Volume 19, Issue 2
June 2021

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2021-04-07
accepted 2021-05-04

The UK and Brexit – environmental opportunity or disaster?

Zjednoczone Królestwo i Brexit – szansa czy katastrofa dla środowiska?

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Citation: Macrory, Richard. 2021. The UK and Brexit – environmental opportunity or disaster? *Opolskie Studia Administracyjno-Prawne* 19(2): 69–86. DOI: 10.25167/osap.4273.

Abstract: The environmental implications of the UK leaving the EU have yet to be fully realized, but the picture is by no means all negative. Initially, as far as possible, all EU environmental legislation continues to apply in the interests of regulatory certainty but divergences are beginning to emerge. Brexit has led to the proposed establishment of a new independent environmental watchdog, and the Government has committed itself to ambitious environmental goals. The Common Agricultural Policy will be replaced by financial schemes that will pay farmers only for public benefits, mainly concerning the environment. At the same time, a consequence of Brexit is that that the UK will see increasing divergencies in environmental law and policy within its devolved administrations.

Key words: Brexit, Environmental divergence, UK environmental policy and law

Abstrakt: Trudno jeszcze wyrokować jakie będą implikacje wyjścia Zjednoczonego Królestwa z Unii Europejskiej, ale w żadnym razie obraz w całości nie jawi się jedynie negatywnie. Początkowo, jak tylko to możliwe, prawodawstwo unijne w kwestiach środowiskowych w całości jest stosowane w interesie odpowiednich regulacji, chociaż zaczynają pojawiać się też rozbieżności. Brexit doprowadził do zaproponowania ustanowienia nowego niezależnego ciała stojącego na straży środowiska, a Rząd Jej Królewskiej Mości zobowiązał się do osiągnięcia ambitnych celów w tym obszarze. Wspólna Polityka Rolna zostanie zastąpiona finansowymi programami, które będą gratyfikowały rolników za ich działania dla dobra wspólnego, szczególnie w sferze spraw związanych ze środowiskiem. Równocześnie, konsekwencją Brexitu

jest fakt, że Zjednoczone Królestwo zauważy w przyszłości pogłębiające się rozbieżności w prawie i polityce środowiskowej zdecentralizowanych administracji.

Słowa kluczowe: Brexit, rozbieżności w sferze środowiskowej, polityka i prawo środowiskowe Zjednoczonego Królestwa

1. Introduction

On 1 January 2021 the United Kingdom formally left the European Union. Since 1973, the EU has developed an impressive range of legislation concerning the environment which has clearly impacted on many areas of the UK environmental law, and has largely been beneficial to the environment. Before the UK joined the Community in 1973, it is true that the country had a well-developed system of laws on industrial emissions, pollution control and nature protection – but while the legislation tended to be detailed on procedural requirements (such as the need for licences or permits), it was deliberately far less specific as to precise environmental standards and goals, leaving this largely to the discretion of the government and public authorities. Two examples epitomise this characteristic. For many years, prior to EU membership, the legal standard for water supply for domestic consumers was simply one of providing 'wholesome' water, allowing water regulators to convert this term into operational specific standards (Water Act 1945, Third Schedule: 31). The second example concerns air pollution. For over one hundred years, the core legal obligation in the legislation concerning emissions into the air from major industries was to use the 'best practicable means' to prevent, minimize or render harmless such emissions, leaving it to the discretion of the enforcement authority to translate this broad-brushed concept into technical requirements to be contained in authorisations (Alkali etc. Works Regulation Act 1881; Ashby and Anderson 1981: 44-51). One of the main effects of the EU membership and the need to transpose EU environmental legislation into national law was to introduce far greater specificity into the body of legislation as to environmental standards and well as legally binding targets. Policy goals and targets which might previously have been contained in official circulars or advisory documents were increasingly transposed into detailed legislation. It is a change in the legislative style that started in the 1980s, has increased in intensity since then (Macrory 1991: 8-23; Jordan 2002: 19-43), and is now so embedded in the legal structure that it is unlikely to shift back post Brexit.

Brexit may be seen as heralding the abandonment of all the environmental gains secured by membership of the EU, and with Britain once again being viewed as the 'dirty old man of Europe' – an over-generalised characterization from the 1980s, which was never completely fair at the time. I want to

suggest that this is by no means an inevitable outcome, and give examples of developments currently taking place which suggest a rather more positive and nuanced picture.

2. Roll-over of EU law and future amendments

The Government's initial approach to Brexit was that all existing EU law, including environmental law, would as far as practicalable continue to have legal effect within the country after leaving the EU (Department for Exiting the European Union 2017: 13-19) The process, known as 'roll-over', was sensible to ensure a degree of regulatory certainty, but has required a myriad of technical amendments to national legislation implementing EU law to make it operational in a national context. References in regulations to requirements to notify the European Commission, for example, have been changed to refer to a national authority, usually the central government. Some EU environmental legislation was so intimately bound up with EU institutions that a simple roll-over proved impossible. The chemicals legislation, REACH (Regulation 1907/2006) was a good example, and the UK has now established a parallel system, UK REACH, which will apply to imports and chemical substances manufactured in England, Wales, and Scotland (under the Northern Ireland Protocol, at present the EU REACH system will continue to apply in Northern Ireland) (House of Commons Library 2021) Similarly, in the interests of legal stability, under s 6 European Union (Withdrawal Act) 2018 decisions of the Court of Justice of the European Union taken before Brexit, termed 'retained EU case law' will remain binding on the lower courts, although the highest courts, the Court of Appeal and the Supreme Court, are given power to depart from them.[1] Decisions of the European Court post Brexit are not binding on any national court, though courts are likely still at least to take note of them where relevant.

The powers under s 8 the European Union (Withdrawal Act) 2018 to amend existing EU regulations or national legislation implementing EU law were restricted to making them operational in a national post Brexit context, and could not be used to alter the substance of the provisions. New legislation, however, is now giving greater powers to government amend the substantive content of the law and REACH again provides a good example. The extent to which UK REACH will depart over time from the EU system is not yet easy to predict, but power has been given to Ministers in a new Environment Bill[2] to

[1] In 2020 the Government was given powers to extend by regulations the power of lower courts and tribunals to depart from existing decisions of the CJEU: s 26 European Union (Withdrawal Act) 2020.

[2] The Environment Bill 2021 has not at the time of writing completed its legislative process but is expected to do so by late 2021.

amend the existing rolled-over provisions. Unusually, though, the government has deliberately fettered the extent to which it can amend these provisions. Under Clause 131 of the Bill any amendment must be considered to be consistent with the overall aim of the EU REACH regulation contained in Article I ('to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as free circulation on the internal market while enhancing competitiveness and innovation') and certain core provisions of the Regulation cannot be amended, including those relating to 'no data, no market', animal testing as a last resort, and communication to the public on risks. In other areas of environmental law, the powers given to the government to amend the existing legislation are not so legally constricted. For example, Clause 83 of the Environment Bill gives power to the government to amend provisions concerning chemicals and chemical standards in the legislation implementing various EU water directives, and although the government insisted these powers would be used primarily to deal with new and emerging harmful substances, the powers are legally broad enough to permit the lowering of existing standards.

The extent to which the government will in future will attempt to depart from the current body of the EU environmental legislation implemented within the UK will, though, be inhibited by a number of factors. First, there is a political constraint in that the present government has committed itself to an ambitious programme of environmental improvement, launching a 25-year plan in 2018 (HM Government 2018) and according to the foreword to the Plan by the then Prime Minister, 'By implementing the measures in this ambitious plan, ours will be the first generation to leave the environment in a better state than we found it.' Second, most environmental policy is now within the jurisdiction of the devolved administrations (Wales, Scotland, and Northern Ireland), and even if the UK Government wished to pursue a policy lowering of environmental standards in favour of greater deregulation, there is no guarantee that the devolved administrations would follow suit, and any such developments would be confined to England only. Finally, the Trade and Co-operation Agreement between the EU and the UK (European Union and United Kingdom 2020) contains a range of commitments on climate change and environmental protection. Article 7.2. in particular, though it gives a general right to both parties to determine their own environmental levels of protection in line with international commitments, then contains an obligation of non-regression on existing environmental standards which might affect trade and investment between the parties: 'A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its

environmental law or climate level of protection'. To take one example, in 2020 the Government indicated that, as part of reforms of the planning system, it intended to design a quicker and simpler framework for the environmental assessment of projects (Ministry of Housing, Communities and Local Government 2020: 57-58) though no details have yet been published. Proving a connection between a simplification of environmental assessment requirements and its effect on trade and investment between the UK and the EU may be challenging, but the obligation in Article 7.2. in the Trade and Cooperation Agreement provides some constraint of the extent of reforms that can be made.

3. A new environmental watchdog

Much of the Government's initial work on Brexit was concerned with ensuring the operational roll-over of existing EU legislation but this was criticized as being wholly concerned with the black letter of the law, and failed to reflect institutional aspects of EU membership which would be lost on post Brexit. In particular, the European Commission would no longer have power to bring infringement proceedings against the UK for failure to comply with EU law, an area where it has been especially active in the environmental field (House of Lords 2017: 83-85). There were calls for a new public body that could hold the government and other public bodies accountable for failures in environmental law and replicate as far as possible the Commission's infringement procedures. Initially, the then Secretary of State, heading the Department for Environment, Food and Rural Affairs, resisted the need for a new body, arguing that it was politically accountable to Parliament for any failures, and that the government and other public bodies were legally accountable through the courts because environmental non-governmental organizations and other parties could always bring judicial review actions against the government and other public bodies for breaches of pubic law duties concerning the environment. It is true that NGOs have won some notable successes in the courts in recent years, but actions in the courts remain an expensive process, NGOs do not cover all areas of environmental protection, and are not set up to provide a systematic review of compliance. In response to the negative reaction of the Secretary of State, the UK Environmental Law Association produced an important report which argued that while judicial review would remain a significant backstop, there was still a powerful case for a new independent watchdog to replace the role of the European Commission post-Brexit (UK Environmental Law Association 2017).

The personalities of Secretaries of State are immensely important in setting policy agendas, and in 2017 there was an unexpected change with Michael Gove becoming the new Environment Secretary of State. Michael Gove had been one of leading Brexiteer politicians, and clearly wanted to demonstrate

that after Brexit the UK could still be an environmentally progressive country. He immediately understood the need for a new independent watchdog to fill the role of the European Commission, and set about a period of extensive consultation to establish a body to be known as the Office for Environmental Protection (OEP). The Environment Bill establishes the body and its functions, and it is expected to be operational by the end of 2021, although will operate in a shadow form considerably earlier (Macrory 2019).

Under Clause 21 of the Environment Bill the OEP is to be set up as what is known in the UK as a non-departmental public body. This means that it operates as an independent entity from the government, and its staff are employees of the OEP rather than ordinary government civil servants. In that its chair and board members are appointed by the Secretary of State, it is funded by the government, and its duties and powers are defined in legislation promoted by the government, it can never be seen as independent as the European Commission. Nevertheless, in practice, it will have considerable freedom to act as it wishes. The Environment Bill provides that in exercising any functions relation to the OEP, the Secretary of State must have regard to its independence, and the government has no legal powers to give it binding directions on any matter, though there are provisions for issuing non-binding guidance. The OEP, in common with all non-department bodies, must provide annual accounts to Parliament, but in doing so it (and the provision is not replicated in other laws concerning non-departmental public bodies) the Bill provides that it must include an assessment of whether the funding providing by the government is sufficient for its tasks – an unusual provision that is not replicated in other legislation concerning non-departmental bodies. If the OEP considers funding inadequate, Parliament and the government are not bound by its assessment, but there will be considerable political pressure to respond.

The OEP will have four key functions. First, under Clause 27 of the Environment Bill, one of independent auditing of the government. The Government is obliged to provide an annual assessment to Parliament on its progress in meeting the 25-year environmental improvement plan and long-term environmental targets to be established under the Environment Bill. The OEP is required to provide to Parliament its own annual evaluation of progress, including recommendation for improvement, and although its reports are not binding on the government, the latter is obliged to issue and publish a response. Next, under Clause 29 of the Bill, on request from the government, the OEP will be obliged to give advice on proposed changes to environmental law or any other matters relating to the natural environment. The advice must be published, though is not binding and the government is not obliged to respond or publish its response.

The third function, under Clause 28 of the Bill, is a duty on the OEP to monitor and report on the implementation of environmental law, and this could

in the longer term prove to be one of its most important roles. Systematic monitoring of implementation has rarely been a feature of the UK environmental law, and often only if some scandal emerges will there been an investigation on the issue by a parliamentary or other official body. There are few instances of legal provisions in national environmental legislation that require regular reporting on implementation. In contrast, most EU environmental directives have required the European Commission to produce regular reports on their implementation within Member States (Directive 91/692). The term 'implementation' is not defined in the legislation and while it would include the enforcement of environmental law (ensuring that the law is complied with) it clearly goes wider and could include, say, the design of the legislation in question if that is proving problematic, training of regulators, staffing levels and the funding provided for regulatory bodies. Although this general function of monitoring and review is expressed as a duty, the OEP will have a discretion in its choice of environmental laws to investigate, and how it goes about the task. The way it does so and the reception given to its reports will be an important test of its credibility and authority. The reports by the OEP on implementation will not be legally binding on the government, but must be laid before Parliament, and under the Bill the government is obliged to issue a response within 3 months.

The one constraint is that the subject matter must fall within the definition of environmental law contained in Clause 45 of the Environment Bill. To provide absolute clarity the Bill could have listed all the specific pieces of environmental legislation included with the scope of environmental law, but such an approach could have rapidly become out of date, and needed constant revision. Instead, there is a more flexible but inevitably rather more ambiguous definition which refers to legislation 'mainly' concerned with environmental protection. What is clear is that the OEP is not established to investigate all areas of law, even where these may have significant impacts of the environment, and the same constraint applies to its enforcement powers considered below. For instance, a planning decision to authorize a new industrial plant may have potentially harmful environmental impacts, but this in itself is not sufficient to bring it within the Bill's definition of environmental law. On the other hand, if that decision involves a breach of specific environmental assessment legislation or will lead to a breach of legally binding air quality standards, both of which are clearly examples of laws mainly concerned with environmental protection, then the 'environmental law' as defined in the Bill is engaged. While there may be some examples of law where there will be conflicting views on whether or not they are 'mainly' concerned with environmental protection, in practice this is likely to be marginal, and the main substantive areas of law such as those relating nature protection, waste, water quality, contaminated land, environmental assessment all clearly fall with the definition of environmental law.

Finally, under Clauses 30-37 of the Environment Bill, the OEP is to be given specific enforcement powers to deal with breaches of environmental law and it is here that one sees most clearly the intention of replicating as far as possible the infringement proceedings of the European Commission. As with the European Commission infringement procedures, the focus is on the state rather than the private sector – i.e. the government, public bodies such as the Environment Agency (one of the key national environmental regulators) and local government authorities, and whether they have failed to comply with their legal obligations. Mirroring the Commission procedures, there is a formal three-stage process – the service of an Information Notice describing the alleged breach and providing an opportunity for the authority concerned to respond. This is followed by a Decision Notice (equivalent to a Reasoned Opinion from the European Commission) again describing the failure, and at this stage the OEP is entitled to set out steps which it considers the authority should take in relation to the failure, such as remediation or internal changes to prevent any repetition. Finally, the OEP may take the matter before a court. The European Commission is able to resolve the vast majority of infringement cases without taking a Member State to the Court of Justice of the European Union, and it is clear that the provisions for the OEP enforcement are similarly designed to encourage resolution without the need for court action if at all possible. Some environmental NGOs have argued that the Information and Decision Notices are weak enforcement provisions because there is no formal sanction if they are not complied with (Greener UK 2018: 11-12). But as with the European Commission initial infringement steps, they have to be treated with seriousness by the bodies on the receiving end because, even if not formally binding in law, they essentially take the form of a one-way ratchet, which may eventually lead to court action.

The legislation establishes a public complaint system, equivalent to that operated by the European Commission, allowing any member of the public, NGOs, or industry to complain to the OEP about alleged breaches of environmental law by public bodies, and since the OEP will be a small body (probably about 80 in staff) this will provide an important source of information both for possible enforcement action. Complaints may also indicate that a particular area of law would be suitable for an investigation and report on its implementation and enforcement, even if no enforcement proceedings are initiated. Although enforcement actions, in practice, may be often taken in response to a complaint, the OEP is also empowered to initiate proceedings where it has other sources of information about potential breaches.

If matters cannot be resolved at these initial stages, the OEP is entitled to take the issue before the High Court in an action termed an 'Environmental

Review', but in practice it is a specialized form of judicial review. The Environment Bill provides that in dealing with a case, the court must apply ordinary principles of judicial review which essentially involves three questions: Was the relevant law misinterpreted? Was there a procedural irregularity? or Could the decision taken by the authority be described as totally unreasonable? In judicial reviews, the courts regularly stress that they provide a supervisory jurisdiction, it is not their role to take substantive decisions in place of the authority concerned, and that the focus is on whether the authority has acted contrary to these public law principles. Besides, in judicial reviews the courts regularly find that the law has been misinterpreted or that procedures have not been properly followed, but when it comes to judging the unreasonableness of decisions, British courts have tended to be fairly deferential to public bodies, especially those such as the Environment Agency or Natural England who have extensive specialist expertise in relation to their functions. The intensity of review is probably rather less intrusive than that of the Court of Justice of the European Union, where it has been noted that in environmental infringement cases, "it quickly becomes obvious that [the Court] has not been deferential in its approach, but in fact applied a quite stringent review of legality" (Wenneras 2007: 123), though even the CJEU has acknowledged in many areas the margin of discretion that should be afforded to decision-making by both the European Commission and Member States (Zglinski: 2018) This deferential approach by the British courts to the substance of decisions is perhaps understandable in a judicial review that is brought by an individual or a small organization against an expert public body. But where, as here, the action is being brought by another specialized public agency, the OEP, it is quite likely the courts will feel rather more inclined to question the reasonableness of the decisions being taken by the body concerned if that is the basis of the case.

In environmental infringement cases, the Court of Justice of the European Union has used its powers under Article 260 TFEU to impose financial penalties on Member States, many of which have been of a considerable size (Kramer 2015: 25-26). Although in an environmental review brought by the OEP, the High Court has no immediate power of imposing fines on the public body concerned, it is arguable that the national courts have greater powers than the CJEU. Article 260 penalty payments are made where a Member State fails to comply with an order of the Court, and the equivalent in a national context would be contempt of court proceedings. If an authority, whether a government department or public authority, failed to comply with an order of the court, the OEP could bring proceedings for contempt of court, and the courts have inherent powers of sanctioning, including unlimited financial penalties, imprisonment of the relevant Minister or civil servants directly engaged in not

obeying the court order, and a power to require other bodies to carry out the order of the court, imposing the costs of doing so on the authority concerned. The powers have sometimes been threatened, but in practice it appears to be very rare that a government department or public authority will deliberately flout an order of the court.

Despite these extensive powers of enforcement, it is clear that in practice the OEP, like the European Commission, will not be able to act on every complaint made to it, and will have to engage in what has sometimes been described as strategic litigation. The Environment Bill reinforces this approach by requiring, under Clause 23, the OEP to publish an enforcement policy setting out its strategic priorities, and by providing that enforcement action is only taken in respect of 'serious' breaches. It is left to the OEP to define in its policy how it interprets what is or is not serious in this context. The Government has no legal powers to direct the OEP whether to take or withhold particular cases, but it does have the power under Clause 24 to issue guidance to the OEP on its enforcement policy, a particularly controversial power introduced at a late stage in Parliamentary debate on the Environment Bill and betraying a degree of nervousness by the government that the OEP might become too intrusive on too many public decisions. The guidance, though, is not legally binding on the OEP, though they must consider it carefully – the legislation uses the phrase that the OEP 'must have regard to the guidance', a familiar phase in British legislation where the government wishes to influence but not dictate the policy of an independent body.

A body such as the OEP could have been established if the UK had remained within the EU, but without the demands of Brexit it is unlikely that this would have occurred. Its underlying purpose is to improve Parliamentary and public confidence that the Government is serious in its commitments to maintain and improve the environmental standards, and time will only tell whether it succeeds in this role. Certainly, there are many expectations - some of them fairly unrealistic - on the new body, and one of its initial tasks will be to explain with clarity to Parliament and the wider community what it can do and what it cannot. There may also be a degree of competitiveness within the United Kingdom on the impact of such watchdogs. The OEP's functions will largely be confined to England because most environmental matters are devolved, with a small number of exceptions such as chemicals policy. Scotland has already established a similar body, Environmental Standards Scotland, and Wales is in the process of doing so. Because of its small size, it is unlike that Northern Ireland will set up its own watchdog body, but the Environment Bill provides that the OEP can extend its jurisdiction to Northern Ireland, provided there is agreement of the Northern Ireland Assembly.

4. New development in environment law

The Environment Bill 2021 contains extensive new provisions dealing with various aspects of environmental law, although most of these are aimed at strengthening existing laws rather than rewriting them completely. For example, they include strengthened duties on local authorities in drawing up air quality plans, and requirements of greater cooperation from other authorities such as government departments or the Environment Agency with responsibilities in the field of air pollution. In the field of waste and resource efficiency, there are new powers for manufactures to provide information about resource efficiency of their products and to provide repair services, powers to establish a drinks container deposit return scheme, and the strengthening of existing provisions on hazardous waste. In the field of water, there will be new duties of privatized authorities to produce long-term sewerage plans, and extended powers on government to revoke water abstraction licences without compensation where they have been underused or are causing potential environmental damage. The most developed section of the Environment Bill, contained in Part 6, concerns nature and biodiversity where there is a much greater emphasis on the production of nature recovery strategies, at both a local and national level. The provision with probably the most far-reaching implications is a requirement under Clause 92 that in future planning permission for any new development cannot be granted unless the developer can demonstrate there will be a minimum of a 10% gain in biodiversity compared to the pre-development state of the site. Preferably this gain will be secured on site, but could also be achieved locally, and as a last resort, where this is not possible, by the purchase of biodiversity credits from the government, the revenue then being used for biodiversity enhancement.

Another recent strengthening of environmental law with significant implications concerns climate change, where the Climate Change Act 1998 introduced a binding target on the government to achieve an overall reduction of greenhouse gas emissions by 80% by 2050, and with provisions for regular 5-year carbon budgets to ensure a smooth trajectory towards the long-term goal. Following recommendations from the Climate Change Committee, an independent body established under the Climate Change Act, this figure was amended in 2019 to 100%, a net zero target (Climate Change Act 2008 (2050 Target Amendment) Order). The UK greenhouse emissions are now 51% below 1990 levels, though with a boost in reduction due to the coronavirus and largely achieved by shifts away from coal production for electricity and cleaner industrial processes (Carbon Brief 2021). Little substantive progress has yet been made in transport and home heating and insultation, and reaching the net zero figure in less than 30 years is clearly going to be especially challenging. But the influence of the new overall legal requirement on the government is apparent in

many policy initiatives currently being considered by government departments (HM Treasury 2020; Department of Transport 2020; Department of Business, Energy and Industrial Strategy 2021). The pressure to produce and implement credible policies will increase because the Government, following advice from the Climate Change Committee, has recently agreed an ambitious Sixth Carbon Budget for the period 2033-2037, requiring a 78% reduction from the 1990 levels, and which will for the first time include the UK's share of international aviation and shipping emissions (UK Government 2021). The Climate Change Act requires the Government to publish proposals and policies to enable the carbon budgets to be met.

Many of these new provisions in domestic environmental law could have been introduced by the government without the UK leaving the EU, and indeed some, such as those concerning resource efficiency of products and the right to repair have clearly been inspired by the 2019 regulations made by the European Commission under the Eco-Design Directive 2009/125/EC. But there are also examples which could only have been made now that Brexit has occurred.

The first concerns the use of forest risk commodities in commercial activity, where new controls have been introduced under Clause 107 of the Environment Bill. In many ways, they are modelled on the controls of timber from illegal sources introduced in the EU in 2010 (Regulation 995/2010) but go much wider, and since they concern external trade could not have been made unilaterally by the UK when it was a member of the EU. The current national legislation implementing the 2010 EU Timber Regulation is preserved under roll-over provisions, but the new controls will extend to all commodities produced from living organisms, including animals and plants, on overseas agricultural land which had been converted from forestry. Current estimates are that almost 80% of global deforestation is driven by agricultural expansion, with some half of tropical forest loss arising from illegal conversion to agricultural land, with far higher proportions in some areas (Department of Environment, Food and Rural Affairs 2020).

Much of the detail of the new controls will be developed in subsidiary regulations and initially will only apply to larger companies. Companies will be prohibited from using forest risk commodities or products made from such commodities where they were produced on agricultural land unless local laws were complied with. Companies must also establish a due diligence system for identifying information about the commodity in question, which must include assessing the risk that local laws were not followed, and they will also be obliged to publish annual reports on the operation of their due diligence system. Interestingly, this is one of the few examples in the UK national environmental law providing for a regular review of the implementation of the system. The Bill provides that the Secretary of State must publish an annual report to be laid

before Parliament, describing the impact of the new controls, and including any steps proposed to improve their effectiveness.

Another highly significant change in the law, which may lead to profound environmental gains, concerns support for agriculture and has been introduced under the Agricultural Act 2020. On Brexit, the UK is no longer subject to the Common Agricultural Policy (CAP), and the provisions are designed to replace the CAP financial support mechanisms. Under CAP, around 81% of the budget takes the form of direct payments, with about 30% of these payments directed towards various sorts of agri-environment schemes. The remainder under Pillar 2 supports various environmental and rural other socio-economic outcomes (House of Commons Library, 2020). Under the Agricultural Act 2020 direct payments, based mainly on land size, will over the next seven years be completely phased out in England,[3] and in future financial payments from the government to farmers will be wholly related to public benefits, mainly environmental. The Act provides that financial assistance may be given in connection with a number of specified purposes, including managing land or water in a way that protects or improves the environment or the cultural heritage, supporting public access for the enjoyment of the countryside, managing land, water or livestock that mitigates or adapts to climate change, conserving native livestock, protecting and improving the health of plants, and preserving and improving the soil quality. Financial assistance may also be given for starting or improving the productivity of an agricultural activity, but in devising any support scheme the legislation provides that the Secretary of State must have regard to the need to encourage food production in an environmentally sustainable way. The underlying shift of approach to what has been termed 'public money for public goods' has been broadly supported by both environmental non-governmental organisations and, perhaps surprisingly, the farming community. Farmers, though, are concerned that political commitments to the level of financial support that will be available will be equivalent to the previous support from CAP and will be maintained for the long-term. Nevertheless, the enormous shift in the focus of financial support for the agriculture is likely to produce substantial environmental benefits. Within the European Union, there has been increasing proportion of support under CAP in recent years for environmental and other socio-economic schemes, but it seems unlikely that a 100% shift is ever likely to be achieved, and certainly not in the time-scales envisaged under the Agricultural Act.

Parallel to the Agriculture Act, a new Fisheries Act 2020 has been passed, providing a new framework for fisheries management now that the UK is no

[3] The devolved administrations in Wales, Scotland and Northern Ireland are still developing their policies on agricultural support, though they are likely to move in the same direction as England.

longer part of the EU Common Fisheries Policy. Despite the progress since the reforms to the Common Fisheries Policy in 2013 in ensuring maximum sustainable yields across fish stocks, the European Commission has acknowledged the need for further efforts (European Commission 2017: 2). It remains to be seen whether the Fisheries Act will be more effective at ensuring that fishing is carried out in a truly sustainable way, though the Government has committed "to setting a gold standard for sustainable fishing around the world" (Department for Environment, Food and Rural Affairs 2018: 6). At the heart of the new legislation are the objectives of environmental sustainability and ensuring "the fishing capacity of fleets is such that fleets are economically viable but do not overexploit marine stocks" (s 1(2)).

5. Divergences and the future

As I have tried to illustrate, the environmental picture in a post Brexit United Kingdom is by no means all negative at present, and some of the recent important legal changes would not have occurred had the UK remained within the European Union. Much, though, depends on there being a government that is committed to progressive environmental policies. The EU environmental legislation has provided a powerful minimum and legally binding base-line throughout the European Union. Post Brexit, the key legal (as opposed to political) constraints on the freedom of a UK government to lower environmental standards will be those contained in international environmental treaties, and in relation to the EU, the provisions of the UK/EU trade and cooperation agreement. Here, though, one should note that the UK has adopted a dualist approach to international treaties meaning that they have no direct legal effect within the country in the absence of implementing legislation. The UK/EU trade and cooperation agreement contains environmental commitments, but equally affirms the right of the parties to determine their own environmental standards, with non-regression obligations limited to where a lowering of environmental standards would affect trade and investment. During the Parliamentary debates on the Environment Bill there was pressure on the government to introduce a general legal obligation of non-regression, but this has been consistently resisted to date.

At a micro-level some divergencies from the EU law are already beginning to emerge, and these could be seen by some as signalling a disturbing trend that is contrary to the overall aspirations of the government for substantive environment improvement in the future. Three recent examples can be given. In January 2021, the government decided not to follow the new EU legislation introducing a general ban on the export of plastic waste to non-OECD countries (Regulation 2020/2174), but instead opted for a system of prior informed

consent for non-hazardous plastic waste meaning that, provided the importer grants such a consent, the UK will be free to continue to export unsorted plastic waste to non-OECD countries. In the same month the UK government granted an emergency 120-day authorization for the use of an insecticide containing thiamethoxam for the treatment of sugar beets in response to a lower yield on beets in 2020. Thiamethoxam has been banned in the EU since 2018, and although the UK applied the same criteria for emergency authorisations under Art 53 of the EU Plant Protection Product Regulation (Regulation 1107/2009), post Brexit it is no longer obliged to inform Member States or the European Commission of the authorisation, nor does the Commission have the power to override the decision. As a third example, the Department of the Environment, Food and Rural Affairs has recently launched a consultation document seeking views on whether gene edited organisms containing genetic changes which could be achieved through traditional breeding should continue being regulated under the EU legislation on genetically modified organisms (Directive 2001/18) as rolled over into the UK (Department of Environment, Food and Rural Affairs 2021). Following Brexit, the UK is no longer bound by the 2018 decision of the Court of Justice of the European Union in *Confederation paysanne and others v Premier Ministre and de l'agriculture, de l'agroalimentaire et de la forêt* (C-528/16 ECLI:EU:C:2018:20) that such gene editing generally falls within the scope of the Directive, and the Consultation document notes that other countries such as Australia and Japan have concluded that gene edited organisms should not be regulated as GMOs. There are likely to be further divergences from EU environmental legislation in future years, though the environmental implications, positive or negative, are not yet possible to predict.

The other source of divergence resulting from Brexit will be within the United Kingdom itself. The environment is largely a devolved competence, but in the past the EU legislation has provided a common underpinning framework throughout the country, with the UK government having powers to override devolved administrations if they failed to implement the EU legislation. International environmental treaties which bind the whole country will still provide a degree of commonality but with far less intensity than EU law. Increasingly, therefore, there are likely to be differences in the approaches taken in England, Wales, Scotland and Northern Ireland (where EU law will still largely apply). The Scottish government, for example, has a general policy commitment to remain aligned with EU laws in the future (Scottish Government 2019), and recent Scottish legislation, the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2020, gives broad powers to Scottish Ministers to make regulations corresponding to future EU legislation, with environmental protection being expressly mentioned in the Act. Public health is also a devolved matter, and the implications of devolution during the coronavirus became especially

apparent to the wider public with the different administrations having distinct approaches to lock-down rules and dates. Devolution, undoubtedly, introduces legal complexity, and in relation to differing environmental standards there may well be tensions and possible legal disputes in some areas should these inhibit the UK Government's aspirations to develop a UK wide internal market for goods and services as envisaged under the United Kingdom Internal Market Act 2020. But at the same time devolution provides the space to develop innovative approaches, and future developments will be largely shaped by the political priorities of the different administrations concerning the environment. These emerging divergences provide opportunities for rigorous comparative analyses within one country of the effectiveness of different regional approaches to environmental policy and law – taking just one example, the enforcement powers of the new Office for Environmental Protection in England is not quite the same as those contained in the Scottish legislation relating to the powers of the equivalent watchdog body, Environmental Standards Scotland, and even the legislative definition of what amounts to a breach of environmental law is expressed in different terms. Whether useful lessons will be learnt from the effect of these divergencies in practice remains to be seen.

The challenges for the United Kingdom post Brexit are undoubtedly demanding, and debates will continue for many years as to the economic and social impacts of Brexit on both the UK and the EU. In the field of the environment, the international power of the EU on the global stage may be weakened, especially in the field of climate change, unless both the UK and the EU are able to pursue common and cooperative strategies. Within the UK there will now be greater though not complete legal freedom to lower environmental standards, but equally there are opportunities to be seized to enhance environmental protection, and there are already some promising developments taking place.

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