

Brexit: Regulation Impact

In this second briefing on the impact of Brexit on the protection and regulation of the Environment in the UK we focus on the key EU institutions and the measures taken by the UK to replace them.



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The European Commission (EC) plays an active role in introducing, overseeing and enforcing Environmental legislation across the EU. It has powers to take infringement actions against Member States not complying with EU Environmental laws. Over the years the EC has not been reluctant to take such measures and on a number of occasions the UK has been in the firing-line. Another important EU institution reinforcing the environmental agenda is the European Court of Justice (ECJ) which has opined on a number of EU Environmental cases and has also shown a keenness to refer to and place weight on the Environmental Principles as a means of contributing to the implementation and reinforcement of environmental standards across the EU.

The UK Government has created, through its recent Environment Bill, a new body called the Office for Environmental Protection (OEP). It is tasked with providing the oversight and enforcement function of the European Commission. To date, the UK approach appears restrictive. The OEP's investigative powers are limited to examining cases where public authorities fail to comply with environmental law but only when that failure amounts to a "serious failure". Its enforcement powers which consist of "Information notices" and "Decision notices" with an ultimate power to raise "Environmental reviews" and challenges of decisions from public authorities by way of Judicial Review are only triggered when these constitute "a serious failure to comply with environmental law". At present, there is concern as to whether the OEP will have the necessary resources to carry out its powers, taking into account the current state of UK government debt exacerbated by Covid-19.



As for replacing the European Court of Justice role, the UK will look to rely on its own courts. The usual approach of UK courts to environmental cases has been via the Judicial Review route. This has its challenges including establishing legal standing, satisfying the "promptness" test and having sufficient resources to bring and run such cases. In addition, recent experience (note the two unsuccessful challenges brought by Chris Packham in relation to HS2 and the Client Earth challenge against the Drax Power Station, both in 2020) demonstrate that Judicial Review has its restrictions primarily because the remit of the Court to examine the merits of the case are very limited.

As matters stand we have to ask whether the UK government is adequately replacing the existing EU institutions. Is there a risk of a "governance deficit"? Or perhaps the UK government does not intend to pursue the same upward trajectory of environmental protection as the EU? Is Brexit an opportunity to lessen the priority accorded to environmental measures? If this is the case, there may be some sectors focused on a more international market that may welcome a watering down of environmental regulations. But other UK businesses trading both domestically and, in the EU, will be faced with increased costs by having to comply with two regimes and standards.

Another point to consider is how disputes between the UK and EU Member states in relation to the Withdrawal Agreement will be dealt with post-Brexit. Considering the latest negotiations, the UK government appears to preclude the ECJ from playing a role in such disputes. What are the options? One might be the International Court of Justice (ICJ) which can in theory enforce any treaty. However the ICJ is an unlikely forum on the basis that only states can raise claims at the court, thus excluding the EU institutions and NGO`s (an important actor in reinforcing environmental standards). Another is the Court of Justice of the European Free Trade Association (EFTA) or even a new international body. The EU of course might still insist that the ECJ has jurisdiction on matters such as state aid.

The UK`s Environment Agency will undoubtedly continue to play a role in relation to Environmental regulation and enforcement but due to resource cuts, its enforcement role has been reduced.

Next week we will look at the role of harmonisation on environmental protection and examine the extent to which the UK is able to adopt the same approach within its territory.