

**Environmental Impact Assessment
Strategic Environmental Assessment
and Brexit**

**Alex Goodman
Landmark Chambers**

Scope



- Refresh on EIA and SEA
 - The EU Withdrawal Bill
 - The EU's Draft Withdrawal Agreement
 - EIA and how it will be affected
 - New EIA regulations
 - SEA (very briefly) and how it will be affected
-

Environmental Impact Assessment and Strategic Environmental Assessment



- Environmental Impact Assessment is the specific European form for a near-global norm requiring the assessment of environmental effects to inform decision making affecting the environment.
- Eg. Principle 17 of the Rio Declaration of 1992 requires EIA.
- Provides for screening of projects to ascertain whether likely to have significant effects
- Evaluation of likely effects of a project, including cumulative effects (in UK through Environmental Statement)
- Leads to informed decisions affecting the environment
- Ideally leads to abandonment or mitigation of unacceptable actions
- Ongoing and iterative process

Environmental Impact Assessment and Strategic Environmental Assessment (2)



- EIA Directive 85/337/EEC in force since 1985
- Amended three times, codified in 2011 and now amended again so that latest form is Directive 2014/52/EU
- Main regulations in England- Town and Country Planning (Environmental Impact Assessment) Regulations 2017
- Various implementing regulations in devolved administrations and in more specific areas (hundreds in total)

- Strategic Environmental Assessment, EU Directive 2001/42/EC
- The Environmental Assessment of Plans and Programmes Regulations 2004 (Statutory Instrument 2004 No.1633) and various equivalents in the devolved areas

How EU law may operate after exit



Clause 1 of the European Union (Withdrawal) Bill repeals the European Communities Act 1972:

“The European Communities Act 1972 is repealed on exit day”.

Exit day” is defined as 11.00pm on 29 March 2019

Subject to proposed amendment by Duke of Wellington

What does repeal of the ECA 1972 entail?



Repeal of the two main provisions in the ECA which are:

- Section 2(1), which ensures that rights and obligations in some types of EU law, such as the EU treaties and regulations are directly applicable in the UK without the need for implementing legislation and
- section 2(2) which provides a delegated power for the implementation of EU obligations: eg. the implementation of the SEA Directive or EIA Directive through secondary legislation.

EU Withdrawal Treaty A Spanner in the Works?



- The EU Transition Period (until 31 December 2020)
- EU's draft withdrawal treaty of 28 February 2018 makes clear that from an EU perspective the continued operation of EU law as before is required during the transition period
- Article 122 of the EU's draft Withdrawal Agreement states:
- "Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period."

EU Withdrawal Treaty A Spanner in the Works?



Article 126 provides:

- During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties before the General Court after a case has been referred back to it.
- 2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom referred to it before the end of the transition period.

EU Withdrawal Treaty A Spanner in the Works?



- In essence these provisions make clear that the operation of EU law and its legal processes continues throughout the transition period (until the end of 2020) and thereafter there will be jurisdiction to address cases or complaints etc. begun within the transition period.
- Cases can, on current timescales, conceivably continue into the 2030s even if there is some relatively hard form of separation in 2021.
- It will be well into the next domestic parliament before the end of the transition period and before a significant separation from EU law and the EU's legal institutions takes effect.
- The UK will have left the political institutions by then.

Transition within the Withdrawal Bill



- **Clause 9** provides the Government with the legislative authority to use secondary legislation to implement any withdrawal agreement agreed with the European Union under Article 50(2) Treaty on European Union (TEU) (controversial- subject to amendment by the Lords that it may only be used after vote on mandate for negotiations; Commons amendment – may only be used after withdrawal agreement has been voted on);
- **Clause 8** gives Government the power, until two years after exit day, to make secondary legislation to prevent or remedy any breaches of the UK's international obligations that might arise from Brexit; and
- **Clause 17** grants powers to make consequential and transitional provisions (also subject to proposed amendments including a sunset clause)

Transition within the Withdrawal Agreement and Implementation $\frac{L}{C}$ Bill

- On 8 December 2017, the Joint Report from the negotiators of the EU and UK refers to a further Bill, the Withdrawal Agreement and Implementation Bill, including:
 - The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement.
-

Florence Speech of 22 September 2017:

$\frac{L}{C}$

- Theresa May said there would be a Brexit “implementation period” of “around two years”.
 - March 2019: UK leaves political institutions but,
 - EU law continues to operate almost as before.
 - UK remains in single market etc.
 - Seems consistent with the EU’s approach
-



European Union Withdrawal Bill

Clause 2 of the Bill provides:

(1) “EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.

(2) In this section “EU-derived domestic legislation” means any enactment so far as—

- (a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,
- (b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,
- (c) relating to anything—
 - (i) which falls within paragraph (a) or (b), or
 - (ii) to which section 3(1) or 4(1) applies, or
- (d) relating otherwise to the EU or the EEA

European Union Withdrawal Bill Clause 2



- Wide definition of ‘EU-derived domestic legislation’ in clause 2 of the Bill: includes regulations made under the European Communities Act but also other secondary or primary legislation which implements or ‘relates to’ the EU or EEA.
- Would include EIA Regs, SEA Regs, as well as hundreds of other EIA regulations that govern specific projects like electricity works, offshore petroleum production, water resources etc.
- The intention of clause 2, according to the explanatory notes, is to preserve laws which would otherwise lapse on repeal of the ECA and to enable amendment of such legislation to ensure it functions properly after Brexit (EN para. 75). The result is achieved by making all such laws part of ‘retained EU law’.
- The intention is that Parliament may then look piece by piece at all retained EU law and in time decide which bits it might wish to change.

European Union Withdrawal Bill

Clause 3



Clause 3(1) provides:

“Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day”

- “Direct EU legislation” includes regulations and any “EU decision”
- As currently drafted it is unclear whether “Direct EU law” will form part of domestic law in the form of primary legislation, as secondary legislation, or as some other sui generis form of legislation.
- Intention is to preserve regulations and tertiary legislation which currently automatically have effect, but which would not have effect in UK law if the UK left the EU and the ECA 1972 was repealed without this provision.

“Retained EU Law”

Clauses 4 and 6



- Clause 4 provides that all rights, remedies etc. existing before exit day continue and can be enforced after exit day.
- The law referred to in clauses 3 and 4 that continues its life after exit day is called “retained EU law” (clause 6(7))
- Clause 6(1): A court is not “bound” by EU law after exit and may not refer issues to CJEU
- 6(2): a court need not have regard to anything done by any EU body after exit day but may do so if it considers it is “appropriate”.

How does Supremacy of EU Law work post-Brexit?



Clause 5 provides:

(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.

(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification.

How does Supremacy of EU Law work post-Brexit? (2)



- **Van Gend en Loos (1963)**- EU Law- A new legal order for the purposes of which member states have curtailed their sovereignty.
- Clauses 5(1) and (2): Supremacy of EU law applies to law that pre-dates exit day. What does this mean? There is no EU law after Brexit.
- Applies to “retained EU law”? But that is no longer EU law, it is EU law converted into domestic law.
- What is “supremacy” without jurisdiction of ECJ to enforce it?

A Case Study on Retained EU Law



- ***R v North Yorkshire County Council ex p. Brown*** [2000] 1 AC 397 (HL)
- House of Lords held that determination of conditions on an old mineral planning permission from 1947 was a “development consent” within the meaning of the Directive and as such required environmental impact assessment.
- At the time, the regulations made no provision for EIA in respect of such decisions, but the HL said that because development could not proceed without the determination of conditions, it was a “development consent”.
- The reason that it was a “development consent” was that that concept had an autonomous meaning in EU law which was not contingent on what domestic regulations determined to require consent. EU law is required to be interpreted purposively. Article 2(1) requires that prior to granting development consent, there be an EIA process. The regulations were therefore in breach of the requirements as was the Council’s decision making. The Council therefore had to consider whether EIA was required and the SSE had to establish criteria through regulations for giving effect to and properly transposing the Directive.

Brown Case Study (2)



- Similar facts are now unlikely to be repeated because nearly twenty years of legislation has ironed out such deficiencies, but it is not impossible that some form of development consent process will be deficient. What would be the effect after Brexit (and after the transition period)?
- The probable outcome is that EU Directives will not be retained law, so the Directive would not be relevant. Further, the supremacy of EU law is abolished by clause 5(2) of the Bill.
- Potentially after exit, there could be no challenge that the regulation failed to give effect to the mandatory demands of article 2(1) of the Directive. While the courts are entitled to have regard to the Directive so as to interpret the regulations, they could not find that the regulations, or decisions under them were *ultra vires* by reason of a failure to implement or transpose the requirements of that directive.
- Or could there? Does the supremacy of retained law continue to have that effect such that *Brown* would be decided the same way?
- There could be some declaratory effect to a judgment pointing to a mismatch between EU and UK processes, but unlikely there would be any direct remedy.

Marleasing incorporated?



- This leaves the question whether the courts would, after exit day, still seek to interpret the regulations compatibly with the Directive. At present under the *Marleasing* principle of “indirect effect” courts are required to read domestic legislation in light of the wording and purpose of the Directive in order to achieve the intended result of the Directive.
- The explanatory notes to the Withdrawal Bill state at 97:

The principle of supremacy also means that domestic law must be interpreted, as far as possible, in accordance with EU law. So, for example, domestic law must be interpreted, as far as possible, in light of the wording and purpose of relevant directives. Whilst this duty will not apply to domestic legislation passed or made on or after exit day, subsection (2) preserves this duty in relation to domestic legislation passed or made before exit.

- If those notes are correct, a court may still in the future be allowed to read the domestic regulations made before exit day which fail to properly give effect to the EIA Directive as it stands at exit day as far as possible to do so in a manner that is compatible with that Directive.
- Purposive interpretation (a European approach) is thus incorporated into domestic statute.
- Along with the Supremacy of EU law!

Marleasing/Indirect Effect



- However, where the EIA Regulations are replaced following exit day, a court should perhaps decline to apply the *Marleasing* principle to their interpretation (it may still apply the principle to modifications though: clause 5(3))
- Potentially therefore from 2021, UK can amend the EIA process in any way it wishes.
- But that would depend on a complete break from the EU legal system which in turn will depend on the terms of withdrawal as negotiated in the negotiation period.

Berkeley-type cases post-Brexit



- ‘A case like *Berkeley v SSE [2001] 1 AC 603* would not succeed in challenging future EIA regulations as failing to give effect to the purpose and intention of the EIA Directive.
- In that case there was a challenge to the grant by the Secretary of State of planning permission for Fulham Football Club’s expansion without considering whether the development was EIA development. The House of Lords read the regulations purposively so as to imply an obligation on the Secretary of State to consider whether development was EIA development.

Further examples of impact of Brexit on litigation



- Challenges which may fall away where new EIA regulations are brought in include:
 - Some salami slicing cases where it is contended that a “project” should be seen as the accumulation of various different sub-projects, but the regulations fail to capture them (eg. *Burridge v Breckland DC*).
 - Where the regulations have not envisaged a particular kind of development or development consent as within the scope of the regulations (eg. old mining permission cases)
 - Challenges about transposition on obscure points eg. retrospective consents; variations of conditions, or whether demolition amounts to a project are all matters which have been litigated on the basis of the Directive.

Town and Country Planning (Environmental Impact Assessment) Regulations 2017



- The above shows the significance of up to date regulations. Until wholesale amendment, they will continue to operate in a very similar way to the old system. One effect of Brexit may have been to speed up compliance ready for exit day.
- 2017 Regs were subject to negative resolution procedure (and not prayed against) in Parliament. Came into force on 16 May 2017.
- Primarily to give effect to certain amendments to the EIA Directive brought in by Directive 2014/52/EU.
- Revoke and replace the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

EIA Regulations 2017 (2)



- Joint and/or co-ordinated procedures (reg 27) for projects which are subject to assessment under the Habitats Directive or Wild Birds Directive
- More flexible for developers
- Terminological changes: eg. 'fauna and flora' has been replaced by 'biodiversity' and there is a
- new requirement to consider, expected risks of major accidents and/or disasters.
- new requirement to use competent experts on ES.
- consenting authority must ensure sufficient expertise to examine the ES
- A new article elaborating on information to be given in decision notices and during the decision-making procedures.
- The decision to grant development consent should also now include, where appropriate, monitoring measures.
- Screening requests must now describe the project, geographical sensitivity and likely significant effects on the environment (rather than "a brief description" of possible effects).

EIA Regulations 2017 (3)



- The scoping request must include new information including the "location and technical capacity" of the proposed development, not just a brief description of the "nature and purpose".
- Where a scoping opinion or direction is issued, the Environmental Statement (ES) must be based on that decision.
- more examples of the type of effects that should be assessed
- Procedural Changes: developers must consult on the ES for a minimum period of 30 days (replacing the respective 21 day and 28 day consultations under the town and country planning and infrastructure planning regimes);
- there is a new 90 day limit (subject to certain exceptions) on extending a screening decision; and
- the ES must be accompanied by a statement outlining the expertise or qualifications of the "competent experts" who contributed to its preparation (which term is undefined).

EU Withdrawal Bill: Clause 7 *Clean up power*



“ Dealing with deficiencies arising from withdrawal

(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—

(a) any failure of retained EU law to operate effectively, or

(b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.”

- Concession by govt. in commons now sets out the complete list of the kinds of deficiencies that UK ministers would be able to correct in retained EU law
- Lords amended to “necessary” rather than “appropriate”
- This is a so-called Henry VIII Clause.

SEA- an example of Brexit impact



- National Emissions Ceilings Regulations 2018
 - The Secretary of State must publish the initial national air pollution control programme by 1st April 2019, including at least the information set out in Part 1 of Annex 3 to the [SEA] Directive.
 - Binding EU Law forced on UK Government. To take effect after exit day.
 - Unlikely to make a difference? See above on continued supremacy of old EU law.
-

New Body to Replace European Commission



- Commission's functions of improving air and water quality to protecting endangered species – are overseen by the European Commission
 - Environment Secretary Michael Gove is consulting on a statutory body to replace the functions of the Commission.
 - The Government also wants to publish a new policy statement to enshrine in one place key environmental principles like “sustainable development” and the “polluter pays” principle, which are currently found in the EU Treaties.
 - Till 8 May 2018
-

Brexit, EIA and SEA

Alex Goodman
Landmark Chambers
