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Environmental law outside the EU

[Colin Reid attempts to set out the continuing ground rules, and the new influences, under which environmental law will operate when the UK leaves the EU]

EU law has had a huge influence on planning and environmental law in Scotland. What then will be the consequences of Brexit? The one certainty is that things will have moved on between the time of writing this text shortly after the referendum and its formal appearance, so it is safer to limit myself to a few simple (and personal) observations and to stick to the basic option of the UK withdrawing from the EU, without speculating about whether Scotland will, by any route, achieve a separate relationship with its current partners.

Although within the EU the town and country planning systems have remained predominantly areas for national control, EU law has still had a significant impact, and even more so in other areas of environmental law. Innovations introduced into our law through the EU include environmental assessment, access to environmental information and bathing water standards, whilst the requirements of the Water and Waste Framework Directives have dominated the law in those areas and the Birds and Habitats Directives have established clear obligations not just to take into account but actually to achieve the conservation of biodiversity.

Starting points

What observations can be made? The first is to emphasise that unless and until the UK's withdrawal from the EU is formally agreed and legally effective, EU law remains in force and must be complied with as if nothing has happened. The courts are still bound to apply EU law and to interpret the law in line with what EU law requires and the Court of Justice has indicated. The referendum vote by itself changes nothing in the law.

A second point is to note the difficulty of identifying and disentangling the EU elements within our law. Directives have to be implemented through national legislation, and even EU regulations which are directly applicable are usually supported by some national legislation to ease their enforcement and application. Measures that in their legal form are wholly domestic, such as the Environmental Assessment (Scotland) Act 2005, may in fact be inspired (and required) by EU law, whilst without detailed study it is far from clear what elements of the reforms to water law over the past decade and more are meeting EU requirements and which are purely domestic in origin. Moreover there is a lot of integration of the two legal sources, with domestic law referring to EU measures at vital points, e.g. to provide the definition of "waste" in the Waste Management Licensing (Scotland) Regulations 2011. Even if this were desired, there is no simple way of extirpating the EU legacy from UK law.

One option might be to identify every piece of the EU inheritance, decide in each case whether it is something we wish to keep, adjust or remove, and then adopt domestic legislation to achieve that result, but it seems inconceivable that this task could be achieved across all areas affected by EU law between now and Brexit day. It therefore seems inevitable that there will have to be some provision stating that all the law in force on Brexit day will continue, whether contained in

EU or domestic legislation, giving more time for the review and adjustment of the law. Even where change is thought desirable, it may not be rapid.

In terms of responding to withdrawal and the making of new laws, one important point to note is that under the devolution settlements most environmental matters are the responsibility of the devolved authorities, and therefore it will be the Scottish Government and Parliament, not those in London, that will be deciding how to use the new freedom of action that Brexit brings. One consequence of this is the risk of greater fragmentation of the law across the UK. Creating the scope for differences is the whole point of devolution, but the fact that all the authorities are currently having to work within a shared EU framework has set limits on that divergence, and there may be concerns that in future greater fragmentation may make life difficult for businesses.

Matters of substance

As far as the substance of the law is concerned, the UK may continue to be constrained by any obligations accepted in exchange for access to the single market, but certainly will be limited by obligations which exist as a matter of international law, e.g. those under the Aarhus Convention which the UK has ratified in its own right. Obligations under international law are often less concrete than under EU law, enforcement mechanisms are less powerful and our national courts do not have to ensure that international law obligations are respected, but future freedom of action will be substantially restricted by the international commitments which the UK has made.

More generally, environmental law today is radically different in style and content from what it was when the UK joined the EU at the start of 1973. Many of these changes and the greater environmental protection they have brought would have taken place in any case, but membership of the EU has undoubtedly meant that change came faster and more thoroughly than would otherwise have been the case. The nature of the law has also been affected, with the older preference for discretionary powers replaced under EU influence by strict standards and long-term targets. These more rigid rules are now an accepted part of domestic environmental law, but it is not inconceivable that future changes may reintroduce some elements of discretion where meeting the fixed standards or targets proves to be particularly difficult or expensive, or clashes with other policy goals.

Fetters loosened

Two features of EU law which will disappear with Brexit merit particular attention. The first is the stability of EU law. It may take a long time for the law to be made, and it may be frustratingly difficult to adjust it once it is in place, but these features can be a virtue in tackling problems such as water quality and climate change where long-term plans and programmes are necessary, and more generally industry and investors tend to welcome a stability which enables them to plan ahead with certainty. Outwith the EU, environmental policy and law may be much more volatile, subject to short-term political pressures and more frequent changes of detail and direction; this has both advantages and disadvantages.

The other major feature has been the extent to which the EU has provided a means for the Government to be called to account in relation to its environmental commitments. The

mechanisms may be far from perfect, but the EU does enable action to be taken to ensure that governments do meet their obligations, even when that is difficult or expensive or just not viewed as a top priority, as seen in the recent litigation about air quality in London. Apart from EU measures, within the UK long-term policies have tended not to be embedded in legal form, and when they have been, such as the legally binding targets under the Climate Change Acts, there is considerable uncertainty over how and by whom they can be enforced. Losing this layer of governmental accountability will perhaps be the greatest impact of Brexit for environmental law, but is, of course, inherent in the decision to “take back control”.

Other consequences of Brexit, such as departure from the Common Agriculture and Fisheries Policies, will have a big effect on our environment, but as with all the points made here, so much depends on exactly what transpires as we negotiate a new future outwith the EU. There is little sign of a desire to sweep away vast swathes of our inheritance of EU environmental law, but Brexit will open up the possibility of strengthening or weakening the law at various points and above all take us away from a structure where environmental laws were locked into a long-term framework with the means to ensure that the Government stuck to the commitments it had made. As ever, there is a tension between flexibility and certainty, and it will be years before we know exactly what potential Brexit will bring, far less what is delivered.

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