Avocetta Meeting 2017

EU Environmental Law in the United Kingdom: A Brexit Update

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At the time of drafting this note, there is a general election looming in the United Kingdom (on 8th June), which adds further uncertainty to an already highly complex picture for the future of environmental law in the UK. On 29 March 2017, the British Prime Minister 'triggered' Article 50 of the TEU with a letter to the European Council indicating this intention. Unsurprisingly, Theresa May's letter to Donald Tusk referred only to the 'environment' when writing of how to manage the evolution of EU and UK regulatory frameworks going forward so as to maintain an 'open and fair' trading environment. In the Brexit debate to date in the UK, the government has paid little attention publicly to environmental matters and laws.

The focus of the government is on 'making Brexit a success' and securing trade agreements with third countries. Environmental protection, and indeed the niceties of highly complex regulatory adjustment generally post-Brexit, are not the government's focus at this stage of planning for Brexit. This situation is worrying to many – including business, NGOs, environmental lawyers generally, opposition politicians and various parliamentary parties who have increasingly been investigating the issue of environmental law and policy post-Brexit.[1]

Maintaining the EU acquis

The extent of the Government's plan so far to repatriate environmental law into UK law post-Brexit is to pass a 'Great Repeal Bill' (and 'associated secondary legislation'), which will initially 'convert' all transposed EU law 'as it stands at the moment of exit' into UK domestic law. The idea is that the UK will start its legal separation from the EU with exactly the same law in place, which may then be reviewed and revised over time. How long this 'roll-over' period lasts is unspecified but is likely to be a number of years.

A White Paper for this bill was released on 30 March 2017. Notably, the White Paper states the following in relation to EU environmental law:

'*The Great Repeal Bill will ensure that the whole body of existing EU environmental law continues to have effect in UK law. This will provide businesses and stakeholders with maximum certainty as we leave the EU. We will then have the opportunity, over time, to ensure our legislative framework is outcome driven and delivers on our overall commitment to improve the environment within a generation. The*

[1] See in particular the Environmental Audit Committee, *The Future of the Natural Environment after the EU Referendum* (14 December 2016). For another interesting committee report, see Climate Change Committee, *Meeting CarbonBudgets – Implications of Brexit for UK Climate Policy* (October 2016).

Government recognises the need to consult on future changes to the regulatory frameworks, including through parliamentary scrutiny.'

The basic mechanisms (though we have yet to see the precise terms of the Bill which is likely to be published in the Autumn) are that on exit:

- The European Communities Act 1972 passed on British entry into the EU and which gives supremacy to EU law, and wide powers to make regulations to implement EU Directives etc will be repealed
- Existing national regulations transposing Directives will continue in force even if made under the ECA 1972
- EU Regulations will continue to be given legal effect within the UK
- The Great Repeal Bill will give power to government to make regulations adjusting the text of existing transposing regulations or EU Regulations to make them operable in a national context (eg substitute powers of consultation or decision by the Commission for a national body)
- The CJEU will no longer play a role but decisions of the CJEU until the date of exit will have the status of a Supreme Court decision. This means that the lower courts will still be bound by them when dealing with EU derived national law (eg *Waddenzee* on Habitats regulations) but the Supreme Court is not so bound and can revisit.

Despite these good intentions, there are a number of problems with the Government's plans for a Great Repeal Bill to convert EU law into UK law, which are now troubling UK legal academics and practitioners:

- While this 'roll-over' of EU law will be relatively straightforward for many EU environmental laws, there are some such as REACH and Emissions Trading where the legislation is so bound up with EU institutions that it is near impossible.
- It is not clear whether the 'rolled-over' EU law will be frozen at the point of exit, and won't update in parallel with future developments of EU law – this has been given the name of 'zombie' legislation
- There are many EU bodies (including the European Environment Agency or the Common Implementation Strategy, Seville Process etc.) where it would be useful for the UK to remain connected in some way. Each Government Department has been asked to 'bid' for the bodies they would like to remain part of and this will be an element of the negotiations. These bids have not be made public.
- The Commission will no longer have an enforcement role, and the citizens complaint procedure will disappear. The Government has said at present that its legal accountability can be met by judicial review actions brought by NGOs and others. JR is a useful longstop but it is questionable whether it can replicate a more systematic supervisory role of the Commission. Lawyers are exploring possibility of new forms of Environmental Ombudsman etc. to supervise public bodes.

- The requirement to send regular implementation reports to the Commission will disappear. These requirements are not transposed into national legislation, and have not be a traditional feature of UK environmental law. There are calls for such obligations to remain but with reports to Parliament.
- The devolved nature of government in the UK complicates and constrains how EU environmental law can be repatriated into UK law. Since the devolved administrations (Scotland, Wales and Northern Ireland) all have some competence in relation to environmental matters, there are difficult constitutional issues about how environmental powers are repatriated into UK law and there is likely to be increasing fragmentation of environmental law within the UK post-Brexit. The White Paper acknowledges these issues but does not provide clear principles as to how the UK will repatriate EU environmental law across the devolved administrations of the UK.
- A heavy reliance on delegated or secondary legislation to convert EU law into UK law is planned. This will create further problems of transparency of UK environmental law and could involve unscrutinised changes to UK environmental regulation and/or give rise to unintended consequences.

International Law : The UK remains bound by international environmental conventions, which will constrain the power of government to change national law. But many of these conventions (esp in fisheries) are EU exclusive competence, and many more are mixed agreements. Not yet entirely clear how the UK will handle these agreements. Also there are many examples of EU environmental law which have fleshed out the bare bones of international agreements to a considerable degree (eg compare Art 4.2 Ramsar Convention ("*Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources…"* with more detailed procedural requirements under Art 6Habitats Directive). These examples could be in jeopardy when the opportunity is taken to revisit the EU derived law leaving just the bare bones of international obligations..

New trading relationships that the UK forms are likely to impact the internal regulatory landscape in the UK. This is because the UK may need to comply with external regulatory standards, including environmental standards, to access trading markets. In particular, this is likely to be a requirement of trading with the EU or having any access to the EU single market. As a practical matter, the UK may end up being bound by EU environmental law in many respects even after the 'roll-over' period.

To put a positive spin on Brexit and environmental law, there might be some opportunities for UK environmental law post-Brexit. The UK might be able to pursue an even more ambitious climate change policy, for example, free of the constraints of EU state aid rules. It could also look to develop agricultural policy that is more sustainability focused, outside the constraints of the common agricultural policy. UK politics will need to align for such developments to occur and it is not yet clear that this will happen. So far in UK politics, environmental issues are not being prioritized in Brexit debates.

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