progress against the UK's 25 year environmental delivery

plan [87]; and the Government can commission the body to provide advice (e.g. on enacting policies on the 25 Year Plan).

15. Its second role is akin to an ombudsman [921-93]. It would consider all valid complaints but has a discretion as to appropriate action to be taken in each case [92]. At [94] the EP&G states *“the new environmental body would effectively be able to make a prominent declaration in cases where it found that an authority had failed to implement environmental law properly”*. While such declarations would not be legally binding, the EP&G suggests that it would serve as *“a powerful driver for the government to change its approach or reconsider its decision”*. In addition, it is suggested such views *“could also be relied upon in the context of any legal proceedings brought by a third party regarding the authority’s decision”*.
16. In terms of its third enforcement role, the EP&G consultation stated that the body would supervise the Government’s delivery of environmental law i.e. legal obligations. The suggestion was that these would be achieved through a power to issue *“advisory notices”* as the main form of enforcement. As an alternative, the EP&G raised the possibility that the *“new body could be given the power to issue binding notices”* [105] which *“could require government to implement the corrective action specified in the notice, subject to a right of appeal to resolve any disputed matters”*.
17. A third *“enforcement”* option put forward was to provide the body with the right to *“intervene in legal proceedings brought by others in relation to the government bodies and subjects within its remit”* (similar to the powers that have been provided to environmental ombudsmen in some other countries such as Austria and Hungary and/or similar to the Equality and Human Rights Commission’s (‘EHRC’) role).
18. The EP&G also raises the possibility of a power to agree environmental undertakings in the event that a government authority accepts that it has failed to meet its environmental responsibilities is also mooted (akin to the Information Commissioner’s Office’s (ICO’s) role).
19. Finally, the EP&G raises the question of whether the new body should have a role overseeing central Government only or also other public bodies.

The provisions of the EUWA in respect of environmental protection

20. During the third reading of the EU (Withdrawal) Bill in the House of Lords last May, Lord Krebs re-tabled an ambitious proposal on environmental protection, reproduced in full in Annex 1. Lord Krebs argued:

“Why have we brought this amendment back at Third Reading?... We have considered the contents of the consultation...and we are not satisfied. Although the consultation document is encouraging, it does not go far enough...The favoured option for the green watchdog’s enforcement role is that it would be able to serve advisory notices to the Government or other public bodies. To quote again from the consultation document: “government believes that advisory notices should be the main form of enforcement”. That is far weaker than the current arrangements, under which the Commission has the power to initiate court

action. In contrast, an advisory notice can be ignored and there is no sanction if it is." (emphasis added).

21. The Lords accepted the amendment, but it was later rejected by the House of Commons. The final text, reproduced at Annex 1 and now Section 16 of the Act, significantly reduces the onus on the Secretary of State and the powers and functions of the future public authority.

Environmental Bill – published December 2018

22. The draft Environment (Principles and Governance) Bill (the EPGB) was published just before Christmas. It is understood to be a pre-cursor to a wider Environment Bill in 2019.
23. The EPGB takes forward s16 of the WA and provides inter alia for the establishment of the Office for Environmental Protection (the OEP) however it does not include the Government's commitment in the withdrawal agreement to "non regression" from current EU environmental laws.
24. The explanatory notes specifically recognise the loss of the commission's 'oversight' as a consequence of Brexit but describes the EPGB as providing for the adoption only of "some EU environmental governance functions".
25. The enforcement functions of the EPGB are set out in articles 18-29.
26. They provide for:
 - (1) a system of complaints available to anyone other than a public authority where that person "*believes that a public authority has failed to comply with environmental law*". The OEP then has a discretion to carry out an investigation but only where such a failure is "*serious*" and thereafter report and make recommendations to the subject authority. The report does not have to be published and the complainant does not have to receive the report.
 - (2) power to serve an information notice (IN) requesting information about an allegation where the OEP has "*reasonable grounds for suspecting that the public authority has failed to comply with environmental law*" which it "*considers*" is serious. The authority must then respond to the allegation suggesting any steps it proposes to address it.
 - (3) power to serve a decision notice (DN) after serving at least one IN setting out steps to address any failure where the OEP is "*satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law*" which again it "*considers*" is serious. Thereafter the authority must again respond in writing and if it accepts the allegation whether it intends to take the steps or any other steps to address the failure.
 - (4) power to challenge the public authority's "*conduct*" following the service of a DN by way of a (judicial) review application relating to the failure to comply. The

consequence of such review if successful appears to be an order with findings and the authority must then make a statement setting out steps it intends to take.

27. There is no provision for there to be any powers to impose financial consequences.

Comparison between the current situation under EU law and the proposed UK regime for environmental protection

28. Whilst the EPGB has clarified matters outlined in EP&G and in particular that individuals will be able to make complaints to the new body it remains the case that the OEP would not have comparable powers in respect of such complaints. In particular it is noted that the OEP's discretion is very wide. It appears to be the sole arbiter of what amounts to a "serious" failure to comply with environmental law and has a discretion whether to act or not in any event.

29. The proposed power to be able to take a public authority to Court is unusual as it is described in JR terms but appears to relate to offending 'conduct' and not to an authority's 'decision'. Again, it does not compare with the Commission's powers.

30. The EPGB in addition does not provide an external supervisory role on the compliance of the UK's environmental law with, for example, norms of international as against domestic environmental law. The EP&G suggested that the body should *not* have a role in securing compliance with international environmental agreements [124] and "matters related to climate change" are specifically excluded [127]. This was not altered by the EUWA or in the EPGB. It is not therefore clear how the UK would propose to give effect to any new environmental standards that may be agreed with the EU in relation to a future free trade or association agreement.

The loss of the EU regulator in other areas of law

31. Environmental law is a particularly clear instance where the removal of the supervisory role of the Commission will arguably reduce the level of scrutiny and enforcement of agreed international norms. However, there are many other instances where such issues could arise. While that is no doubt part of the justification for UK withdrawal from the EU, that UK Government action should no longer be constrained either by the UK Courts giving effect to EU law or by the EU Commission threatening or bringing proceedings against the UK in the CJEU, the loss of enforceable rights for businesses and individuals is undoubtedly significant, as is the potential cost to, in the above case, the environment.

32. Other instances where the Commission currently plays a pivotal role include the following:

- Coordinating the enforcement of EU competition law, pursuant to which the national Courts and regulatory authorities are obliged to avoid inconsistency with enforcement action by the Commission and to stay proceedings pending such action.

- Supervising State aid granted by the Member States, under which the national authorities are obliged to notify aid and are prohibited from implementing such aid pending approval by the Commission, and
- Supervising telecommunications law, pursuant to which a number of initiatives by the national regulatory authorities are subject to notification and approval by the Commission in accordance with the EU framework of directives intended to lead to common rules and standards across the EU.

All of the above are necessary to maintain a level playing field throughout the EU, to the benefit of business and consumers alike.

33. It is as yet unclear how these regimes (or its role in other major EU sectoral regimes such as the common agricultural or fisheries policies or the various EU social or structural funds) can be effectively replicated within the UK or the extent to which the UK authorities will in practice maintain close regulatory alignment with the Commission's approach. On the assumption that the UK does indeed cease its membership of the EU in accordance with the Withdrawal Agreement on 29 March 2019, many of these topics will be the subject of intensive further negotiation on the Future Relationship between the UK and the EU. If it leaves with no deal, the currently foreseen arrangements will fall woefully short.

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ANNEX 1

Third Reading of the European Union (Withdrawal) Bill

House of Lords, Lord Krebs proposal:

“Maintenance of EU environmental principles and standards

(1) *The Secretary of State must take steps designed to ensure that the United Kingdom’s withdrawal from the EU does not result in the removal or diminution of any rights, powers, liabilities, obligations, restrictions, remedies and procedures that contribute to the protection and improvement of the environment.*

(2) *In particular, the Secretary of State must carry out the activities required by subsections (3) to (5) within the period of six months beginning with the date on which this Act is passed.*

(3) *The Secretary of State must publish proposals for primary legislation to establish a duty on public authorities to apply principles of environmental law established in EU law or on which EU environmental law is based in the exercise of relevant functions after exit day.*

(4) *The Secretary of State must publish proposals for primary legislation to establish an independent body with the purpose of ensuring compliance with environmental law by public authorities.*

(5) *The Secretary of State must publish—*

(a) a list of statutory functions that can be exercised so as to achieve the objective in subsection (1); and

(b) a list of functions currently exercised by EU bodies that require to be retained or replicated in UK law in order to achieve the objective in subsection (1).

(6) *The Secretary of State must before 1 January 2020 lay before Parliament a Statement of Environmental Policy which sets out how the principles in subsection (7) will be given effect.*

(7) *The principles referred to in subsection (3) include—*

(a) the precautionary principle as it relates to the environment,

(b) the principle of preventive action to avert environmental damage,

(c) the principle that environmental damage should as a priority be rectified at source,

(d) the polluter pays principle,

(e) sustainable development,

(f) prudent and rational utilisation of natural resources,

(g) public access to environmental information,

(h) public participation in environmental decision making, and

(i) access to justice in relation to environmental matters.

(8) *Before complying with subsections (3) to (6) the Secretary of State must consult—*

(a) each of the devolved administrations;

(b) persons appearing to represent the interests of local government;

(c) persons appearing to represent environmental interests;

(d) farmers and land managers; and

(e) such other persons as the Secretary of State thinks appropriate.”

House of Commons rejected Lord Krebs’ amendment It Sir Oliver Letwin’s amendment, which ultimately became s.16 of the Act). :

“Maintenance of environmental principles etc.

(1)The Secretary of State must, within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of—

(a)a set of environmental principles,

(b)a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,

(c)a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),

(d)provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill), and

(e)such other provisions as the Secretary of State considers appropriate.

(2)The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of—

(a)the precautionary principle so far as relating to the environment,

(b)the principle of preventative action to avert environmental damage,

(c)the principle that environmental damage should as a priority be rectified at source,

(d)the polluter pays principle,

(e)the principle of sustainable development,

(f)the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,

(g)public access to environmental information,

(h)public participation in environmental decision-making, and

(i)access to justice in relation to environmental matters” (emphasis added).