

Studying EU Law in Scotland during and after Brexit

Chapter 11

Environmental Protection and Law

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Introduction

Environmental protection has been held to be a ‘wall breaker’ for the EU,¹³ as already in the 1970s it pushed the EU project beyond its economic foundations to include broader concerns of human wellbeing. Since then, over 200 secondary legislative instruments on a wide range of environmental topics have been adopted.¹⁴ Additionally, the EU has increasingly integrated environmental considerations into other areas of EU law. It is estimated that nowadays 70-80% of national environmental legislation in the Member States is of EU origin.¹⁵

This chapter will first briefly introduce the fundamental elements of EU environmental law (and its basis in the Treaties). It will then discuss three different aspects of EU environmental regulation, which have made significant contributions to environmental protection in the UK: nature conservation, environmental integration and procedural environmental rights. It will, in particular, use the Common Agricultural Policy and Common Fisheries Policy, two frameworks of sectoral legislation with great relevance to the environment, as illustrative examples. Against this backdrop, it will discuss the implications of Brexit for environmental protection in the UK and Scotland, concluding that despite risks of lowering protection levels, there are also opportunities for more ambitious approaches and for the recognition of local needs.

Basics and Basis of EU Environmental Law

Since the entry into force of the [Single European Act](#) in 1987, the EU has an explicit legislative basis for autonomous environmental policy making. [Article 191 TFEU](#) lists the following objectives: preserving, protecting, and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. The article thus leaves the EU with ample flexibility to tackle emerging environmental issues. However, the exercise of EU competence in environmental matters is restricted by the principle of subsidiarity: the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States themselves ([Article 5 TEU](#)).

Moreover, EU law provides for minimum environmental harmonisation only, thus allowing Member States to maintain or introduce more stringent environmental

¹³ Sadeleer, N (2014) [EU Environmental Law and the Internal Market](#) (Oxford University Press), p. v

¹⁴ Morgera, E ‘Environmental Law’ in Barnard, C and Peers, S (eds) (2017) [European Union Law](#), (2nd Edition, Oxford University Press), p 657

¹⁵ Kramer, L ‘Regional Economic International Organizations: The European Union as an Example’ in Bodansky, D, Brunnée, J and Hey, E (eds) (2007) [The Oxford Handbook of International Environmental Law](#) (Oxford University Press)

measures ([Article 193 TFEU](#)). Various principles of EU environmental policy, furthermore, govern any action taken in this field. These include, amongst others, the principle of a 'high level of environmental protection' ([Article 3\(3\) TEU](#)); the integration principle ([Article 11 TFEU](#)), the precautionary, prevention, and polluter pays principles ([Article 191\(2\) TFEU](#)).

Contribution of EU Law to Nature Protection in the UK

EU law on nature protection was at the forefront of EU environmental action, with its two pieces of flagship legislation, the [Birds Directive](#) and the [Habitats Directive](#), dating back to the 1970s and early 1990s. The directives provide for a network of protected areas – Special Protected Areas (SPAs) under the Birds Directive and Special Areas of Conservation (SACs) under the Habitats Directive, together known as Natura 2000 sites. Additionally, the directives provide for direct species protection, through prohibitions of activities directly harmful to a protected species, or by imposing monitoring and reporting obligations regarding their status.

The directives have led to an increase in the [level of protection](#) previously offered under UK law for Sites of Special Scientific Interest (SSSIs). Increased protection is not only important for ecological reasons, but also for human wellbeing. Internationally and within the EU, it is increasingly recognised that the effective [exercise of human rights](#) greatly depends on the maintenance of healthy ecosystems. In 2016, the UK [committed internationally](#) to consider relevant linkages between health and biodiversity, in recognition of biodiversity as a source of nutrition, medicines, heating, clothes, clean water and shelter.

The implementation of the EU's directives is still [considered inadequate](#) in the UK, with only 8.53% of the national land area covered by Natura 2000 sites, and 71% of protected habitats considered to be of an unfavourable-bad status. The European Commission has used both softer (progress reporting requirements, deadlines) and harder ([infringement proceedings](#)) instruments to direct Member States, including the UK, towards better implementation. The EU's nature framework has been considered a '[clear and logical framework of rules](#)' and it has been held that 'investing in Natura 2000 makes good economic sense', considering its relevance for the environment, people and the economy and its very low cost-benefit ratio.

Beyond Environmental Legislation: The Value of Integration

As a general principle of EU law, environmental integration ([Article 11 TFEU](#)) is framed in mandatory wording. It allows environmental measures to be adopted under non-environmental policies and for environmental principles to be applied in a non-environmental context. This has resulted in an 'integrationist' approach in the development of EU environmental law (e.g. by promoting reliance on environmental impact assessment), as well as 'greening' other areas of EU law, such as the Common Agricultural and Fisheries Policies.

Although the Common Agricultural Policy (CAP) initially primarily aimed at increasing productivity, the current CAP 2014-2020 integrates various [environmental measures](#). These include cross-compliance obligations for basic payments ([Regulation 1306/2013](#)) and mandatory greening payments ([Regulation 1307/2013](#)). Additionally, the CAP's Rural Development Fund seeks to contribute to environmentally-balanced and climate-friendly development of rural economies, whilst providing Member States

with considerable leeway to decide on the particular needs of their regions ([Regulation 1305/2013](#)).

Similarly, the [Common Fisheries Policy \(CFP\)](#) has [shifted away](#) from its initial focus on [commercially valuable species](#), towards a more [holistic approach](#) encompassing non-target organisms and sensitive habitats. The overarching objectives of the CFP now include the long-term sustainability of fisheries activities, the application of the precautionary and ecosystem-based approaches, and the achievement of coherence with EU marine environmental policy. Moreover, funding under the European Maritime and Fisheries Fund (EMFF) seeks to reduce the environmental impacts of fishing and contribute to the protection and restoration of aquatic biodiversity and ecosystems ([Regulation 508/2014](#)). Nevertheless, while significant progress has been achieved in greening the CAP and the CFP, there remains ample scope for further enhancing the environmental sustainability of the agriculture and fisheries sectors.

The principle of environmental integration has also allowed for the mainstreaming of environmental considerations into a wide range of sectoral policies at the national level, as it is binding not only on the institutions and agencies of the EU, but also on those of the Member States when they are interpreting and implementing Union law ([Article 52\(5\) EU Charter](#)). An example is the cross-compliance rules under the CAP, which cross-reference 13 legislative standards in the field of environment, food safety, animal and plant health and animal welfare. In the context of Brexit, this means that integration could complicate the elimination of a piece of EU environmental law from the UK legal system, as it is likely to ‘unravel’ other connected environmental legislation and related sectoral and cross-sectoral legislation.

Procedural Rights and the Implementation of the Aarhus Convention

EU law protects certain key [human rights of relevance](#) to the environment, which are predominantly procedural in nature: namely, access to environmental information, public participation in environmental decision-making and access to justice in environmental matters. In addition to being the subject of a dedicated [EU directive](#), the right of all natural and legal persons to access environmental information held by public authorities has been enshrined in several EU legislative instruments across a range of environmental policy sectors (e.g. Article 19 of the [Marine Strategy Framework Directive](#)). Similarly, provisions on public participation are found in sectoral pieces of EU environmental legislation (e.g. the [Water Framework Directive](#)), as well as in legislation relating to the assessment of the environmental effects of [public and private projects](#), the strategic environmental assessment of [plans and programmes](#), and permitting processes regarding [industrial installations](#).

Even though the European Commission has been [unsuccessful](#) in introducing a directive on access to justice in environmental matters, the EU judiciary has [indicated](#) that relevant national regulations must be interpreted in such a manner as to avoid making the exercise of the right impossible, or excessively difficult, in practice. Moreover, Articles 2, 6(1), 8, 10, and 13 of the [European Convention on Human Rights \(ECHR\)](#) have been [interpreted](#) by the European Court of Human Rights as incorporating procedural as well as substantive environmental rights. The relevant case law [informs the interpretation](#) of analogous provisions of the EU Charter of Fundamental Rights (Articles 2, 7, 11, 17, 42 and 47 CFR), which has been endowed with the status of primary EU law ([Article 6\(1\) TEU](#)).

EU law on procedural environmental rights is inextricably linked with the implementation of the [Aarhus Convention](#) on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which was elaborated under the UN Economic Commission for Europe (UNECE). All EU Member States are individually parties to the convention, and the EU is also a party in its own right. Even though the UK will continue to be bound by the obligations enshrined in the Aarhus Convention after Brexit, challenges may arise from the loss of the 'hard, enforceable edge' that EU law has conferred on this international treaty by providing a basis for the European Commission and the EU judiciary to monitor its implementation by the Member States.¹⁶

The judgments issued by the Court of Justice of the EU in the context of a [preliminary reference](#) submitted by the UK Supreme Court and an [infringement action](#) brought against the UK by the European Commission in relation to the prohibitive effect of litigation costs on access to justice in environmental matters were among the catalysts of a broad-ranging reform of the England and Wales costs regime in 2013.¹⁷ By capping the cost of judicial proceedings for certain categories of environmental cases, this reform was an important step forward in eliminating some of the procedural hurdles that hindered access to justice for many individuals, communities and non-governmental organisations (NGOs), which are the actors most likely to bring cases for judicial review.

Post-Brexit, UK compliance with the Aarhus Convention will continue to be monitored by a body established under the convention, namely, the Aarhus Convention Compliance Committee (ACCC). An important feature of the ACCC is that it allows individuals and NGOs to submit complaints regarding the noncompliance of state parties with the provisions of the convention. Even though the direct involvement of civil society promotes legitimacy and justice, the ACCC nevertheless lacks the 'hard enforcement' infrastructure provided by the European Commission and the Court of Justice of the EU, as it is only able to issue non-binding recommendations. On the other hand, once they have been endorsed by the Meeting of the Parties to the Aarhus Convention, the recommendations of the ACCC are considered authoritative interpretations of the treaty provisions, which must be [taken into account](#) by domestic authorities and courts in the interpretation and implementation of the convention.

Implications of Brexit for Environmental Protection in the UK

At least two [basic scenarios](#) may be envisaged regarding the future relationship of the UK with the EU. Under the first scenario, the UK could preserve its close ties with the EU by, for instance, maintaining its membership in the European Economic Area (EEA). Among other privileges, this scenario would provide the UK with preferential access to the Single Market. As a condition of access, the UK would be subject to a range of EU laws, as well as some enforcement procedures and bilaterally negotiated financial obligations. It should, however, be noted that EEA membership entails only a 'patchwork' of legal obligations in connection to the environment, as it does not cover

¹⁶ Lee, M (2014) [EU Environmental Law: Challenges, Change and Decision-Making](#) (Hart Publishing), p 160

¹⁷ Jaffey, B and Mehta, R (2013) '[Reigning in the "Prohibitive Expense" of Environmental Litigation: Edwards v Environment Agency](#)', *Judicial Review*, 18(4) 403-415; Westaway, N (2013) 'The Ritz Reformed? Costs in Environmental and Public Interest Cases', *Judicial Review*, 18(4)

the Common Agricultural and Fisheries Policies or nature conservation, but does address aspects of trade in agricultural and fish products, as well as invasive species.

On the other hand, EEA membership would allow the UK to act jointly with EU Member States in various areas of environmental policy (e.g. climate change). Under the second scenario, the UK would remain outside the EU and the EEA. Even so, it is [highly probable](#) that the UK, like any other country wishing to export to the Union, would face pressure to align with European environmental law, at least in areas that are closely associated with access to the Single Market (e.g. compliance with energy efficiency requirements).

By any account, Brexit presents [significant challenges](#) for [environmental protection](#) in the UK, particularly with regard to the loss of scrutiny and enforcement powers associated with the operation of EU law and institutions; the loss of the long-term policy horizon and transparency provided by EU law; the restriction of opportunities for funding and cooperation; and the potential repositioning of the UK in international and regional environmental governance fora. Additional challenges arise for the devolved administrations, whose ability to engage in international cooperation on environmental matters is limited by their lack of international legal capacity. Moreover, in environmental policy areas where EU processes and institutions play a prominent role (e.g. the regulation of chemicals, waste, CO₂ emissions from cars), the repatriation of powers to the UK post-Brexit [raises questions](#) about the allocation of competence between the UK's central and devolved administrations.

On the other hand, the loss of the monitoring and enforcement mechanisms provided by EU law may to a certain extent be mitigated through enhanced private enforcement. To this end, Scotland and England and Wales could seek to further [strengthen procedural](#) environmental rights, allowing individuals and civil society to be more involved in the implementation of environmental law. In addition, the UK may pursue environmental standards akin to those of the EU, thus building upon EU-level guidance and resource pooling. The devolved administrations may also use their [competence in the environmental field](#) to develop standards that are even more ambitious than those of the EU, focusing on the protection of ecosystem services and ecosystem restoration, and taking into account local environmental, socioeconomic and cultural features.

More broadly, the UK can work towards implementing international obligations relating to the ecosystem approach, in acknowledgment of the crucial contribution of ecosystems to the protection of substantive human rights and the realisation of sustainable development objectives (e.g. the UN [Sustainable Development Goals](#)). This is particularly relevant to the agriculture and fisheries sectors, which, as mentioned above, are still facing considerable shortcomings in terms of environmental integration and the implementation of an ecosystem-based approach, despite being heavily reliant on ecosystem services for their sustainable development. In light of weakened accountability systems post-Brexit and the resulting increased importance of national and local enforcement mechanisms, opportunities for continued participation in relevant EU networks should also be explored (e.g. the [European Union Network for the Implementation and Enforcement of Environmental Law – IMPEL](#)).

Conclusion

The EU's regulatory activities in the environmental field have led to a broad and diverse environmental *acquis* and increased environmental integration across the EU's sectoral and cross-sectoral laws and policies. Although the EU has shown more ambition in some areas than others, its impacts on national environmental laws can be considered substantial. This chapter has highlighted some particular topics of consideration when safeguarding the environment from the UK's withdrawal from the EU – namely, nature protection, environmental integration and procedural environmental rights. As the EU has driven progress in these areas, there is a risk that Brexit could hinder further progress within the UK or even lead to a lowering of the level of environmental protection. However, there are also opportunities to pursue similar or even higher level of environmental protection, which are better catered to the local environmental and socio-economic conditions in the UK's regions.

Further Reading

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