

## Landmark Brexit Seminars

# Environmental implications: context

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### General



- Referendum legislation contained no provisions for giving effect to Referendum on EU Membership
  - Mechanism to leave the EU is art. 50 which 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. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
    3. 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. ...”
  - <http://researchbriefings.files.parliament.uk/documents/CBP-7551/CBP-7551.pdf>
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## General



- Divisional Court (LCJ, MR and Sales LJ) currently hearing the judicial review by **Santos & Miller** and others of the executive decision to proceed with art 50 notification without consulting Parliament:
  - Claimants argue that Parliament must be consulted and rights will be lost simply as a result of triggering the process since the process is irreversible
  - The Crown relies heavily on the Royal Prerogative to make and withdraw from international treaties even if this affects right. See **ex parte Rees-Mogg** [1994] Q.B. 552
- See <https://www.judiciary.gov.uk/publications/santos-and-m-v-secretary-of-state-for-exiting-the-european-union-transcripts/>
- Supreme Court ?
- Donald Tusk recently suggested that the art 50 notification may be reversible and there may be a choice for the UK following negotiation – political decision. Reference to CJEU?

## General



- Announcement 2.10.16 of a “Great Repeal Bill” which will repeal the 1972 Act but will “grandfather” EU laws –
- <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act>
  - “To ensure continuity, we will take a simple approach. EU law will be transposed into domestic law, wherever practical, on exit day.”
- <https://www.gov.uk/government/speeches/exiting-the-eu-next-steps-ministerial-statement-10-october-2016>
- This can only take effect once the Art 50 process has completed since to repeal beforehand would be in breach of Treaty
- Leaves open many important questions
- Preserved legislation will then be considered presumably according to the priorities of the time

## Preserving legislation



- Rights e.g. EU citizenship, will be lost in any event and cannot be conferred by national legislation
- Provision for considering and having regard to CJEU judgments. What regard to future decisions of CJEU
  - D Davis Ministerial Statement 10.10.16
    - “we have had to abide by judgements delivered by the ECJ in their interpretation of European Union law. The Great Repeal Bill will change that with affect the day we leave the European Union”
  - s. 2(1) HRA 1998 model – “must take into account”?
- What regard to future guidance documents from CJEU. See e.g. SEA Guidance, Managing Natura 2000?
- Any regard to future legislative changes? Presumably not.
- International treaties and conventions on the environment? Preservation of EU laws as UK law should help maintain status quo

## Environmental law



- EU law is the source of the great part of environmental law currently applicable in the UK
- Includes waste regulation, pollution control, environmental permitting, air quality, water quality, climate change/ETS, EIA, SEA, marine environment, habitats and species protection as well as agriculture and fisheries
- If a “soft Brexit” under Norwegian model, UK would have to retain most EU environmental law to ensure full access to the EU market such as environmental permitting, water and air quality, waste management and REACH but not the Habitats and Birds Directives but a “hard Brexit” would allow wider choice of applicable regulation
- What priority will Government give to environmental legislation among concerns over the business and the economy, trade and immigration? Will it adopt a coherent, holistic approach or target areas which are seen as inhibiting economic growth?

## Environmental law



- YouGov poll for FOE 16/17 August suggested a majority in favour of post-Brexit laws protecting wildlife and the countryside at least as strongly as current EU rules and support for a new farming subsidy regime to promote environmental protection more than the current EU CAP
- Some may see as an opportunity to water down controls. Minister for Farming, Food and Marine Environment interviewed in May –  
 “The birds and habitats directives would go ... A lot of the national directives they instructed us to put in place would stay. But the directives’ framework is so rigid that it is spirit-crushing...”
- See March 2016 Report ***The potential policy and environmental consequences for the UK of a departure from the European Union*** - Institute for European Environmental Policy which set out what it considered the successes of EU environmental law and the risks of exiting  
 “Over the last four decades, the EU has developed probably the most complete and influential body of environmental law and policy in the world ”

## Institute for European Environmental Policy: risks



- Complete departure would create identifiable and substantial risks to future UK environmental ambition and outcomes. It would exclude the UK from decision making on EU law and there would be a risk that environmental standards could be lowered to seek competitive advantage outside the EU trading bloc.
- Departure whilst retaining membership of the EEA would lessen such risks, as most EU environmental law would continue to apply. However, there would be significant concerns related to nature conservation and bathing water, as well as to agriculture and fisheries policy. In addition, the UK would lose most of its influence on EU environment and climate policies.
- Under both exit scenarios, significant tensions would be created in relation to areas of policy making where responsibility is devolved to the governments in Scotland, Wales, and Northern Ireland, but where a broadly similar approach has been required as a result of EU membership, including environmental protection, agriculture, and fisheries.
- The uncertainty and period of prolonged negotiation would itself create significant risks both for environmental standards and for the green investment needed to improve the UK’s long-term environmental performance.

## Further questions



- Should the UK simply preserve the EU derived material and tinker with it over time e.g. the high threshold for habitats on appropriate assessment or for requirements regarding air quality?
- Would it be preferable to assemble from the EU material coherent frameworks for new UK legislation and guidance which -
  - Creates a proper UK body of environmental law, which can have due regard to international issues e.g. treaties such as Aarhus and Ramsar
  - may reduce the need to have regard to CJEU decisions
  - How would it approach environmental controls seen as imposing a restraint on economic growth e.g. in terms of development, industrial practices or agriculture?

