THE IMPLICATIONS OF LEAVING THE EUROPEAN UNION FOR PLANNING AND ENVIRONMENTAL LAW

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Introduction

1. The prime minister at Conservative Party Conference and David Davis in Parliament have in the past two weeks announced:

- It can be expected that the process for leaving the EU will be that under article 50 of the Treaty on European Union;
- That the government will start that process on grounds that it is part of the Royal Prerogative powers to do so;
- That the process will commence in March 2017;
- That there will be a "Great Repeal Bill" which will repeal the European Communities Act 1972 and re-enact European Legislation as UK Legislation wherever practical;
- That the authority of EU law, and the European Court of Justice's jurisdiction will end;
- That the UK will no longer be part of a political union with supranational institutions that can override national parliaments and the courts;
- The UK will have the right to make its own decisions over a whole host of matters from how we label our food to the way in which we control immigration;
- Existing worker's rights deriving from EU law will be continued as UK law;
- There will not be a Norway Model or Swiss Model;

The only other matters on which there has been some policy indication is that the government has said that it will offer some support to compensate for agricultural payments and university funding that will be lost.

2. Taken together, these suggestions indicate that the government's intention is that the UK will in the long run undergo a radical reorganisation of its relationship with the EU. If it is right to read much into what is being said, the current intention at least is that the UK's future relationship will be a closer version of that which Canada hopes to enjoy with the EU. However, it is not considered sensible to read too much into what is a highly fluid and political situation in which the government is resisting clarity or definition and frequently changing position.

3. This paper is in three parts:
    1. In the first part I suggest that the process for withdrawing from the EU will involve negotiating both a withdrawal treaty (ideally within two years) and some years thereafter a treaty establishing a future relationship between the EU and UK. I suggest there are no automatic consequences of leaving the EU. It is entirely a matter for negotiation and political decision as to how far the UK continues to harmonise and cooperate with the EU and its law or not.
    2. In the second part I suggest there is no necessary substantive impact of Brexit on aspects of the UK planning system including for example on climate change policy, environmental impact assessment (EIA), strategic environmental assessment (SEA), habitats conservation or Aarhus. It is a matter for political decision and in part for negotiation whether UK planning and environmental law and policy diverges from or continues to harmonise with EU law following Brexit.
    3. In the third part I suggest what I consider to be the most achievable and democratic terms for the withdrawal treaty. In my view the withdrawal treaty should effect a fairly narrow Brexit for a transition period so as to allow for informed consideration of the basis of a future relationship over many years. A future relationship can learn from (though not imitate) Norway's relationship with the EU. The UK should continue to harmonise its law with EU environmental law following withdrawal from the EU.

Part 1: The Withdrawal Process

4. Article 50 (1) and (2) of the Treaty on European Union provide (in part)

> "1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."

In my view this implies that the withdrawal process will involve broadly four stages:

1. The UK decides to leave the EU in accordance with its own constitutional arrangements (article 50(1)). This has not yet occurred, as the government had to admit with some embarrassment in the High Court last week.
2. The UK gives notice to the European Council of its intentions to leave the EU pursuant to article 50(2) of the TEU.
3. The EU will then negotiate and conclude a withdrawal agreement. This has to be agreed by qualified majority of the European Council (Heads of State); the threshold being roughly two thirds (of countries and overall population). It is implicit within article 50(2) that the withdrawal treaty will address the terms of withdrawal, but that a separate and subsequent treaty will have to address the future relationship with the EU. The likelihood is therefore that the withdrawal treaty will establish a transitional period and a set of transitional arrangements pending the conclusion of a future treaty or treaties establishing a new framework for relations between the UK and the EU. The withdrawal treaty will not of itself seek to establish that framework, but it will take it into account.
4. The future framework will then take many years to negotiate and a realignment of British legislation and policy will similarly take many years. The future framework will be subject to EU rules on agreements with third parties, and as such will need to achieve unanimous agreement (consequently there is good sense in getting as much as possible of the future relationship into the Withdrawal Agreement).

Stage 1: Deciding to leave pursuant to Article 50(1) TEU

5. Article 50(1) of the Treaty on the European Union provides that a member state may decide to leave the EU in accordance with its own "constitutional arrangements". The provision, inserted into the Treaty On European Union by the Lisbon Treaty of 2007, was intended to clarify that it was possible to leave the EU, but it has never been deployed[1]. No decision to leave the European Union has yet been made by the UK. The High Court is currently hearing joined legal challenges by Ms Miller and Mr Dos Santos concerning the question whether the UK's constitutional arrangements require that decision to leave the EU to be made by parliament, or whether it can be made as an executive decision- as a matter of royal prerogative. A number of challenges emanating from Northern Ireland have also been reported. The arguments on the question of the prerogative are discussed by Hickman et al in a helpful article[2] and transcripts and skeleton arguments of the argument in High Court are now freely available. It will be up to the courts to decide how the decision to leave is to be made. A central argument for the Claimant seems to be: "Suppose that there had been no referndum. Would it have been "in accordance with the UK's constitutional arrangements" for the prime minister to unilaterally notify the European Council that the UK was withdrawing from the EU? No. Has the referendum broadened the ambit of the prerogative? No."

6. There will probably be an appeal, possibly a "leap-frog" appeal to the Supreme Court. If so, this would leave open the possibility of an article 50 notification by the end of March next year (provided the government wins the case).

[1] Professor Steve Peers describes four conceivable methods for leaving the European in his blog here http://eulawanalysis.blogspot.co.uk/ as follows:

> "However, this has not prevented many hard-line Brexiters claiming that Article 50 is not the only mechanism for extrication. The Vote Leave Roadmap considers that there are three main options for withdrawal. The first method suggested is use of the Article 48 TEU process for changing the treaties of the EU. The second suggestion is the Article 50 TEU process and the final suggestion was to rely on general public international law, specifically article 54 of the Vienna Convention of the Law of Treaties 1969. A fourth possibility also tentatively mooted, is for the UK to simply repeal the European Communities Act 1972 and replace it with new UK law."

[2] https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/

Repeal of the European Communities Act 1972

7. Some of the leading proponents of Brexit such as MEP Daniel Hannan advocate the repeal of the European Communities Act 1972 as the sole mechanism for achieving a clean break. It is now confirmed that an Act to repeal the 1972 Act will be tabled at some point next year, presumably such repeal taking effect on "Brexit day" to give domestic legal effect to withdrawal, but that would be only upon the TEU and the Treaty on the Functioning of the European Union (the TFEU) ceasing to apply as a result of the article 50 process. The "Great Repeal Bill" will also enact, wherever practical, EU law into UK law. It is unclear what this means in practice. It may mean that most regulations which currently take effect through the principle of direct effect will be put on a domestic statutory footing. Presumably some Directives will also be fast-tracked into UK law. But it might not mean (for example) that EU law on free movement of workers will be re-enacted.

The Effect of Leaving the EU: EU Treaties Cease to Have Effect

8. Sub paragraph (3) of Article 50 provides:

> "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

Accordingly, two years after initiating the article 50 process, the Treaties - defined in the preamble as the TEU and the TFEU - cease to apply. That is what withdrawal from the EU means (absent any alternative agreement). No state obligations under international treaties other than those two treaties are cancelled. The UK's accession to the European Convention on Human Rights; its membership of the United Nations etc. are unaffected. Its ratification of the Aarhus convention is unaffected. Similarly, domestic legislation which implements EU law is unaffected by the Article 50 process: it would require specific parliamentary decisions to withdraw such legislation.

Stage 2: Negotiation of Withdrawal Treaty

9. It is an entirely open question as to what legal order will be negotiated to replace the TEU and TFEU once they cease to apply. Similarly it is a matter for the UK parliament to decide what domestic measures will accompany the process of leaving. If the UK does not agree a withdrawal treaty and simply exits the EU at the end of the two-year period, then upon the EU treaties ceasing to apply, without any replacement or transitional treaty, all EU Directives and the supremacy of EU law, as well as the principles of direct effect and indirect effect will all cease to apply. But that is not going to happen: the extent to which such principles are in fact modified will depend upon what provision the withdrawal treaty makes as to these principles- and that is a matter which is entirely open to debate. Even in the event that the withdrawal treaty makes no transitional provisions, as a matter of domestic law, saving provisions will be passed to avoid a legal vacuum emerging.

10. A significant question in this regard- which will potentially impact on the withdrawal treaty- is the extent to which the UK remains in the single market. If it does, then it seems to me to be likely that the EU will require it to accept much of the *acquis* of European law, just as Norway does. I would anticipate (though this is speculation) that most environmental law would, in this case, be bundled in with the law that the UK is likely to adhere to. But even if the UK is not compelled to retain environmental law as part of the deal on the single market, there is no reason in principle why the UK should not continue to adhere to EU environmental law either completely, or to shadow it through domestic legislation. Whether it choses to or not is essentially a matter of political choice for the UK.

Part 2:

The Impact of Brexit on UK Planning Law and Policy is a Matter of Choice

11. In this part I explain why there do not need to be many automatic consequences of Brexit for UK planning and environmental law. To illustrate this I consider some of the components of environmental law: Climate change, EIA, SEA, Aarhus Convention and Habitats conservation and the choices the UK might make as to the nature of the future relationship it negotiates with the European Union.

Impact of Brexit on Climate Change and Environmental Assessment

Existing UK Climate Change Legislation and Policy

12. The Climate Change Act 2008 establishes a legally binding target to reduce the UK's greenhouse gas emissions by at least 80% in 2050 from 1990 levels. This objective was partnered by measures in the Planning Act 2008 to ensure that planning specifically addressed climate change. Thus, section 19 (1A) of the Planning and Compulsory Purchase Act 2004 (added by the Planning Act 2008) requires local planning authorities to include in their Local Plans "policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change". Tackling climate change is now a key priority in national policy both in spatial planning and in decision taking. Paragraph 93 of the NPPF states: "Planning plays a key role in helping shape places to secure radical reductions in greenhouse gas emissions". A component of the definition of sustainability is "moving to a low carbon economy" (NPPF para 7).

Existing UK Practice on Environmental Assessment

13. Sustainability appraisal is the process by which the effects of plans and programmes in the UK are assessed in the course of being made. This assessment process includes assessment of climate change impacts. Sustainability Appraisal is intended to implement the requirements of the SEA Directive but it is nonetheless a process designed by domestic legislation. Environmental impact assessment is the process by which the environmental effects of plans and projects on the environment are

assessed. Again, this is a process governed by (hundreds of) domestic regulations which are intended to implement the EIA Directive in various different fields of planning. The EIA process ensures that climate change impacts are required to be assessed in relation to major developments.

14. Thus, each process, although European in origin, has been integrated within the UK system of town and country planning. In turn, the requirements of the EU directives supplement rather than replace the pre-existing domestic systems. It is fair to say that in some areas (minerals development for example) EIA has resulted in a lot more detailed environmental assessment than was required, say, in the 1990s before EIA had much influence. However, the more detailed assessment now undertaken is not entirely due to the impact of the directives as much as to an overall domestic and international trend of increasing concern for the environment and of recognition of the part that procedural protections can play.

Effect of Cessation of Influence of EU Directives

15. Supposing a 'hard Brexit' in which the supremacy of EU law and the principles of direct and indirect effect (the *Marleasing* principle) ceased to apply, then some of the underpinning of the detailed EIA and SEA regimes that now pertain in the UK would be withdrawn. Mrs May's speech to the Conservative Party conference and David Davis' subsequent statements in the House of Commons indicate that this is intended to be the outcome of the negotiations. The cessation of SEA and EIA Directives would not of itself immediately lead to drastic change since the UK implements their regimes through domestic law. In time, however, in the event of such a "hard Brexit", it would be open to the UK to amend its procedures so as to reduce the extent to which these regimes require assessment of and consideration of environmental factors. It would however be a matter of political decision as to whether the UK did adopt that course.

16. Tackling climate change takes a central place in the UK's legislative and policy schemes on planning. This has not been as a result of being in the EU, but as a result of the significance of the issue. At the same time, climate change can sometimes be

of peripheral significance in practice when local authorities or the Secretary of State are tasked with considering plans or planning permission. If that is the case, then again, that is not a consequence of EU membership. In my view the impact of leaving the EU is more likely to be felt in more obscure parts of EU environmental law which will be easier prey for those who regard such legislation as unnecessary or onerous.

17. What political choices might the UK make as to its continued harmonisation or divergence? This of course is a matter for speculation, and for debate. However, for the UK to depart significantly from existing practice on environmental assessment and tackling climate change would be against the domestic and international grain. Internationally, the RAMSAR convention, the Espoo Convention, the Aarhus Convention all expect environmental assessment and public participation. I consider it likely that in the event of leaving the European Union (whatever the terms) the UK will chose to retain the existing systems for environmental assessment in the immediate future without significant adjustment. It is instructive to note that the UK has recently loosened the thresholds for requiring EIA of a development, which demonstrates that as a matter of domestic choice the UK's standards exceeded those required by the EU (so the procedures adopted were not simply by virtue of being compelled). There is no reason to assume the automatic consequence of leaving the EU would be to diminish the procedural protections afforded by EIA and SEA further. Leaving the EU may afford an opportunity for a better system in the long run, since some of what is produced by developers pursuant to these directives and some of the concerns of public authorities are focused more on attempts to fend off legal challenge than to aid assessing environmental impacts.

18. I do consider that there is a risk the UK will in time fall behind EU legislation on planning if some form of harmonising framework is not retained. The EU will continue to pass environmental legislation, including revisions to the EIA and SEA directives while the UK's legislators may be too consumed with fire-fighting the legislative consequences of Brexit to match the EU in terms of progressive legislation.

19. One significant issue in relation to environmental law as a whole, and particularly in relation to climate change, is that EU regulations unlike directives do not require to be implemented into UK law. EU regulations, once passed at EU level, apply automatically across every EU country, without having to be passed as law at national level. This means that in a "hard Brexit" scenario where direct effect no longer applied (and there was no saving provision) the force of these regulations would fall away. It seems that the "Great Repeal Bill" will ensure that existing regulations are enacted as UK legislation, but practically speaking there will need to be a continued means of harmonising with EU law in order to maintain trade links etc. Again, it seems to me likely that at least as a matter of domestic law, if not also as part of a withdrawal treaty, the UK will (and should) pass some sort of transitional saving provision to maintain equivalent regulatory standards with the EU. In my view there is also merit in the continued operation of EU regulations through the continued operation of direct effect, or through an equivalent mechanism following Brexit. This seems to be what is now envisaged by the government to take place in the Great Repeal Bill. Examples of regulations which would be affected are those on emissions trading and on greenhouse gas monitoring. A full list is on European Law Monitor's[3] website.

Aarhus Convention

20. The UK's ratification of this Convention will be unaffected by departure from the EU. However, the EU is itself a signatory to that convention and has passed a number of Directives which give effect to its three pillars (public participation, access to information and access to justice). The Aarhus Convention extends far wider than the EU. To some extent it reflects what had already become common practice, while it has to some extent pushed the EU and its member states a bit further on procedural aspects of environmental law. The Aarhus Convention has largely been implemented into UK law already (in part because it is a convention which the UK has ratified, rather than because the EU ratified it). Access to information is

[3] http://www.europeanlawmonitor.org/eu-referendum-topics/the-legislative-impact-of-brexit-on-environmental-protection-in-the-uk.html

facilitated by the Environmental Information Regulations; public participation measures inherent in our planning system are concordant with the demands of the Aarhus Convention. If the EU Directives which seek to implement the Aarhus Convention were to cease to have effect, there would be little immediate impact on public participation and access to information. Access to justice has been facilitated by the emergence of protective costs orders and to a limited extent by "costs capping orders" under sections 88 to 90 of the Criminal Justice and Courts Act 2015. However, this is one area in which the UK has been resistant to implementation. Without EU Directives re-enforcing this pillar, it may be that the government takes the opportunity to treat its Aarhus obligations in a "softer" way and rein back on some of the measures so far taken to limit costs exposure of claimants.

Detailed Example of Impact of Hard Brexit with Regard to Habitats Directive

21. In order to explore the potential impacts of leaving the EU further, I now turn to consider in more detail what the landscape with regard to the Habitats Directive might look like after an exit from the EU.

22. I stress it is, for example, open to the UK to seek to depart the EU on terms that maintain the application of all EU environmental law. However, suppose for argument's sake that the Habitats Directive ceased to apply to the UK. In England and Wales the Habitats Directive has been implemented primarily through the Conservation of Habitats and Species Regulations 2010 as well as several other sets of regulations specifically concerned with offshore petroleum; offshore marine conservation etc. Further regulations implement the Habitats Directive in Northern Ireland and Scotland (there have been over 30 sets of UK regulations in implementation of the Habitats Directive, while occasional provisions have been inserted to implement the Directive in hundreds of acts and regulations). All the domestic regulations take effect as a matter of domestic law of England, Wales, Northern Ireland and Scotland as the case may be. The government's intention to re-enact EU legislation as UK legislation suggests that UK legislation which has already implemented EU legislation will remain in place in the medium term.

23. There is much international environmental law outside of EU law which would also continue to apply. The Bern Convention of 1979 is a parent to the Habitats Directive. The UK is a signatory to the Bern Convention, and is obliged by it to take measures to conserve habitats[4].

24. I turn to consider the practical effects of the Habitats Directive ceasing to apply to the UK in the (assumed) event of a 'hard Brexit'.

Designation of Protected Sites

25. The UK is currently obliged, pursuant to the Habitats Directive to designate Special Areas of Conservation which are intended to form part of an EU-wide coherent European ecological network called Natura 2000. This EU-wide programme of designating sites has probably been more ambitious and effective than if member states had been left to devise their own networks as a matter of domestic competence. This is not least the case because many threatened species, as well as some threats to bio-diversity (eg. alien species, climate change) cross borders. The UK has designated around 9% of its terrestrial area as SACs, this being one of the smallest of any EU nation (Slovenia, the greatest, has designated 38%).

26. Exiting the EU on terms in which the Habitats Directive ceased to apply would have no immediate impact on the existence of the protected network of sites because sites which had been designated as SACs or SPAs would continue to be protected by the Habitats Regulations and correlative policies as a matter of domestic law to effectively the same degree as if the Habitats Directive applied. Furthermore, every site designated pursuant to the Habitats Regulations is also a SSSI under part II of the Wildlife and Countryside Act 1981 (WCA 1981), which is part of domestic law. While SSSI is a less powerful designation than SAC in protecting against development, it

[4] However, unlike the Habitats Directive, it contains no mechanism for implementation: it is a form of "soft law" whose implementation is left to the signatory states. It is not partnered by any funding (unlike the EU Directives which are partnered by the EU Life programme and CAP rural development budgets) By contrast, while the Birds Directive and Habitats Directives have not been implemented with complete vigour by EU institutions, they have proved to be much more effective in achieving results than other forms of international obligation.

provides a fall back and would mean that there was no simple means of getting around the protections afforded to designated sites.

27. By way of analogy, about 80 wetlands are designated pursuant to the RAMSAR convention of 1973. Although this convention has no statutory basis in domestic law, each of these is also a SSSI (and therefore subject to the provisions of Part II of the WCA 1981) and most are SPAs under the Birds Directive (and therefore subject to the Habitats Regulations). National policy also covers RAMSAR sites.

28. If the Habitats Directive ceases to apply, it is possible that extension of the existing network of protected sites might halt. However, while the UK is currently undertaking work on the designation of new marine sites, I understand that significant advancement of the existing network of terrestrial sites is in any event unlikely. Indeed the Commission's Natura 2000 January 2015 Newsletter stated that the UK's network was nearly sufficient. If EU law ceased to apply to Habitats, then such limited encouragement and compulsion as is provided by the Commission to further designate SACs would evaporate, but the Commission has never ardently compelled the designation of sites under the Habitats Directive or the Birds Directive (so the practical consequences may well be limited). Any planned extension of the network of conservation sites might well proceed in any event by designation of the site as a SSSI.

29. Furthermore, exit from the EU may not be all one-way. If the Common Agricultural Policy were replaced, there is the possibility that some of the environmentally destructive consequences of agricultural subsidies could be tackled with it. For example, it might be that former agricultural land could more realistically be given over to conservation[5].

[55] See for example this summary in George Monbiot's article in May 2013: https://www.theguardian.com/environment/georgemonbiot/2013/may/22/britain-uplands-farming-subsidies

Impact on Developers and Development

30. If the Habitats Directive were to be taken out of the framework of UK law, there would be no automatic impact on the rules governing development. The Habitats Regulations implement the requirements of the Directive, in some cases going beyond the supranational minimum standards imposed by the Directive. Those regulations are partnered by the WCA 1981 and other domestic provisions, as well as domestic policy. The mere removal of the underlying directive would have little immediate impact. Of course departure from EU environmental law does remove a fail-safe in the long run (see below). The continued operation of the regulations without the underpinning of the Directive and the EU institutions would not be without issues that required to be addressed: enforcement powers and mechanisms such as those of the EU Commission would be withdrawn and require replacement; some aspects of interpretation and effect of domestic regulations refer back to the Directive and would need to be amended or addressed. For these kinds of reasons some sort of sweeping saving provision would be far more sensible as an interim measure than hoping to go through with a tooth comb every one of the thousands of regulations that refer to EU law and amend them.

31. If EU environmental law ceased to apply in any form, the possibility of references to the ECJ or infraction proceedings by the Commission would also evaporate. The diminishment of these enforcement mechanisms could (unless replaced) have some impact on the efficacy of the Habitats regime. Certain legal challenges would no longer arise if the *Marleasing* principle (that domestic regulations must, as far as possible, be construed consistently with the purpose of the Directive they implement) no longer applied. Again that might in isolation diminish the efficacy of the regime. That said, it is likely that courts would continue to have regard to EU law to understand domestic regulations passed in implementation of it, so any changes may not amount to much in substance.

32. When EU Directives are amended an issue would arise as to whether the UK sought to keep pace or not. The automatic legal obligations which have in some cases

proved to be a spur to legislation would be removed, so that inertia might have greater force.

Protection of Threatened Species

33. The Habitats Directive also provides a general system of protection for European Protected Species listed in Annex 1 to the Directive. The Directive, requires member states to implement measures to prevent the deliberate, and for some species, the unintentional capture or killing etc. of protected species. Again, these provisions have been implemented domestically and any immediate changes are unlikely to be dramatic.

The Resource Implications of Changing the System

34. If the Habitats Directive ceased to apply, it would in the long run be open to the UK to change the domestic system that currently implements it. While there would be pressure from developers to do this, there is also political sense in maintaining harmony with the EU over a system which needs to be international to be effective.

35. The resource implications for replacing the former scheme could be very onerous and even more onerous on the devolved administrations in Scotland, Wales and Northern Ireland. There will need to be careful amendment of swathes of legislation. For example, regulation 3 of the Conservation (Natural Habitats etc.) Regulations 1994 (which still applies in Scotland) provides for Scottish ministers to carry out their functions under a whole host of statutory provisions in a manner which secures compliance with the Directive. Amending even this provision could be complex. Since the Scotland Act 1998, the Scottish Parliament has assumed legislative power over local government, planning and the environment and the Scottish Executive holds most of the functions of the former Secretary of State for Scotland. Yet at the same time, international and EU relations are reserved to Westminster. In practice environmental law and policy-making is governed by concordats between the two parliaments. Thus, Westminster may agree a Withdrawal Treaty which impacts on EU law in Scotland, but revision of implementing regulations to make sense of that

change will be within the competence of the devolved Scottish administration. There is potential for conflict, and complexity and a significant drain on resources. Similar, but different complexities will arise in relation to Wales and Northern Ireland. Even minor deviations from the Habitats regime, though possible, are likely to be very complex, and there will be scant resources for achieving them.

Summary of Position on Habitats

36. If Environmental Directives as well as the principles of the supremacy of EU law and of direct and indirect effect ceased to apply to the UK, the immediate consequences for habitats conservation would be limited because domestic law already implements European law and it would continue to do so. The consequences would only start to be felt if the UK government subsequently decided to diminish protection of habitats. There is an argument however that there would be a strong pull towards retaining the *status quo* since the existing system provides a workable balance between conservation and economic interests and is strengthened by its connection to an international conservation programme. The House of Commons Environmental Audit Committee stated in its Third Report of Session on 23 March 2016:

> "The UK Government's view, as expressed to us by Rory Stewart MP, Parliamentary Under-Secretary at DEFRA, was that, in general, the correct balance between common EU frameworks and distinct national approaches had been broadly achieved in the environmental sphere. He said, "We have not concluded that we need to return competencies from the European Union in relation to the environment."

37. At the same time, there might be opportunities arising to strengthen UK conservation efforts- for example from the cessation of the Common Agricultural Policy.

Effects of Brexit on Wider Environmental Law

38. The effect on the legal landscape would not necessarily be an even one, however. I have not attempted a review of the whole scope of EU environmental law since to do so would require an extensive paper addressing biodiversity, animal welfare,

product regulation, labelling, water protection, air pollution, noise, climate change, energy and waste (among other areas). It may be that in other areas where domestic legislation has not implemented EU law, or where the profile of that law is not as high as the Habitats Regulations, there will be more scope for the UK to apply weaker domestic standards than would pertain if it remained a member of the EU.

Part 3:

A Proposed Solution for Exiting the EU

A Two-Stage Process for the UK's withdrawal

39. I have explained in the first part that article 50(2) of the TEU envisages a two-stage process- a withdrawal treaty and thereafter a more fleshed out future framework for UK/EU relations. The future framework for UK/EU relations will presumably need to give effect to the desire for "sovereignty" over UK law-making which is said to have been why some people voted to leave the EU. But the future framework will also need to recognise the advantages (particularly in relation to the environment) of continuing to maintain cooperation and harmonisation of legal frameworks. I suggest the following outline of how an initial withdrawal treaty, and thereafter a more substantial further treaty might operate (with particular regard to environmental law). In my view, this course best achieves the demand that the UK retains sovereign control over law-making (since there is now a countervailing risk that huge changes which neither parliament nor the people chose could be given effect by the new treaty).

40. Firstly, the withdrawal treaty pursuant to the article 50 negotiations will provide that until the end of a transitional period EU law:

    - Which was in force at the date of departure (e.g. 2019); and
    - Which comes into force during a subsequent transitional period

    shall continue to have effect over the UK. It seems as though the government is envisaging that at the date of departure, EU law and institutions will no longer play a part in the regulation of environmental law in the UK. That strikes me as likely to be problematic. In my view there is a case for environmental law to continue for a

transitional period as though the UK were a member of the European Union (thus, the UK will, in respect of environmental law, remain subject to the jurisdiction of the ECJ; and to principles of EU law throughout the transitional period following withdrawal). This would preserve the legal framework which has been approved by parliament up to now, until such time as parliament has an opportunity to reconsider it. If this course is not adopted, there will be a very considerable period of uncertainty and litigation about the consequences of the new legal order- not just in relation to environmental law, but elsewhere too. The effectiveness of the law will be undermined significantly if the major institutions for enforcing the law are simply deprived of a role without replacement.

41. I would propose that the position after the transitional period will depend upon the terms of a further future treaty with the EU. The envisaged framework will see continued harmonisation and cooperation on most environmental matters. There will be some scope for the UK to deviate however. The construction of the future framework could be informed by the relationship enjoyed between Norway and the EU (though I do not suggest the UK joins EFTA).

Norway as an Example for a Bespoke Future Relationship for the UK/EU

42. The history of the relationship between the EU and Norway illustrates how the UK can sensibly manage a divergence from the EU with a legislative and judicial structure independent of the EU, but without major disruption to either party. The EU/Norway relationship also provides a model for the transition process.

43. By the EEA agreement (to which Norway, Iceland and Liechenstein on the one hand, and the EU states on the other are contracting parties), Norway essentially agreed to most of the EU laws as they stood in 1992 including the four freedoms of movement- workers, capital, goods and services, as well as state aid, competition, consumer protection and parts of environmental law. The EEA Agreement does not cover common agricultural policy, fisheries, customs union, common foreign and security policy, justice and home affairs, taxation, or economic and monetary union. Norway's EU-based environmental law is governed by Article 73 and Annex XX to the

EEA agreement which incorporate provisions mirroring the provisions of the Treaty on European Union on the environment. For reasons bespoke to Norway's economy the Habitats and Birds Directives are notable exceptions to the environmental *acquis* applying to Norway. The EFTA/EEA countries currently enjoy powers to influence the incorporation of EU law, either through (a) suggesting amendments to the EU law; (b) contesting its applicability to the EEA states; or (c) through a right of veto (though this has never been exercised). There is a necessarily complex, but sophisticated infrastructure and set of rules which govern how the EEA countries which are not within the EU incorporate and keep pace with relevant EU legislation (so as to retain harmony with EU countries in relevant areas), while retaining their sovereignty over areas which are not covered by EEA legislation. There are well-developed arrangements for courts to determine disputes over violations of these arrangements. Norway acceeds to the jurisdiction of the EFTA court which is not bound by, but often follows the case law of the ECJ.

44. There is no reason to retain the same mix of harmonisation and divergence of law in the future UK/EU relationship as is enjoyed by Norway now. The UK could continue to harmonise on all environmental law and retain the jurisdiction of the ECJ over its interpretation and application if it wished (subject to EU agreement- though there is little reason to see why it would be witheld). Or it could retain harmony on legislation and the jurisprudence of the ECJ up to, say 2019 when it leaves the EU, and thereafter either diverge or shadow EU environmental law. In that case a new international court would probably need to be established (this seems to me to be a significant issue which is yet to be addressed by the government). Rather than the notional veto enjoyed by Norway, there could perhaps be a system equivalent to the negative resolution procedure used for statutory instruments in parliament by which the instrument becomes law after 21 days unless objection is raised (following which there is debate). Adopting something along the lines of these objection procedures would secure the preservation of British sovereignty while at the same time securing the benefits of continued cooperation and harmonisation on EU law.

Alex Goodman

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