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### Brexit

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## Brexit - The Never-ending Story

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### At a glance

- Many aspects of the UK's withdrawal from the European Union remain to be put fully into effect or even finally determined.
- International agreements, including the EU-UK Trade and Cooperation Agreement limit how far the UK has a free hand in deciding its way ahead.
- New arrangements for environmental governance have been made in the different parts of the UK, covering the role of environmental principles and new environmental "watchdogs".
- The devolved nature of many environmental responsibilities can lead to regulatory divergence across the UK, with the means of dealing with this themselves creating tensions.
- The Retained EU Law (Revocation and Reform) Bill raises significant concerns over the uncertainty created, the challenge posed by its tight timescale, and the wide powers conferred on ministers.

The first time I spoke about Brexit at a UKELA event (held jointly with the Society of Legal Scholars) was in November 2015, seven months before the referendum. None of us could imagine then that seven years later it would still be far from clear what the formal, far less the practical, impact of withdrawal from the EU (if it happened) was going to be.

### Continuing uncertainty

Although agreements have been made on withdrawal and aspects of "trade and cooperation" between the UK and EU,<sup>1</sup> significant elements of these are not yet fully implemented. The key question of the position of Northern Ireland remains without a final answer, with agreed rules again not fully given effect, legal action started and negotiations continuing over the implementation and future of the Northern Ireland Protocol. Meanwhile the Northern Ireland Protocol Bill<sup>2</sup> is progressing through UK Parliament with a view to enabling the UK to disregard parts of that agreement.

Within the UK, the ways of dealing with regulatory divergence on matters of devolved competence veer between the collaborative approach of common frameworks (although many are still in process rather than finalised) and the overriding impact of the United Kingdom Internal Market Act 2020. Meanwhile on environmental matters, the UK Government's rhetoric continues to swing between commitments to a greener future and the deregulatory thrust typified in the EU Retained Law (Revocation and Reform) Bill,<sup>3</sup> a Bill that threatens a major disruptive effect.

In terms of substantive changes, we have seen some major innovations. Legislation has attempted to fill the "governance gap" in environmental matters that arose from the loss of the EU structures, in relation to both environmental principles and holding the government to account. Separate regulatory mechanisms on issues such as chemicals and emissions trading have had to be established, but the overall legacy of EU environmental law has not been swept away.

### Legal Inheritance

Under the European Union (Withdrawal) Act 2018,<sup>4</sup> EU law as at the end of 2020, and the domestic measures that implement it, continue in force as “retained EU law”, subject to the many detailed legislative changes made to purge various legal regimes of the involvement of EU institutions. EU legislation continues in force, and it has recently been confirmed that this can include broad obligations included in Directives. In *Harris v Environment Agency* it was held that since it had previously been recognised by the courts in Luxembourg and the UK as imposing a clear obligation, the duty under the Habitats Directive to prevent the deterioration of habitats within Special Areas of Conservation was one that could still be relied on and enforced in the domestic courts.<sup>5</sup>

Similarly, case-law from the Court of Justice of the European Union dating from before the end of 2020 continues to have force. It is binding on the lower courts, but although the Supreme Court and the senior appeal courts (e.g. Court of Appeal and Inner House) must pay heed to it, they are empowered to depart from it.<sup>6</sup> This power is to be exercised in line with the same cautious approach as the Supreme Court takes to departing from its own earlier decisions.<sup>7</sup>

### Trade and Cooperation Agreement

It is often said that Brexit is about “taking back control”, but the UK government does not have a wholly free hand in shaping the future. Apart from the range of obligations contained in the many international treaties, environmental and other, to which the UK is a party, specific commitments have been agreed in the EU and UK Trade and Cooperation Agreement. In an environmental context these include obligations:

- not to weaken or reduce, in a manner affecting trade or investment, measures for environmental or climate protection below the levels in place at the end of the transition period, including by failing to enforce them effectively (art 391);
- to respect environmental principles (art 393);
- to maintain the commitment to undertaking the assessments of projects, plans and programmes likely to have significant environmental impact (art 393);
- to ensure that there is access to effective remedies on environmental matters, including injunctive relief, and that the remedies are not prohibitively costly (art 394);
- to provide public access to environmental information held by or for public authorities, including active dissemination by electronic means (art 398).

The obligations under the Agreement do not create any legal rights for individuals or companies (art 5), so that any action if they are not being fulfilled lies solely in the hands of the two parties. The Agreement does, however, provide a comparatively rapid and powerful means of enforcing the obligations through the ability of a party to take rebalancing actions, disapplying other provisions of the Agreement, where divergence between the parties is having a material impact on trade or investment (art 411).<sup>8</sup>

### Environmental Governance

Given the deregulatory rhetoric at the time of the referendum, it was feared that the governance gap mentioned above would remain unfilled. In practice, though, significant steps have been taken but since the environment is largely a devolved responsibility, these differ across the UK.

#### *England*

For England the Environment Act 2021 does a number of things. It sets out a framework for shaping future action by requiring an environmental improvement plan (ss 8-15) and a range of statutory targets (ss 1-7).<sup>9</sup> It provides that in making policy Ministers must have due regard to a statement of environmental principles; the principles are integration, prevention,

precaution, polluter pays and rectification at source (ss 17-19). It establishes the Office for Environmental Protection (OEP) which has several functions, including (ss 23-43):

- to monitor progress on plans and targets
- to provide advice to government
- to exercise oversight over non-compliance with environmental law, on its own initiative or in response to complaints, although ultimately all it can do is seek a form of judicial review, with limited remedies.

### *Northern Ireland*

During much of the period before and after the UK's withdrawal from the EU, the Northern Ireland Executive and Assembly have not been in operation. This significantly limited the opportunities to plan a distinctive way forward. Instead, it was decided that the Environment Act should include equivalent provisions on principles and oversight for Northern Ireland, with the OEP looking at devolved matters as well (ss 48-94, Scheds 2-3). On a related issue, it can be noted that the absence of working institutions has meant that there has been no progress towards the creation of an independent Environment Agency, as was promised in *New Decade, New Approach*, the deal that settled the then current disputes to enable the re-establishment of the NI Assembly and Executive in January 2020.

### *Wales*

The different legal background in Wales, created by the Well-being of Future Generations (Wales) Act 2015 and the role of the Future Generations Commissioner for Wales, demands a different solution rather than just applying the Environment Act yet further. Legislative provisions were deferred until after 2021 elections but the Interim Environmental Protection Assessor for Wales was established on a non-statutory basis. The Assessor can receive and investigate complaints, but has no legal enforcement powers. As yet no clear longer-term plans have emerged.

### *Scotland*

Scotland has legislated for its own new governance framework, in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. This grants legal status to the same environmental principles as in the Environment Act, but the duty to have due regard to these in making policy applies not just to Ministers but to a wide range of public authorities (ss13-18). It also refers to the principles themselves as developed in EU law, not just a ministerial statement (although guidance has to be produced). Ministers must also prepare an environmental policy strategy (s 47).

Environmental Standards Scotland (ESS) has been created as the new watchdog, with a narrower remit but stronger legal powers than the OEP (ss 19-46). Its role is to oversee the effective implementation of and compliance with environmental law, including implementation of international obligations. Although redress in relation to individual decisions remains through the standard appeal and review procedures, ESS can receive representations or act on its own initiative leading to the service of a compliance notice on a public authority that is not complying with the law. The authority can appeal against the notice to the sheriff court, but continued non-compliance can be referred to the Court of Session and treated as a contempt of court. For systemic problems, an improvement report can be made, requiring the Ministers to produce an improvement plan which must be approved by the Parliament. By the spring of 2023,<sup>10</sup> the Scottish Government must consult on a review of environmental governance, including access to justice and the potential of an environmental court.

### Devolution

The previous paragraphs show that the general picture of environmental law inherited from the EU has continued in effect and that a lot has been done to try to ensure that there is a

framework to secure that the law is effective and complied with. Yet significant problem areas remain, including the relationship between the devolved and UK authorities. Many post-Brexit statutes contain powers for UK Ministers to act in devolved areas, often with consent,<sup>11</sup> but sometimes not<sup>12</sup> and at times it is unclear what use is envisaged for powers that are widely drawn.<sup>13</sup> Such issues must be viewed against the background where Northern Ireland by law (under the Northern Ireland Protocol) and Scotland by policy seek to remain in step with evolving EU law whilst policy in London points towards a different path.

At the same time the United Kingdom Internal Market Act 2020 has a significant impact on the practical effect of powers exercised by devolved administrations. The Mutual Recognition and Non-discrimination principles embodied in that Act mean that goods and services lawfully available in any one part of UK must be available throughout, and the relative size of markets means that businesses are likely to focus on the English requirements. This meant that the restrictions introduced in Scotland in June 2022 on single-use plastics could in effect be bypassed until mid-August when legislation made in London took effect to exempt this area from the scope of these two principles.<sup>14</sup>

### Retained EU Law (Revocation and Reform) Bill

The biggest issue just now, though, is undoubtedly the Retained EU Law (Revocation and Reform) Bill that started its parliamentary journey in October. Under its terms, all EU laws remaining in effect and all domestic subordinate legislation giving effect to EU law will be revoked on 31 December 2023, unless expressly saved or granted an extension until no later than 23 June 2026 (10 years after the referendum). EU case law will no longer be binding on the higher courts, with a streamlined process to allow lower courts to refer issues to a level where the inherited law can be departed from. The general principles of EU law will no longer play any part of domestic law and any law derived from an EU source is to be interpreted in line with domestic enactments and be subject to them. Moreover, very sweeping powers are conferred on Ministers (again allowing those at UK level to act in devolved areas) to make regulations to restate, replace or update any current retained EU law or make other changes; any revocation or replacement must not increase regulatory burdens (including “administrative inconvenience”).

Primary legislation is not affected by the Bill, so that the choice of implementation route many years ago may determine the fate of particular measures. For example, strategic environmental assessment in most of the UK will be subject to the sunset provision, but not in Scotland, where implementation was by means of primary legislation.<sup>15</sup>

The Bill raises a number of significant concerns, including the very demanding timetable that will divert UK and devolved departments from other business, the uncertainty over which regulatory provisions will be continued, abolished or replaced and the lack of scrutiny over the broad ministerial powers. The only thing that is clear is the Brexit story remains unfinished.

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<sup>1</sup> EU-UK Trade and Cooperation Agreement, 2021 CP 426, TS No.8/2021.

<sup>2</sup> 2022-23 HL Bill 52 (as brought from Commons).

<sup>3</sup> 2022-23 HC Bill 6 (as introduced).

<sup>4</sup> As amended by the European Union (Withdrawal Agreement) Act 2020.

<sup>5</sup> [2022] EWHC 2264 (Admin).

<sup>6</sup> European Union (Withdrawal) Act 2018, s 6; European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, SI 2020/1525.

<sup>7</sup> European Union (Withdrawal) Act 2018, s 6(5); *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441.

<sup>8</sup> A useful source for keeping track of divergence is the reports produced by the UK in a Changing Europe programme, most recently <https://ukandeu.ac.uk/research-papers/uk-eu-regulatory-divergence-tracker-fifth-edition/>.

<sup>9</sup> At the time of writing the statutory deadline has passed without these being produced.

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<sup>10</sup> The deadline is set as six months from the submission to the Parliament of ESS's Strategy, which took place on 30 September, 2022.

<sup>11</sup> E.g. Environment Act 2021, s 50 on producer responsibility obligations.

<sup>12</sup> E.g. Agriculture Act 2020, s 43 on the limits to financial support so as to ensure that WTO rules are met.

<sup>13</sup> E.g. the proposals on environmental and habitats assessments in the Levelling-up and Regeneration Bill, which grant powers on devolved matters, but then lists only the English legislation for some purposes (2022-23 HC Bill 6, Part 5 as introduced).

<sup>14</sup> United Kingdom Internal Market Act 2020 (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022, SI 2022/857. See D. Davies, *Scotland's Ban on Single-Use Plastics: a case study of the impact of the UK Internal Market Act* (SPICe) [Scotland's Ban on Single-Use Plastics: a case study of the impact of the UK Internal Market Act – SPICe Spotlight | Solas air SPICe \(spice-spotlight.scot\)](#).

<sup>15</sup> Environmental Assessment (Scotland) Act 2005 as opposed to SI 2004/1633 (England), SI 2004/1656 (Wales) and SRO 2004/230 (NI).