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## **Environmental Impact Assessment and Strategic Environmental Assessment in the UK after leaving the European Union**

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### **Abstract**

The United Kingdom has voted to leave the European Union and, until the terms of the 'Brexit' are negotiated, this has led to considerable uncertainty over the future practice of Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) in the UK. Here we show that multiple obligations exist outside the scope of the EU which mean that EIA and SEA will continue to be required in the long-term, but that their future compliance with the Directives remains unclear. We consider three scenarios for Brexit and present the implications of each; these are: signing up to the European Economic Area (EEA) Agreement; membership of the European Free Trade Association (EFTA), but not EEA, or negotiate a separate agreement. The implications of no longer being subjected to the obligations of the Directives under some scenarios are discussed and include opening the door for increasing diversity of application across the regions of the UK, and the probability of raised screening thresholds so as to reduce the burden of assessment on developers.

**Keywords: Brexit; EIA; SEA; immigration; EEA; EFTA**

The UK referendum on EU membership which took place on June 23<sup>rd</sup> 2016 voted 51.9% in favour of leaving (colloquially known as 'Brexit'), with a 72.2% turnout of voters (33,551,983 people). This vote signals the beginning of a period of uncertainty for the country and, in particular, the future status of Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) given they are primarily derived from EU Directives (Arts *et al.*, 2012). However, there is very little likelihood that EIA and SEA will disappear from the UK as they are embodied in international treaties which the UK has signed up to independently (i.e. not simply as a Member State of the EU). In particular, the country's membership of the United Nations Economic Commission for Europe (UNECE) has led to its ratification of the following:

- Espoo Convention on Transboundary EIA (United Nations Economic Commission for Europe, 1991) and subsequent Kiev Protocol on SEA (United Nations Economic Commission for Europe, 2003).
- Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters (United Nations Economic Commission for Europe, 1998)

Whilst there is no international court which could sanction the UK for non-compliance with these international obligations, and the treaty obligations are not legally binding in the UK courts unless transposed in to national law, the moral duty of compliance remains. Morgan (2012) lists others relevant to EIA:

- The Ramsar Convention on Wetlands of International Importance
- UN Framework Convention on Climate Change
- UN Convention on Law of the Sea
- Protocol on Environmental Protection to the Antarctic Treaty

To this we can add the Rio Declaration Principle 17 which specifically calls for EIA to be undertaken for activities likely to have significant environmental effects (George, 1999); and the declaration and Agenda 21 also called for the environment to be considered at all levels of decision making (so including SEA) (Fundingsland Tetlow and Hanusch, 2012). Various sectoral drivers expect EIA and SEA as good practice, for example: the Equator Principles promote EIA within the finance sector (Lawrence, 2009); the signatories of the third European Conference on Environment and Health (including the UK Department of Health) agreed to integrate health into EIAs and to carry out strategic assessments of the environmental and health effects of proposed policies, plans and strategies (Dora, 2004).

We note that the referendum was a vote on membership of the EU, and does not include Euratom which governs the nuclear industry, within which there exists expectation in respect of SEA and EIA in line with EU Directives (The Nuclear Safety Directive (Council Directive 2009/71/Euratom) as amended, specifically cross references the EIA and SEA Directives). Article 50 of the Treaty on the European Union has to be invoked to start the Brexit process and does not mention Euratom. However, Euratom has been amended so that Article 50 applies to it, and in reality it is hard to see how the UK could trigger Article 50 without it applying also to Euratom.

Thus there are manifold obligations to continue with EIA and SEA irrespective of EU membership, though not necessarily in the precise form required by EU law. So EIA and SEA are in the UK to stay, but at what level? The key issues over which the two sides fought the referendum were immigration, sovereignty and economics (Kirk, 2016). Economic stability is likely to be sought either by signing up to one of the existing two trade agreements or through the negotiation of a new trade agreement with the EU. We consider the implications for EIA and SEA of these possible future scenarios for the UK:

- 1) European Economic Area (EEA) membership.
- 2) European Free Trade Association (EFTA) membership (but not EEA membership).
- 3) Separate trade agreement with the EU.

### **EEA membership**

The EEA Agreement allows access to the 'Internal Market' of the European Union and is open to EU and EFTA countries. However, a condition of membership is an obligation to cooperate on a number of matters, including the environment, which is the reason why EEA countries have to comply with the EIA and SEA Directives (Bjarnadóttir, 2001).

The EFTA Surveillance Authority (ESA) oversees that the EEA countries comply with the EIA/SEA Directives. There is also an EFTA Court which places great emphasis on ECJ rulings (Schütz, 2014), which means that ECJ case law indirectly applies to the EEA/EFTA countries.

EIA and SEA requirements would thus remain largely unchanged under EEA membership. However, other changes which might influence EIA/SEA practice in the UK under this scenario is that some of the EU Directives covering nature conservation fall outside the EEA Agreement (e.g. the Habitats Directive and Birds Directive) (Bugge, 2011).

Three countries are a member of EEA without also being members of the EU: Norway, Iceland and Liechtenstein; hence this scenario has been referred to as the 'Norway model' in the press. As EEA membership is contingent on free movement of people within the EU member states, joining the EEA seems politically difficult for the UK Government given the immigration implications, and certainly that seems to be the position taken by candidates for future Prime Minister.

### **EFTA membership**

EFTA is an intergovernmental organisation promoting free trade and economic integration. Originally established as an alternative to the European Economic Community (EEC, the precursor to EU), it has four Member States (Iceland, Norway, Liechtenstein and Switzerland).

EFTA manages the EEA Agreement and Switzerland is the only EFTA country which is not also part of the EEA (hence the press refer to this scenario as the 'Swiss model') but instead accesses the internal market by virtue of over 120 bilateral agreements, felt to be cumbersome and unworkable by the EU. Switzerland is not required to implement the EIA and SEA Directives under any of the bilateral agreements (Truffer, pers. comm. 2016), but do have their own legislation independently.

EFTA membership comes with fewer obligations to implement EU legislation, but still requires freedom of movement. Switzerland has proposed an immigration quota after a referendum in 2014 which the EU considers will invalidate the bilateral agreements (and therefore stop access to the internal market if the quota is introduced), a position reaffirmed since the UK referendum (Wintour, 2016). This scenario also seems politically difficult for the same reasons as EEA membership.

### **Separate trade agreement with EU**

A new trade agreement between the UK and the EU could be developed outside the EEA and/or EFTA frameworks. This scenario includes a number of other trade models appearing in the media, including the 'Canada option', the 'Turkey model' and the 'Singapore and Hong Kong approach' (Anon., 2016), none of which have specific ties to EU environmental legislation. Whilst potentially providing the most flexibility for the UK, it remains possible that the EU could insist on stipulations related to EIA and SEA. The EIA Directive (Council of the European Communities, 1985) was originally adopted based on article 100 and 235 of the Treaty of Rome before the Single European Act introduced any express competence for the EU to act on environmental conservation in 1986. Article 100 allowed secondary legislation (like Directives) to be adopted where functioning of the common market was a consideration, that is, EIA was introduced based on arguments that it needed to be consistently applied to have a level playing field for development actions (Bond and Wathern, 1999). This argument is no less valid today, but could well be lost in the complexity of negotiations. This

scenario may be more palatable for the UK Government, but is politically difficult for the EU if freedom of movement of EU citizens is not included.

### **Increasing variability of practice within the UK?**

These scenarios all have a business-as-usual potential outcome for EIA and SEA. The second and third scenarios are the ones that could be different (where trade agreements do not include EIA and/or SEA) and lead to increased variability of practice across the UK, and this is the basis for the following discussion. The legal context for EIA and SEA in the UK is in any case highly complicated, being devolved to the various regions and with legislation for EIA also being spread across a number of different sectors (Glasson *et al.*, 2012), and so we might expect to see increasing variability between these regions. Scotland, for example, came out as being very pro-EU in the referendum on June 23rd (62% voted to remain in the EU), and might be expected to continue to implement the requirements of the Directives irrespective of any actual obligation in case of future independence followed by an application to join the EU. Other regions of the UK voted for exit. Across the sectors, in these other regions we will likely see moves to erode the influence of EIA in particular (see Bond *et al.*, 2014) in line with an agenda to maintain economic development, although we would expect these to be relatively minor to ensure continued compliance with international obligations for EIA; the most likely changes being to increase screening thresholds to remove the need for EIA from some proposed developments (this has already happened through the Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2015 SI No. 660 to reduce the application of EIA in three categories of projects within discretion allowed by the Directive), but maintain compliance with the spirit of the international and sectoral obligations. SEA has proven difficult for some authorities, in particular the requirement to assess alternatives, and its scope has been legally controversial, for example in the HS2 (High Speed railway connection between London and Birmingham) case involving plans approved by Parliament. There might be some arguments as to limiting its scope, though it seems unlikely that SEA requirements would be scrapped entirely. Perhaps politically, much depends on how amicable or otherwise is the parting from the EU. If there is acrimony, at the most pessimistic it is possible to foresee a situation where anti-EU sentiment might require a bonfire of “non-democratic” EU “red tape” unless sound reasons can be found for its retention.

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