



e-law

Better law for the environment

January/February 2019 | Issue 110



Welcome to the January/February edition of elaw.

December 2018 saw publication of the draft Environment (Principles and Governance) Bill and hence the focus of this issue is the Environment Bill: the new body, the courts and the future of UK environmental law.

With the future path of Brexit and the likely effect on environmental law hanging in the balance, we are grateful to Tom West for his article: [The Draft Environment \(Principles and Governance\) Bill: an Initial Review](#), which includes detailed analysis of the provisions relating to the proposed Office for Environmental Protection (OEP) and the environmental principles. Tom also goes on to consider what else is needed in the final Environment Bill, which is to contain the final clauses and additional measures on air quality, nature recovery, waste and resource efficiency and water management, and which is expected early in the second parliamentary session of 2019.

We are also thankful to Viviane Gravey for setting out so clearly in her article: [Northern Ireland: Brexit requires tackling environmental governance gaps old and new](#), the specific challenges faced by Northern Ireland as a devolved administration and the part of the UK least well-armed to tackle these challenges: with no sitting Assembly or functioning Executive for over two years.

Alec Samuels has also [provided his reflections](#) on the future of environmental law, following Baroness Barbara Young of Old Scone's talk at a special UKELA lunch in December, for which we are most grateful.

In this edition we also attach the transcript of the 2018 Annual Garner lecture delivered by Advocate General Dr Juliane Kokott, Court of Justice of the European Union: ["The Contribution of the Jurisprudence of the Court of Justice of the European Union to the Development of Environmental Law in the UK"](#).

Finally, don't miss Nicholas Whitsun-Jones' article: [The Law Commission's Report Planning Law in Wales – a Synopsis](#). The report suggests a new Planning Act/Planning Code for Wales, which would amount to a radical shake up and modernisation of planning law applying to Wales, building on the diversification from England that has already taken place.

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I would also like to take the opportunity to extend a welcome to Beatrice Petrescu and Sophie Tremlin, our new Student Advisors, who will be taking over the role from Lewis Hadler over the coming months. Thanks also to Lewis for all his hard work in his time as Student Advisor.

We also welcome Sefki Bayram and Cecily Kingston as editorial assistants, who will start in time for our next issue. I look forward to working with you both!

Best wishes,

Sophie Wilkinson

Sophie Wilkinson
UKELA e-law Editor

E-law editorial team

Sophie Wilkinson, Editor – Sophie is an environmental law specialist at LexisPSL with 13 years' experience, including 11 years' experience in private practice. She moved to LexisNexis from Shoosmiths LLP where she was a Senior Associate. Prior to this Sophie trained at Browne Jacobson LLP and spent 6 years at Eversheds LLP.

Dr Ben Christman – Senior editorial assistant, is an independent environmental law researcher.

Words from the Chair



Welcome to your February edition of elaw, our final instalment before the UK's scheduled departure from the European Union on 29 March. In amongst all the political turmoil, UKELA's recent conference on environmental principles and governance, held in conjunction

with UCL, ClientEarth and WWF, was a welcome moment of clarity. The expert panels delivered excellent analysis of Part 1 of the Environment Bill to a packed room and the event made an important contribution to the debate on the government's proposals for environmental law post-Brexit. The presentations are now available in the member's area, see: [A First Response to the Environment Bill: The New Body, The Courts and the Future of UK Environmental Law](#) in the [UKELA news](#) section.

UKELA is uniquely placed to hold such events and not surprisingly it was heavily over-subscribed. We will continue to create as many opportunities as possible for such engagement.

As the parliamentary process begins at Westminster and the devolved administrations make their own views known on environmental protection, we anticipate a significant number of consultations to which UKELA can make a valuable, indeed crucial, contribution. The Brexit Task Force and its subcommittee looking at the Environmental Governance and Principles Bill, supported by our working party and Brexit adviser Dr Paul Stookes, has been doing a fantastic job in this respect. However, we need all members to be engaged in this. If you are a member of a working party, please contact your convenor to see what they are doing and how you can get involved. Or contact me directly, I am always delighted to hear from members.

I would also like to take this opportunity to extend UKELA's congratulations to three of our members who are to be appointed as Queen's Counsel in March – Charles Banner and Tim Buley of Landmark Chambers and William Upton of Six Pump Court. Also to Justine Thornton QC of 39 Essex Chambers who has been appointed as a High Court judge.

And finally, we also recognise in this edition of elaw the enormous contribution made to UKELA by two of our members. Tom Huggon has been a member of the nature conservation working party for as long as it has existed and prior to that was a founding member of the Solicitors Ecology Group in the early 1970s. Tom is stepping back from being an active UKELA member. We thank him for all he has contributed. Sir Crispin Agnew of Lochnaw has been a UKELA Patron since 2010 but stepped down at the end of last year. Over the years Sir Crispin has been heavily involved in organising both the annual Scottish conference and the wild law weekends. We are very glad that he is planning to continue as an active member of UKELA and are sincerely grateful for all he has done for the organisation and environmental law over the years.

Regards,

Anne Johnstone

Anne Johnstone
UKELA Chair

UKELA news

UKELA Membership renewals 2019

Membership renewal reminders went out to all members during December. Thank you to those who have already renewed; if you haven't had time, please do so before **28 February 2019**. If you have any questions please contact [Elly-Mae Gadsby](#), UKELA Senior Administrator.

A First Response to the Environment Bill: The New Body, The Courts and the Future of UK Environmental Law

This half-day conference was held on 14 January 2019; there was such demand for tickets that we sold out! If you were unable to attend the presentations are now available in the [members' area](#).

Annual Garner Lecture 2018 – transcript

Please find [attached](#) the transcript of the 2018 Annual Garner lecture delivered by Advocate General Dr Juliane Kokott, Court of Justice of the European Union. The theme of Dr Kokott's lecture was: **"The Contribution of the Jurisprudence of the Court of Justice of the European Union to the Development of Environmental Law in the UK"**. Once again kindly hosted by Freshfields Bruckhaus Deringer at their Fleet Street conference facility, the 2018 Garner was chaired by our President, Lord Carnwath and attended by members from across the UK, some of whom joined by webcast from locations including Plymouth, Bristol and Newcastle. We hope you enjoy reading Dr Kokott's lecture, which is reproduced with her kind permission as an exclusive member benefit.

To continue to receive benefits such as this, don't forget to renew your 2019 membership as soon as possible. Contact elly-mae@ukela.org for more details.

The UKELA annual conference 2019

[Bookings](#) are now open for our annual conference in Sheffield over the weekend of 28-30 June 2019. Head to our events listing to find out more and don't miss out on early bird tickets until the end of February – we have limited numbers available at last year's prices.

Annual fundraising lunch

Introduction:

UKELA's annual fundraising lunch was kindly hosted by Caroline May of Norton Rose Fulbright and organised by Stephen Sykes, UKELA Past Chair. It took place on December 5th 2018. Attended by 30 guests, the lunch raised more than £1,500 for UKELA. These funds will go towards UKELA's ongoing work on Brexit-related matters; and efforts to consolidate our membership base, in particular the introduction of a comprehensive Customer Relationship Management (CRM) system. UKELA is very fortunate to count Baroness Young as one of its patrons. Baroness Young gave a brilliantly insightful, astute, wide-ranging and upbeat talk entitled 'No time to stand still'. The talk reinforced the need for more effective environmental governance in these uncertain times. Alec Samuels article summarises the environmental challenges facing society, as well as the main themes of Baroness Young's talk.

Reflections on the future of environmental law

Alec Samuels

At a special lunch in December UKELA was honoured and privileged to hear a talk by Baroness Barbara Young of Old Scone on the future of environmental law. Lady Young has had a most distinguished career, playing a leading role in Diabetes UK, health authorities, the Woodland Trust, the RSPB, English Nature, and, of particular relevance to UKELA, the Environment Agency 2000-2009. At this time, with Brexit still unresolved, the future of environmental law is uncertain, so deep thought on environmental principles is imperative. Energetic and visionary forward thinking is required. At the simplistic level Brexit need be no more than transcribing or translating or adopting EU environmental law into English law, with some minor adjustments, and anyway so much of environmental law in England is directly descended from the EU law in and already part of our daily law. In practice however the process is proving to be not so simple.

The challenges for the environment most certainly are continuing and indeed daunting: Climate change. Air pollution. Loss of forests and trees. The needs and demands for new housing. The northern powerhouse. The Oxford-Cambridge arc. The advance of technology. The need to grow food, and the role of "inside-produced" food production, or factory-produced food. Already Parliament is grappling with the new Agriculture Bill and the new Fisheries Bill.

If and when the hoped-for new trade agreements are negotiated efforts should be made to include good environmental standards in those agreements.

The legislative process, particularly for secondary legislation, is less than satisfactory. Challenge is very limited. Changing the text is almost impossible. The sheer volume of material can be overwhelming.

The advent of a new Environmental regulator should hopefully offer the opportunity for strong independent regulation, critical of Government where necessary, reporting annually direct to Parliament.

Lady Young graciously acknowledged and welcomed the constructive professional assistance being rendered by the UKELA working parties to environmental law and protection.

News from the devolved administrations

Wales

Law Commission publishes report on Planning Law in Wales

In November 2017, following a request from the Welsh Government and a scoping exercise, the Law Commission published a consultation document (over 500 pages) inviting comments and representations on proposals for simplifying and codifying Welsh planning law and procedure. The Commission's view was that the planning system in Wales was not fit for purpose and difficult for professionals to understand, let alone the public.

65 consultation responses were received (including from the UKELA Wales Working Party) and last November the Commission published its final Report *Planning Law in Wales*. The report will now be considered by the Welsh Government, who are due to provide an interim response by 31 May 2019 and a detailed response by 30 November 2019.

The background to this exercise has been the continuing diversification of Welsh planning from the English model with Welsh specific legislation already in place. If acted upon, the Law Commission's proposals will result in a radical restructuring of Welsh planning law.

Further information can be found in this issue in Nicholas Whitsun-Jones' paper: [The Law Commission's Report Planning Law in Wales – a Synopsis](#).

Working party news

Public Health and the Environment Working Party

There is an air quality in Manchester seminar from 1 pm – 6.30 pm on 7 March 2019, at Weightmans, Manchester. The event is being jointly organised by the Society of Legal Scholars, UKELA and Weightmans. The preview material explains that this is an important and timely event following in the wake of the third defeat of the UK Government in the High Court last year. In the third case brought by ClientEarth, the court held that the government's failure to require action from 45 local authorities with illegal levels of air pollution in their areas was unlawful and ordered ministers to require local authorities to investigate and identify measures to tackle illegal levels of air pollution in 33 towns and cities as soon as possible. The challenges involved are not to be underestimated and this event brings together speakers from public health and legal backgrounds for an afternoon of discussion on the governance of air quality and the challenges ahead.

The confirmed speakers are: Dr Veneta Cooney (Consultant Physician in Occupational and Environmental Medicine, Trustee of UK Environmental Law Association and Convenor of the UKELA Public Health and Environmental Law Working Party); Professor Eloise Scotford (University College London Faculty of Laws, University of London); Dr Aleksandra Cavoski (Birmingham Law School, University of Birmingham) and Katherine Nield (UK Clean Air Lawyer, ClientEarth).

More information can be found [here](#).

Please see the [UKELA events](#) section for booking details.

Waste working party

The waste working party is holding two events over the coming weeks.

Brexit Part 2 update seminar – 6 March 2019, Clyde & Co. Following on from last year's popular Brexit update, we hope to see you on 6 March at Clyde & Co for the Brexit Part 2 seminar. This important event will bring together a number of speakers to provide an update on waste and Brexit at this crucial time.

Exploring the pathway to a circular economy seminar – 4-6 pm, 2 April 2019 Ashurst, London. The seminar 'Exploring the pathway to a circular economy' is a great opportunity for those who want to know more about the circular economy, including in the context of Brexit. We have six speakers lined up for a panel discussion and will provide a legal overview of the circular economy. The event held on 2 April from 4 – 6 pm with drinks to follow at Ashurst's office. Please see the [UKELA events](#) section for booking details.

Students news

Andrew Lees essay prize 2019

We are pleased to announce that the question and competition rules for the Andrew Lees essay prize are now available. The article question is:

To what extent is there room to apply creatively common law doctrine to combat, in the UK courts, the damage to the environment resulting from climate change?

We will be accepting entries from 1st February 2019 until midday on 25th March 2019. The prize is a free place at UKELA's annual conference at Sheffield University on 28 – 30 June 2019 (including reasonable travel expenses from within the UK). Full competition rules and the competition form may be found on the [website](#).

Student publication opportunity

Interested in co-authoring a hot topic article with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members' journal which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to [Lewis Hadler](#), our student advisor. If selected, the Editorial Board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is air quality, expected to be published in early April 2019.

An introduction to our two new student advisors, by Lewis Hadler

For just over a year now I have had the pleasure, as UKELA's Student Advisor of meeting and speaking with students and a whole range of people from varying backgrounds interested in a career in environmental law. There are a lot of enthusiastic, talented people out there who can benefit from what UKELA offers. In terms of reaching this demographic, a central role is played by the annual UKELA careers evening, hosted at Francis Taylor Building and attended by professionals representing the gamut of environmental law who volunteer their time to share their experience. But it is important also to be able to maintain connections and encourage engagement throughout the year and in this the Student Advisor plays an important part. I am pleased to welcome Beatrice Petrescu and Sophie Tremlin, who have now joined as Student Advisors and will be taking over my role over the coming months, as I focus on other commitments. With both positions filled, I have every confidence that they will continue to develop the role and do an excellent job.

Beatrice is a Politics and International Studies student at University of Warwick. Coming from a non-law background, she is excited to bring her experience of transitioning to law to the role of student advisor, in order to make UKELA more accessible to non-law students, and ultimately help create and maintain an inclusive and supportive community of like-minded young people. In her spare time she loves travelling and playing lacrosse.

Sophie is a current LLM Environmental Law and Policy student at University College London, after graduating in law from Cardiff University. Sophie has been involved with many environmental law matters, from pro bono cases to conferences, and is excited to be working with UKELA to widen the audience of environmental law to students around the UK.

UKELA events

London meeting: cities and nature: bringing biodiversity into the urban landscape- 18 February 2019

Please join us for this early evening session where the subject will be the restoration of biodiversity in the urban landscape. For more details and to book your place, please visit the [events](#) page.

Waste working party seminar on Brexit- 6 March 2019

A follow up to the highly successful seminar on waste and Brexit in March 2018, this seminar will examine the latest position as Brexit day draws close. [Bookings](#) now open.

Air quality challenges; governance and good health – joint event with Society of Legal Scholars- 7 March 2019

Join us in Manchester for a half day event looking at the impact of air quality on health. Places are limited and so early booking is required. For more details and to book your place, please visit the [events](#) page.

Circular economy seminar- 2 April 2019

Organised by the waste working party. Join us at Ashurst in London for a circular economy update. [Bookings](#) now open.

Annual conference 2019- 28 June-30 June 2019

Please join us at Sheffield University's beautiful campus from 28 to 30 June 2019 for the UKELA annual conference 2019.

Our conference programme starts at 11.20am to give you maximum CPD value. Registration is from 10.30am. With seven plenary sessions covering a broad range of topics, there is something for everyone. We also have our working party sessions, always a popular end to the main business of the weekend. With a relaxing social programme to complement the working day, including some new activities such as running and walking clubs, we are sure you will have an enjoyable weekend with colleagues and friends. [Bookings](#) now open! **Early Bird tickets available to end February!**

Non-UKELA events

Castle debates: can digital technology protect the environment?- 5 March 2019

A debate discussing Can digital technology protect the environment? In association with Accounting for Sustainability; chaired by Pamela Castle OBE. For more details and to book your place, please visit the [events](#) page.

Groundwater 2019 conference- 27 March 2019

Join Environment Analyst on 27th March, in London, for their annual groundwater conference. UKELA members will receive a 10% discount when using the code UKELA10. Booking details are on the [events](#) page.

Human-forest relations in England: equity and inclusion in law, ecology and society-13-15 May 2019

As part of a two-year Arts and Humanities Research Council-funded project [Reimagining the Law of the Forest](#) this workshop invites up to twenty researchers from academia, government, the third sector and independent researchers into a creative space at the [National Arboretum, Westonbirt](#), to generate new ideas and visionary thinking on the relationship between people, trees and forests in England. Please see the call and project [website](#) for further details.

UKELA diary dates

Wild law weekend: 24 May – 27 May 2019

Organised by Wild Law SIG. Join us at Boggle Hole youth hostel near Whitby in North Yorkshire. [Details](#) to follow.

The e-law 60 second interview



Begonia Filgueira, Head of Environment at Foot Anstey LLP and Co-Chair, Brexit Task Force

Begonia is Spanish by birth but grew up in New York as her parents moved there when she was baby, then moved back to Vigo when she was about 10. She came to England to study law at UCL and be part of the art scene in London.

What is your current role?

Legal director and Head of Environment at Foot Anstey LLP. UKELA – current Co-chair of the Brexit Task Force and UKELA Ex Vice-chair.

How did you get into environmental law?

It wasn't planned but I have been an environmental lawyer since 1998. I qualified in the U.K. and Spain and an opportunity came up for a EU environmental lawyer at FBD who would work in London and across Europe including Madrid. Luckiest chance encounter ever as I love my job and the variety it gives me – environmental law covers commercial matters, regulatory compliance, property, planning, investment, governance and contentious matters to mention a few.

What are the main challenges in your work?

Time pressure to get everything done.

What environmental issue keeps you awake at night?

The opportunity that the Environment Bill presents and how it will play out.

What's the biggest single thing that would make a difference to environmental protection and well-being?

Policy that limits how we live to something closer to the planetary boundaries.

What's your UKELA working party of choice and why?

All WPs are great but my choice is nature conservation. They are hugely knowledgeable as a group and super active in scrutinising and influencing the law. They are also super helpful with any questions and even run a course on nature conservation law.

What's the biggest benefit to you of UKELA membership?

Personal satisfaction of working with such a fantastic membership organisation in making the law work for a better environment. It's also very collegiate so there is a sense of belonging to an environmental community and I always learn something working with UKELA!

Environmental law headlines

A selection of recent environmental law news and updates prepared by the teams at [Lexis®PSL Environment](#) and [Practical Law Environment](#).

Government publishes draft environmental principles and governance provisions for Environment Bill, policy paper and consultation response

[Practical Law Environment](#).

On 19 December 2018, the Department for Environment, Food and Rural Affairs (Defra) presented the draft clauses on environmental principles and governance for its Environment (Principles and Governance) Bill to Parliament. This is required by section 16 of the European Union (Withdrawal) Act 2018 (EUWA).

Defra also published:

- A policy paper highlighting other areas that the final Environment Bill will include relating to air quality, nature conservation, waste and water management. The paper also identifies where further consultations will be undertaken and what arrangements could be put in place in a no-deal Brexit scenario where the jurisdiction of the Court of Justice of the European Union ends before the new environmental watchdog proposed under the Bill is established. Defra has published extra detail on all policy areas separately, and will publish more in due course. In November 2018, the Secretary of State, Michael Gove, indicated that Defra would publish these other provisions of the Environment Bill in the first quarter of 2019.
- The government response to its May 2018 consultation on its initial proposals for post-Brexit environmental principles and the establishment of a new independent environmental watchdog. The consultation was partially superseded by section 16 of the EUWA.

The draft clauses provide for:

- The Secretary of State to publish a statutory policy statement to explain how the government should apply the nine environmental principles required under section 16 of the EUWA in its policy making. Alongside the draft Environment Bill, Defra published an information paper on the policy statement on environmental principles that sets out the government's initial approach to its development.
- Regular long-term environmental improvement plans (EIPs) for improving the natural environment. The government's 25 year environment plan will

be the first EIP and will be set on a statutory footing (see [Practice note, 25 year plan to improve the natural environment](#)).

- A new statutory and independent environmental body, the Office for Environmental Protection (OEP), which will provide a domestic replacement for the existing scrutiny function of the European Commission and the European Environment Agency. It will oversee the implementation of environmental law and the government's EIPs by monitoring government environmental policies and legislation and by providing independent information to the government. It will also hold public authorities to account for breaches of environmental law after Brexit.

Most of environmental law is a devolved matter, but there are some reserved matters. The draft Environment Bill applies principally to England. It applies to Wales, Scotland and Northern Ireland in relation to environmental matters that are reserved to UK ministers. Subject to the ongoing discussions with the devolved administrations, the OEP could exercise functions more widely across the UK. Annex A to the draft Environment Bill sets out the territorial extent and application in the UK of the draft clauses in detail.

The House of Commons Environment, Food and Rural Affairs Committee indicated, in November 2018, that it will undertake pre-legislative scrutiny of the draft provisions during February and March 2019. The government plans to introduce the Bill early in the second session of this Parliament. It wants to ensure that the measures in the Bill are introduced before the end of the implementation period in December 2020.

The draft Environment Bill is a significant development for UK environmental law. It will be interesting to see how the OEP will use its powers and how it will manage the tension between the two roles of advising the government on its EIP while being an independent watchdog taking enforcement action.

For more detailed coverage of the draft Environment Bill, see [Legal update, Government publishes draft environmental principles and governance provisions for Environment Bill, policy paper and consultation response](#).

Government publishes resources and waste strategy

[LexisPSL Environment](#)

The government has published its [Resources and Waste Strategy](#) for England. In its strategy, the government sets out how it will preserve material resources by minimising waste, promoting resource efficiency and moving towards a circular economy in England.

It is the first significant government statement in this area since the [2011 Waste Review](#) and the subsequent [Waste Prevention Programme 2013](#) for England. It builds on this earlier work but also sets out a new approach to issues such as waste crime, and to problems such as packaging waste and plastic pollution.

The Strategy sits alongside the government's [25 Year Environment Plan](#), the recently published [Bioeconomy strategy: 2018–2030](#), and the [Clean Growth Strategy](#). It sets out how the government will:

- Ensure producers pay the full net costs of disposal or recycling of packaging they place on the market. Producers will have to pay a modulated fee, so that those who use packaging that is very difficult to recycle will have to pay the most.
- Introduce a tax on plastic packaging that contains less than 30% recycled plastic.
- Consider producer responsibility for items that are harder or costly to recycle including cars, electrical goods, batteries and consider extending producer responsibility schemes to include textiles, fishing gear, vehicle tyres, certain materials from construction and demolition, and bulky waste such as mattresses, furniture and carpets.
- Introduce a consistent set of recyclable materials collected from all households and businesses, and consistent labelling on packaging so consumers know what they can recycle.
- Ensure weekly collections of food waste- this will be subject to consultation which will also consider free garden waste collections.
- Introduce a deposit return scheme, subject to consultation, to increase the recycling of single-use drinks containers including bottles, cans, and disposable cups filled at the point of sale.
- Explore mandatory guarantees and extended warranties on products.
- Introduce annual reporting of food surplus and waste by food businesses This is part of the government's commitment to reducing food waste, reducing the carbon footprint, and meeting the [UN Sustainable Development Goal](#) to halve global food waste at consumer and retail levels by 2030.
- Introduce compulsory electronic tracking of waste, and tougher penalties for rogue waste crime

operators who mislabel waste. The government intends to create a Joint Unit for Waste Crime. This would be led by the Environment Agency with the Police, Crime Commissioners, HMRC and waste industry representatives working together to tackle the most serious cases.

- Consult on increasing the plastic bag charge and extending this scheme to small retailers (this consultation was published in December 2018).

For more information, see News Analysis: [Government publishes resources and waste strategy](#).

Clean Air Strategy 2019

[LexisPSL Environment](#)

The final [Clean Air Strategy 2019](#), published on 14 January 2019, sets out how the government aims to significantly reduce the emissions of the five air pollutants by 2020 and by 2030. The strategy summarises what measures have been taken to date and identifies a number of intended actions to come. It does not therefore repeat what has already been set out in the Road to Zero Strategy, which sets the plans to end the sale of new conventional petrol and diesel cars and vans by 2040, or the UK plan for tackling roadside nitrogen dioxide concentration. It also notes that the UK government will need to work in partnership with the governments of Scotland, Wales and Northern Ireland.

Publishing a Clean Air Strategy is also one of the policy commitments listed in the [25 Year Environment Plan](#), looking at reducing pollution. The final strategy followed government [consultation](#) from 22 May 2018 to 14 August 2018 with the results of the consultation helping inform the final strategy. The [summary of responses](#) to the consultation was issued alongside the final strategy. Publication of the strategy follows pressure from the European Commission and ClientEarth to produce a national strategy to show how the UK will comply with EU and national standards.

One part of the strategy sets out new goals to cut public exposure to particulate matter (PM) pollution since this type of pollution has been identified by the WHO as the most damaging air pollutant. Domestic burning accounts for 38% of PM pollution compared to industrial combustion at 16% and road transport at 12%. The government has committed to see households move away from these polluting fuels towards cleaner technologies.

Proposals in the Clean Air Strategy 2019 include:

- A new goal to cut public exposure to PM pollution across the UK by 50% by 2025 in all areas where the level of pollution is above the WHO guideline

level (Defra will publish further evidence on how this might be done).

- New legislation to prohibit the sale of the most polluting fuels.
- Plans to ensure that only the cleanest stoves are available for sale by 2022.
- Changes to existing smoke control legislation to make it easier to enforce.
- New powers to local authorities to take action in areas of high pollution.
- Development of a dedicated communication campaign targeted at domestic burners, to improve awareness of the environmental and public health impacts of burning.
- Working with industry to identify an appropriate test standard for new solid fuels entering the market.
- Ending the sale of new diesel and petrol cars and vans from 2040.
- Legislative controls concerning the use of emissions control systems, the use of mobile machinery, and to reduce impacts from the activities of railways, maritime transport and ports.
- Phasing out coal-fired power stations and oil and coal heating.
- Tightening of standards of control of industrial emissions.
- Enhancing regulation of agricultural activities, including a strategy to invest in low-emission infrastructure and equipment and funding schemes.
- Reducing ammonia emissions from farming, with new rules proposed on slurry use, spread and coverage from 2025.
- Extending the environmental permitting regime to cover the dairy and intensive beef sectors, not just intensive pig and poultry farms.
- Proposals for a personal air quality messaging system to inform the public, particularly those who are vulnerable to air pollution.
- Proposals to reduce the use of non-methane volatile organic compounds in household products such as carpets, upholstery, paint, cleaning, fragrance and personal care products.

The government plans to set out new primary legislation to deal with the proposals outlined in the Clean Air Strategy 2019, as well as new enforcement powers at local and national level to underpin the proposals. This will include an up-to-date legislative framework for tackling air pollution at national and local level, tying this into the development of the new environmental principles and governance framework to be outlined in the Environment Bill. This includes updates to both the Local Air Quality Management framework and the Smoke Control Area framework.

For more information, see News Analysis: [Clean air strategy 2019 – raising difficult expectations?](#)

Outcomes of COP24

[LexisPSL Environment](#)

The twenty-fourth session of the Conference of the Parties (COP24) to the United Nations Framework Convention on Climate Change (UNFCCC), took place in Katowice between 2-14 December 2018.

The main task for delegates at COP24 was to agree on a Paris Agreement rulebook (the rulebook), a set of technical rules and guidelines to implement the Paris Agreement. COP24 was the most significant COP since the adoption of the Paris Agreement in 2015. To this end, in the lead up to COP24, there was an inter-sessional in Bonn in June 2018 and an additional inter-sessional in Bangkok in September 2018, where delegates negotiated the framework and details of the rulebook.

The rulebook is critical for the implementation of the Paris Agreement, providing guidance for countries on how to produce their Nationally Determined Contributions (NDCs), establishing methods for cooperative implementation of targets, scaling up ambition, tracking and measuring climate action, including on finance and reviewing progress towards the Paris Agreement's goals.

Adoption of the rulebook was concluded in an overtime session on 15 December 2018. The rulebook was received with cautious optimism. It is significant in creating a foundation for countries to move forward with the operationalisation of the Paris Agreement. At the same time, many of the key issues, such as the ambition of climate mitigation actions and the scale of climate finance, will depend on future political will. Furthermore, an important element of the rulebook, on market mechanisms, is yet to be decided.

In addition there were significant pledges and announcements during COP24 outside the negotiations. Continuing the trend over the last few years, many of these were from industry and business. For example, the IKEA Group pledged to cut carbon emissions from production processes by 80% in absolute terms by 2030 from 2016 levels. The new pledge covers IKEA's own factories plus hundreds of its direct suppliers. Shipping giant, Maersk also set a goal of reaching zero emissions by 2050, without the use of offsets, which should spur technological innovations throughout its supply network to help it reach that goal.

The key steps over the next two years will be enhancing ambition ahead of an all-important COP26 (potentially in the UK), where countries deliver updated NDCs that need to be closer to achieving the goals of the Paris Agreement.

Chile replaces Brazil as hosts of COP25 in 2019 after Brazil's withdrawal. With no agreement on market mechanisms at COP24, this will also be a focus for 2019.

For more information including how the landscape has changed since COP23 in 2017, detail on the aspects of the rulebook agreed upon at COP24 and how the UK contributed to discussions and outcomes, see News Analysis: [Exploring the outcomes of COP24](#).

Government consults on Smart Export Guarantee (SEG) scheme to support small-scale low-carbon generation after FITs closes

[Practical Law Environment](#).

In December 2018, the Department for Business, Energy and Industrial Strategy (BEIS) published the government response to its July 2018 consultation, which confirmed that the Feed-in-Tariffs (FITs) scheme would be closed to new applicants from 31 March 2019. The response also stated that the government would follow up in due course on the call for evidence published alongside the July 2018 consultation with proposals to maintain a route to market for small-scale low-carbon generators after 31 March 2019 (see [Legal update, Feed-in tariffs: Closure Order made, guidance updated and government responds to closure consultation](#)).

On 8 January 2019, BEIS published a consultation on the Smart Export Guarantee (SEG) scheme for small-scale low-carbon generation, which will replace the FITs scheme when it closes. The consultation states that evidence from the 194 responses to the July 2018 call for evidence indicates that there are currently limited routes to market for exported electricity and these are focused on larger capacity generators. The consultation proposes a mandatory supplier-led scheme (SEG) which would remunerate small-scale low-carbon generators for the electricity they export to the national grid. The proposed scheme would:

- Cover all the technologies currently eligible for FITs up to 5 megawatts (MW) in capacity.
- Be mandatory for larger electricity suppliers with more than 250,000 domestic electricity customers.
- Be market led so that the per kilowatt (kW) tariff to remunerate small-scale low-carbon generators and the length of the contract would be set by suppliers.
- Require eligible generators to be metered. Smart meters will enable domestic installations to participate in the scheme.

The consultation closes on 5 March 2019.

For more information, see [Legal update, Government consults on Smart Export Guarantee \(SEG\) scheme to support small-scale low-carbon generation after FITs closes](#).

Court of Appeal decides surface water mixed with trade effluent liable to be charged as trade effluent

[Practical Law Environment](#).

On 13 December 2018, in *Boots UK Ltd v Severn Trent Water Ltd [2018] EWCA Civ 2795*, the Court of Appeal dismissed an appeal against charges levied by the respondent sewerage undertaker under the Water Industry Act 1991 (WIA 1991) on surface water that was mixed with trade effluent.

The court held that where surface water was mixed with trade effluent, the mixed liquid came within the definition of trade effluent in section 141(1) of the WIA 1991 and the respondent was entitled to levy trade effluent charges on it. The court did not accept the appellant's argument that the statutory scheme for regulating sewerage and drainage had always distinguished between three categories of effluent (domestic sewage, surface water and trade effluent) with separate rights of discharge and that that threefold classification had been carried through to the WIA 1991. The court held that this argument involved a misreading of section 141(1) as this classification was not reproduced in section 141(1), was contrary to existing case law and did not take account of the fact that once two liquids are mixed they cannot be separated.

For more information, see [Legal update, Surface water mixed with trade effluent liable to be charged as trade effluent \(Court of Appeal\)](#).

Council Presidency, EU Parliament reach provisional agreement in fight against plastic pollution

[LexisPSL Environment](#)

The presidency of the European Council and the European Parliament have reached a [provisional agreement](#) to set tougher restrictions on certain single-use plastics in efforts to reduce marine litter and protect the environment.

The agreement, which builds on existing EU waste legislation, bans the use of certain plastic items by 2021 where alternatives are readily available and affordable. These include plastic cutlery, plastic plates, food or beverage containers made from expanded polystyrene, products made from oxo-degradable plastics, straws, drink stirrers, balloon sticks and cotton bud sticks made of plastic. Single-use drinks containers made with plastic will only be allowed on the market if their caps and lids remain attached.

In addition it has been agreed that:

- Reduction measures should also cover waste from tobacco products, in particular cigarette filters containing plastic, which would have to be reduced by 50% by 2025 and 80% by 2030.
- Member States should ensure that at least 50% of lost or abandoned fishing gear containing plastic is collected per year, with a recycling target of at least 15% by 2025.
- Member States will have to reduce the consumption of several other items, for which no alternative exists (such as use of plastic food containers and sandwich boxes) by at least 25% and must set national reduction plans to encourage the use of products suitable for multiple use, as well as re-using and recycling, making alternative products available at the point of sale, or ensuring that single-use plastic products cannot be provided free of charge.
- Producers will be obliged to help cover the costs of waste management and clean-up, as well as awareness raising measures for food containers, packets and wrappers (such as for crisps and sweets), drinks containers and cups, tobacco products with filters (such as cigarette butts), fishing gear, wet wipes, balloons, and lightweight plastic bags—industry will also be given incentives to develop less polluting alternatives for these products.
- Member States will be obliged to collect 90% of single-use plastic drinks bottles by 2025, for example through deposit refund schemes.
- Certain products will require a clear and standardised labelling which indicates how waste should be disposed, the negative environmental impact of the product, and the presence of plastics in the products, such as sanitary towels, wet wipes and balloons.
- Member States will be obliged to raise consumers' awareness about the negative impact of littering of single-use plastics and fishing gear, as well as about the available re-use systems and waste management options for all these products.

If this provisional agreement is confirmed by the EU ambassadors of Member States, the Directive will be submitted to the European Parliament for approval and then back to the Council for final adoption.

For more information, see: [LNB News 20/12/2018 25](#).

Practice Note: [Waste types and controls – plastics](#) provides more information on international, European and national action in relation to plastic waste.

Environment Bill: the new body, the courts and the future of UK environmental law



The draft Environment (Principles and Governance) Bill: an initial review

Tom West, ClientEarth

At a glance

- In December 2018 Defra published a draft Environment (Principles and Governance) Bill (the Environment Bill) that establishes a new environmental watchdog and enshrines some environmental principles in domestic law. This development is an indirect consequence of leaving the EU and a direct consequence of section 16 of the European Union (Withdrawal) Act 2018.
- The Environment Bill will be constitutional in nature, overhauling the legal framework for environmental protection in the UK post-Brexit.
- As it stands, the Environment Bill proposes a watchdog that lacks the independence and legal force it needs to effectively oversee compliance with environmental law by public bodies.
- The provisions on environmental principles need a complete overhaul to prevent a significant regression in environmental law.
- The full Environment Bill must create new legal results based obligations on the government to achieve ambitious environmental objectives. It must also create new processes and mechanisms to facilitate this.

1. The Office for Environmental Protection (OEP)

Establishment

The independence of the OEP is crucial, yet the current format creates an entity that is too close to Defra in particular in terms of funding and accountability. The independence of the OEP must be better assured by creating closer ties to parliamentary committees, other arms of government (including the devolved governments), and the public.

The OEP must produce a statement under para 11(3) of the Schedule to the Environment Bill regarding the sufficiency of its funding. However this must play a more prominent and proactive role in the negotiation

of the OEP's budget, with parliament given a decisive say on funding matters. As an [example of a better approach](#), the German equivalent of the National Audit Office is able to submit its own proposed budget alongside the government's. The parliament is then able to make an informed and impartial decision as to its funding need. The appointment of key staff should also not be reliant on the Minister alone.

The OEP would benefit from being assigned an overarching purpose, such as 'to act on behalf of people and nature to ensure compliance with environmental law'. A purpose would help direct the strategic approach of the OEP and keep its activities focussed. Some elements of this are provided for in clause 12(4) of the Environment Bill, but this goes nowhere near far enough.

Scrutiny and advice

The OEP has a range of scrutiny and advice functions under clauses 14-16 including with respect to the 25 Year Plan, the implementation of existing law and on changes to the law. The Minister is under a duty to respond to some, but not all, of the OEP's reports.

The power under clause 15 to report on 'any matter' concerned with the implementation of environmental law is valuable. It creates an opportunity for the OEP to conduct deep and thorough assessments of public body (in)action. It should be bolstered by also legislating a power to issue recommendations to public bodies regarding implementation of the law, similar to a power of the [Welsh Future Generation Commissioner](#).

While the OEP can make recommendations following an investigation under clause 19(5), these do not have any legal status. Instead, a public body should be required to take all reasonable steps to follow the OEP's recommendations (unless certain considerations apply).

Complaints and investigations

The existence of a complaints procedure is welcome, though it is in need of improvement. There are potentially problematic provisions around time (there are no proposed emergency or interim measures, and complaints must be made within one year), an unclear requirement for the non-compliance to be 'serious', the need to exhaust any 'internal complaints procedures', and the dependence of the OEP's investigation process on a public complaint having been submitted.

The procedure could be significantly improved by assuring the continued involvement of the complainants and other relevant stakeholders in the investigation process. The OEP should operate via **transparent and deliberative forums**. This approach has many advantages, not least that solutions arrived at will have wider public buy-in and ownership by local communities than those delivered via a closed-box bureaucracy akin to the European Commission.

Furthermore, the OEP cannot conduct an investigation under clause 19 on its own initiative, but only in response to a complaint received under clause 18. This should be broadened to enable the OEP to set its own investigative strategy rather than merely launching reactive investigations.

Notices and enforcement

The OEP is empowered to issue 'information notices' and 'decision notices'. An information notice may be issued under clause 22 if the OEP has 'reasonable grounds for suspecting that the public authority has failed to comply with environmental law'. An information notice requests further information from the authority about the alleged breach. The authority must respond to such a notice within two months.

A decision notice may be issued under clause 23 if the OEP is 'satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law'. A decision notice 'sets out the steps the OEP considers the public authority should take in relation to the failure'. An authority must respond to a decision notice, again within two months.

These constitute the beginnings of a potentially useful escalating series of notices to ensure compliance with environmental law by public authorities. However, the potency of these notices is undermined in a number of ways.

Firstly, decision notices are **not legally binding**. Public authorities must respond to notices, but they are not bound to take the steps set out in them. While the government has claimed it is inappropriate to make OEP notices legally binding, there is already precedent for such legal tools in UK law: both the [EHRC](#) and [ICO](#) have comparable powers.

While the OEP may take a public authority to the High Court after having issued a decision notice on a particular matter, the court will only assess the legality of the **original decision** of the authority, rather than its decision to not comply with the decision notice. Thus, the broad discretion afforded to decision-makers that threatens the effectiveness of much environmental law remains. Instead, the OEP's decision notices should be made legally binding. This, along with enhancing the OEP's powers under clauses 15 and 19 would create the possibility of the OEP being a ['world-leading' environmental watchdog](#).

The second weakness is found in the scope of application of the notices. The OEP's notices can only be issued where a public authority has (potentially) 'failed to comply' with 'environmental law' and that this failure is 'serious'. While these may initially seem reasonable qualifications, the definition of 'failure to comply' under clause 17 is problematic, the absence of a definition of 'serious' renders it superfluous and potentially confusing, and the definition of 'environmental law' is too narrow.

Thirdly, there is a lack of effective remedies. Even if a court finds in favour of the OEP, the authority must only make a statement which could include details of how the public authority intends to ensure the recommended steps to rectify the failing in question are taken. The implication being that it could also ignore the recommended steps.

Instead, courts (or indeed the Environment Tribunal, which may be a useful forum here) should be required to issue **compulsory remedies**, with the default option being an order to comply with the steps set out in notices issued by the OEP. Further remedies and sanctions, such as fines, a 'special measures' type procedure, and requiring a senior representative of the authority in question to appear before a public panel would also be of value in the right circumstances.

2. The environmental principles

Environmental principles are crucial building-blocks for the proper functioning of environmental law. The draft bill fails to give the principles the right legal treatment, putting their future efficacy at risk. The duty attached to the principles (to have regard to a policy statement) is too weak. The government's [response](#) to the consultation states that this is broadly equivalent to both the standard in the Treaty on the Functioning of the European Union and in the Marine and Coastal Access Act 2009. However, the 'have regard' duty has [repeatedly been found](#) to offer a high level of discretion to decision-makers. This standard is **inappropriately weak** for present purposes.

The wording and framing of the principles also needs some work. The Aarhus rights and the objective of sustainable development are incorrectly treated as

principles and the precautionary principle is only invoked relating to the environment (ie not human health).

There are also too many trap doors to escape the effect of the principles. The principles only apply to Ministers of the Crown when making, developing or revising policies (not all public bodies when performing relevant functions). Taxation, spending and allocation of government resources are explicitly outside the scope of the principles. Finally, a Minister can rely on clause 4(2) to simply sidestep the effect of the principles.

Instead of this woolly approach, the principles could be used to properly integrate environmental concerns across government. Ministers could be required to release a statement with their new policies explaining how they have relied on and applied the environmental principles.

The proportionality standard is introduced in clause 4(2). This may pose a risk to the principles given the failure to retain the overarching objective of the principles found in the TFEU meaning it is unclear to what objective action must be proportionate. To prevent further confusion arising, the Environment Bill must introduce a new legally binding overarching objective into environmental law, such as to secure the recovery and maintenance of a healthy environment.

3. What else is needed? (Part 2 of the Environment Bill)

New governance mechanisms

The 'governance gap' cannot be fully closed by the OEP. A host of new mechanisms (and potentially institutions) is needed to guide the implementation, development and trajectory of environmental law post-Brexit.

New powers to issue plans, set targets, update policy statements, establish funding regimes and make technical updates are needed. But crucially, these powers must be exercised according to **ecological guidelines**. There must be new legal provisions that require (environmental) law to be constructed in the following ways:

- Transparently and democratically via public conversations.
- Reliant on a range of expertise and following leading knowledge.
- At spatial and temporal scales that reflect environmental challenges.
- In ways that speak both to planetary boundaries and local communities.
- **Non-regressively**: on an upwards trajectory, substituting old for new.
- Robust in the face of political pressure but flexible enough to respond to new pressures.

New transformative duties and objectives

To give renewed vigour to environmental law, new overarching duties on public bodies are needed. A new, transformative, cross-government duty to **secure the recovery and maintenance of a healthy, diverse, clean and beautiful environment** must be set out in the full Environment Bill.

This must be accompanied and detailed by duties on relevant ministers to achieve key [environmental objectives](#) relating to issues such as air quality, biodiversity, environmental education, and access to nature. These objectives must not be the siloed responsibility of Defra, with other departments holding their own objectives and all public bodies required to act compatibly with the achievement of the objectives.

Private actors too must be given impetus to take more seriously their impacts on the natural world. New duties of due diligence or environmental responsibility could be deployed to mainstream environmentalists' concerns, while retaining the flexibility needed for the diversity of actors and actions that must be covered.

New environmental rights

We all have a right to live in a healthy environment. Recent [developments at the UN](#) have confirmed the legal, environmental and democratic importance of environmental rights, and [Scotland](#) is now considering how to incorporate them into its legal order. For too long, environmental law has been about stipulating what must not be done. Instead, environmental rights can speak to a more positive, empowering and emancipatory vision of what our relationship with the natural world should be like.

The full Environment Bill must therefore enshrine our environmental rights, locking in both the substance and the procedures that are necessary to guarantee that the world we live in is healthy. This means giving greater weight to environmental considerations across the board, and ensuring that civil society is able to access effective remedies when our rights are breached.

To be most effective, environmental rights must by their very nature be [diverse](#). They ought to belong to both individuals and communities (noting the advantages this will have with regards causation) and our understanding of a healthy environment must be broad. It is an environment which is both conducive to human health, and healthy in and of itself. One that is diverse, resilient, clean, accessible, thriving, connected and beautiful.

Tom West leads on ClientEarth's work on the law and governance reforms required as a result of Brexit. He holds a PhD in environmental legal theory.

Environment Bill: the new body, the courts and the future of UK environmental law



Northern Ireland: Brexit requires tackling environmental governance gaps old and new

Viviane Gravey, Queen's University Belfast, co-chair of Brexit & Environment <https://www.brexitenvironment.co.uk/>

At a glance

- Tackling environmental governance gaps in Northern Ireland requires addressing pre-existing gaps, such as the lack of an independent environmental agency, as well as responding to new Brexit challenges, some of which, such as maintaining cross-border and all-island co-operation are unique to Northern Ireland.
- However, Northern Ireland is the part of the UK least well-armed to tackle these challenges: there has been no sitting Assembly or functioning Executive for over two years. This puts intense pressure on the Northern Ireland Civil Service – with continued uncertainties over decisions it can or cannot take and its legitimacy to do so.
- The alternative to NI-specific answers, UK-wide solutions, are still missing. The draft Environmental (Principles and Governance) Bill (the Environment Bill) is yet another example that instead of genuine co-design between the four nations, the devolved administrations are invited to join policies developed for England and made common by default.

Northern Ireland faces a Brexit paradox: while it is central to the UK-EU negotiations, it has no government to handle Brexit preparations. This absence is particularly felt in areas of devolved competences such as the environment. While the Scottish and Welsh governments and legislatures are preparing responses to, and even alternatives to, the Environment Bill, Northern Ireland is not in a position to do so.

Yet, if one part of the UK is really in need of a re-think of its environmental governance it is Northern Ireland.¹ As a post-conflict society, environmental concerns have long ranked lower in Northern Ireland compared to Great Britain – in many ways, Northern Ireland remains the 'dirty corner' of the UK. The Northern Irish government fell in January 2017 in reaction to the 'cash for ash' scandal, and the dramatic

overspend of the Renewable Heat Incentive non-domestic scheme. Northern Ireland also faces major cross-border environmental crime exemplified by its illegal waste crisis: a review in 2013 of illegal waste at the Mubuo site in Derry/Londonderry (on the Northern Ireland side of the border) found it contained over 900,000 m³ of illegal waste. On the Irish side, the Carndonagh tyre dump is the largest in Europe, with over 16 million tyres illegally disposed of, most of which come from Northern Ireland.²

The situation in Northern Ireland is a stark reminder that as the UK prepares for Brexit, we need to do more than just address environmental governance gaps arising from leaving the European Union. We also need to address the gaps and failures which pre-existed at all levels. European infringement procedures are often very lengthy – and depend on the European Commission choosing to pursue them. The Commission can make the choice to be lenient, and allow time for catch-up – this was the case in Northern Ireland in the 1990s and early 2000s, as is the case for Greece since the onset of the eurozone crisis. The Renewable Heat Incentive scandal exposed governance issues not only in Northern Ireland but also in Great Britain – as most of the day-to-day administration of the scheme was handled by Ofgem, which failed to inform NI departments when it feared the scheme could be abused. Finally, Northern Ireland remains the only part of the UK without an independent environmental agency which raises concerns about the ability to enforce environmental legislation on economic actors with strong links with the government.

Where the Northern Ireland case offers a cautionary tale about the present quality of environmental governance in the UK, it also offers positive examples of international co-operation, both in a cross-border and all-island fashion. Hence, since the Good Friday/Belfast Agreement of 1998 listed the environment as one of six areas of North/South co-operation, environmental co-operation has

blossomed: from tackling illegal waste or invasive species to jointly implementing the Water Framework Directive (Directive 2000/60/EC) to environmental non-governmental organisations building bottom-up cooperation helped by submitting joint applications for EU LIFE or INTERREG funding.

Northern Ireland faces different Brexit challenges

This means Brexit is fuelling rather different environmental challenges for Northern Ireland compared to Great Britain. First, it faces shared issues of potential regulatory gaps – such as queries about the fate of the sets of environmental principles underpinning EU environmental law – and potential governance gaps – such as missing the enforcement capacities of the Commission and Court of Justice. Second, these challenges are supplemented by the need to address pre-existing environmental governance challenges (such as the lack of an independent environmental agency) and to protect cross-border co-operation under and outside the Good Friday/Belfast Agreement. Third, these challenges are compounded by the difficulties of ‘taking back control’ in the absence of a functioning government and assembly.

This situation is putting a lot of strain on the Northern Ireland Civil Service, which has to oversee Brexit preparation with very little political cover. The only agreed Brexit policy of the Northern Irish government was a short letter to the Prime Minister sent by then First Minister Arlene Foster and Deputy First Minister Martin McGuinness in August 2016. While this letter provides examples of shared areas of concern – access to labour, protecting the agri-food sector, and maintaining energy cooperation – it makes no mention of the environment or of governance arrangements. In addition to lacking political direction, civil servants face uncertainty about their decision-making powers. In July 2018 the NI Court of Appeal confirmed that ‘any decision which as a matter of convention or otherwise would normally go before the minister for approval lies beyond the competence of a senior civil servant in the absence of a minister’³ But since then the Northern Ireland Secretary of State Karen Bradley introduced a Bill in the autumn to give civil servants added powers in the absence of a government (now the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (the Act)). This allows senior civil servants to make decisions which would normally require ministerial sign-off, if they deem them to be in the public interest. And this understanding of public interest is to be guided by, although not determined by, guidance produced by the Secretary of State.⁴

The Act creates a very difficult situation for NI civil servants: the absence of an Assembly and Government means that NI-specific answers to the

environmental regulatory and governance gaps cannot be developed in time for Brexit – and perhaps at all. The lack of environmental commitment of most NI parties means that even if the Assembly were back in action this would be very low on the political agenda. Should NI civil servants then opt-in the common policy frameworks currently discussed between the Welsh and UK governments? Should they ask to join the new Office for Environmental Protection set out in the draft Environment bill?

Genuine co-design or common policies by default?

This would be a momentous decision for civil servants to make – and would expose them to criticisms from parties unhappy with strengthening the power of the UK government over Northern Ireland and from parties who have repeatedly opposed environmental ambition. Such a decision becomes even more problematic when we consider how the UK government has envisaged co-design with the devolved administrations until now.⁵ Despite stating in the policy paper accompanying the draft Environment Bill that it ‘welcomes the opportunity to co-design with the Devolved Administrations’, its approach to co-design appears to be limited to inviting the other administrations ‘to join any proposals’⁶ This is making common policy by default, by extending the scope of policies developed by Defra beyond England, without necessarily taking non-English interests or experiences into account.

The limitations of this ‘co-design’ approach are evident in the Environment Bill. It is first noteworthy that while the Environment Bill was published in time to meet the government’s obligation under the European Union (Withdrawal) Act 2018, it fails to meet what is asked of the UK government under the UK-EU Withdrawal Agreement. Hence the Northern Irish backstop component of this agreement states that ‘the UK shall implement a transparent system for the effective domestic monitoring, reporting oversight and enforcement of its obligation (...) by an independent and adequately resourced body or bodies’⁷ But the proposed body is not UK-wide and critically it does not cover Northern Ireland (where environmental roll-back would have direct impact on a EU country). Furthermore, the Environment Bill does not contain steps to ensure either that the body would extend its reach or that, together with other devolved ‘bodies’ it would cover the whole of the UK.

Second, if the body and the Environment Bill were simply extended to Northern Ireland this would raise a number of issues. The Environment Bill does not include an overriding aim to improve the state of the environment – and while such an improvement may be conservative party policy, it is not necessarily shared with NI political parties. Hence if the Environment Bill were extended to cover Northern

Ireland, questions around setting a regulatory floor or how to ensure non-regression of environmental standards (another commitment in the 'backstop agreement') would need to be addressed. Furthermore, considering the importance of cross-border and all-island co-operation to tackle shared environmental challenges, the principle of avoiding transboundary harm should be considered. As it stands, the principles listed in the Environment Bill are quite weak with many caveats, which risk being abused in Northern Ireland especially as environmental concern is lower among politicians (as evidenced by the continued lack of a NI Climate Change Act) and environmental charities are less well resourced. Finally, the proposals could be read as implying a small Office of Environmental Protection, which would focus on significant, high impact cases – but in order to work this requires mundane cases of environmental harm to be addressed by other, lower bodies. Which brings us back to the resources available to the Northern Ireland Environment Agency and its lack of independence.

Conclusion

While the EU referendum was silent on the environment, the ensuing Brexit process has put environmental standards and governance high on the political agenda. This surprising turn of events means Brexit is offering us a rare opportunity to take a hard look at what works and does not work in protecting and improving the UK's environment.

Such introspection sheds a harsh light on the situation in Northern Ireland. While the Welsh and Scottish executives used their newly devolved powers to develop ambitious environmental policies, their Northern Irish counterparts did not. Instead, Northern Ireland remains an environmental laggard. With Brexit and its impacts on the environment, Northern Ireland starts from a lower point and faces greater challenges, from continuing cross-border co-operation to delivering Brexit without a government.

The continued absence of a Northern Irish Executive means that bottom-up, NI-specific solutions to these challenges are unlikely to come in time for Brexit. But can UK-wide approaches be developed instead? Intergovernmental relations in the UK, especially between the UK and Scottish governments, are at a particularly low point. As the UK government signed up to the UK-EU Withdrawal Agreement and its environmental governance requirements, it is the responsibility of the UK government to make the first step. The Environment Bill should be strengthened with genuine environmental ambition underpinned by strong principles and an overarching principle of environmental improvement, to prevent an environmental race to the bottom within the UK. Defra and Parliament should wait for and study the forthcoming Welsh and Scottish environmental

governance plans instead of rushing ahead with the Environment Bill, in order to deliver the 'independent and adequately resourced body or bodies' we need.

Endnotes

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Matters in practice

The Law Commission's report Planning Law in Wales – a synopsis¹



Nicholas Whitsun-Jones
Member of UKELA Wales Working Party

At a glance

- The Law Commission's December 2018 Planning in Wales report (the Report) suggests a new Planning Act/Planning Code for Wales.
- It follows an extensive consultation exercise, including submissions by UKELA.
- It would amount to a radical shake up and modernisation of planning law applying to Wales, building on the diversification from England that has already taken place.
- Some 190 recommendations are made for reform, leading to a simplified and codified planning system (containing legislation, policy and guidance) if enacted by the Welsh Government.

Background

In November 2017, following a request from the Welsh Government and a scoping exercise, the Law Commission published an extensive consultation document (over 500 pages) inviting comments and representations on proposals for simplifying and possibly codifying planning law and the planning system in Wales, saying '[t]he system needs complete, radical overhaul'. The Commission referred to the fact that, including the Town and Country Planning Act 1990 (the '1990 Act'), there were now over 50 statutes in England and Wales dealing, wholly or partly, with planning matters. As an illustration of complexity and inexorable growth, it mentioned that in 1947 the *Encyclopaedia of Planning* comprised one volume – now it was 10 volumes.

In short, the Commission's view was that the planning system in Wales was not fit for purpose and very difficult for professionals to understand, let alone the public. (Undoubtedly the same applies to England, but that was not within their remit).

Having received 165 consultation responses from both individuals and organisations (including the UKELA Wales working party²), the Commission published in November 2018 *Planning Law in Wales Final Report – Cyfraith Cynllunio yng Nghymru Adroddiad Terfynol* (the Report) (note the bilingual title: one of the recommendations is that the Welsh language is made a relevant (material) consideration in Code planning functions). This is some 455 pages³.

The background to and catalyst for this exercise has been the continuing diversification of Welsh planning from the English model, starting with devolution and the First National Assembly in 1999, but very much gaining ground since the Government of Wales Act 2006 and the Wales Act 2017. The Welsh Government now has power to enact primary planning legislation on most development policy and development control matters⁴. The Welsh Assembly enacted four flagship statutes in 2015 and 2016 – the Planning (Wales) Act 2015 (the '2015 Act'), the Well-being of Future Generations (Wales) Act 2015, the Environment (Wales) Act 2016, and lastly the Historic Environment (Wales) Act 2015. The Welsh Government's intention is that there should be a link between the first three of these Acts for the purpose of ensuring sustainable development⁵. How that will occur in practice is a moot point, given the different regimes being administered and addressed. The Law Commission's proposals pave the way for a radical restructuring of Welsh planning law if they are accepted and enacted.

The Law Commission's proposals

The Commission's 190 recommendations are to be found in *Appendix B*⁶ of the Report and relate back to the Chapter topics covered in Part 2. Principal recommendations mentioned in the Report *Summary* (for details see the individual Chapters and recommendations as cross-referenced) are as follows (with the author's occasional comments thereon italicised in square brackets):

Chapter 5: Introductory provisions covering principles underlying the Planning Code and administration of the planning system

- Extend the duty to have regard to the development plan to the exercise of any Code function.
- Similarly extend the duty to have regard to 'all other material considerations';
- Change 'material considerations' to 'relevant considerations'. [*It is thought that 'relevant' is easier to understand*].
- Refer to 'inspectors', not 'appointed persons' and to 'planning authority' instead of 'local planning authority' or 'mineral planning authority' as Wales' local government is solely unitary.

Chapter 6: The formulation of the development plan

- Restate the provisions in Part 6 Planning and Compulsory Purchase Act 2004 (substantially amended in the 2015 Act), confirming that the development plan in Wales will be the National Development Framework, the strategic development plan and the local development plan.
- Continue Strategic Environmental Assessment as part of the Sustainable Assessment process in plan-making, not separately.
- Restate the current statutory procedures for blight notices.

Chapter 7: The need for a planning application

- No change to the statutory definition of 'development' in section 55 1990 Act or to the definition of 'engineering operations';
- Simplify demolition consent by using the Town and Country Planning (Generally Permitted Development) Order 1995 (GPDO) instead of Ministerial exemptions.
- Provide that works to increase a building's floor space, underground or otherwise, will always be development, leaving the GPDO to cover excepted cases.
- Provide that any change in the number of dwellings in a building is development;
- Abolish the procedures for enterprise zones and simplified planning zones as redundant to Wales.
- Certificates of lawfulness should be dealt with under the need for planning permission, not under enforcement, but no deemed application for a certificate as part of a permission application.

Chapter 8: Applications to the planning authority

- Restructure the primary legislation to apply more clarity as regards types of, and procedure for, planning applications.
- Bring into force in Wales the revised version of section 70A 1990 Act (power to decline consideration of repeat applications) but not the prohibition on twin-tracking (section 70B) as the practice has advantages.
- Provide for a duty on planning authorities to prepare a community involvement scheme specifying consultees for planning applications (in England this is already done in statements of community involvement). *[This is a potentially important and useful provision as such a statement/scheme will create a legitimate expectation that it will be followed, thus giving the possibility of legal redress by judicial review if it is not].*
- Do away with the distinction between conditions and limitations, defining 'condition' to include 'limitation'.
- Include in the Code a general power for planning authorities to impose such planning conditions as they think fit provided (in terms) that they comply

with the case law test for the validity of a planning condition (*Newbury v. Secretary of State* [1981] AC 578 (HL)) as now supplemented by Welsh Government guidance.

- Establish a right for an applicant for permission to see draft conditions proposed by a planning authority prior to the decision on the application with a duty on the planning authority to have regard to any comments. *[The Commission's suggested procedure is unsatisfactory (the Report acknowledges that it needs careful consideration) and could conflict with committee procedures and timescales. Proposed conditions will usually be in a planning officer's committee report if recommending approval of an application, but often not when the recommendation is for refusal and committee members (councillors) nevertheless resolve to approve (although an officer should be ready for this possibility, with draft conditions to hand). The suggested requirement might at least avoid council lawyers and planners, surprised by a member's approval motion, scrabbling to concoct conditions at the committee meeting. But the draft conditions should not prevent additions or amendments being made at or just prior to committee if necessary, e.g. responding to comments made on the previous drafts. Further, and importantly, the draft should be made publicly available for comment x days before the committee date, whatever the officer's recommendation. The Commission's suggestion is that only the applicant should see them; that cannot be right – conditions on a permission are of public interest].*
- No need for an express power for Grampian type conditions in the Code but a need for Welsh Government guidance.
- The Welsh Government should issue guidance discouraging inappropriate conditions and in particular the drafting of conditions worded as pre-commencement conditions.
- No legislative change enabling definitive categorisation of pre-commencement conditions going to the heart of a permission.
- A right for developers to apply for a certificate that all pre-commencement conditions have been complied with.
- Where development has commenced in breach of a pre-commencement condition, the permission authorising the development should be deemed to have been granted without it so that other conditions can subsist and be enforceable.
- Tighten up the procedure for the approval of conditions.
- Section 73 1990 Act should be amended to allow any amendment to a permission, not just conditions.
- In uncontroversial cases, there should also be an expedited procedure for seeking a permission variation after development commencement.
- Planning authorities should be allowed to grant

permission for part of an application development.

- Planning authorities should be required to give reasons for granting permission contrary to a refusal recommendation.

Chapter 9: Applications to the Welsh Ministers

- No change to the 2015 Act's power allowing Welsh Ministers to step in if a planning authority is under-performing.
- No change to applications to Welsh Ministers for Developments of National Significance, save minor details. *[As mentioned above, the procedure for national infrastructure consents is currently only partly devolved].*
- Abolition of planning inquiry commissions as they have never been used.

Chapter 10: The provision of infrastructure and other improvements

- Incorporate the Planning Act 2008 provisions relating to Community Infrastructure Levy (CIL) into the Code Bill without change, as they are likely to be subject to review by the Welsh Government in due course.
- Incorporate the 1990 Act provisions for planning obligations into the Code Bill and include the *vires* rules relating to planning obligations that are currently in the CIL Regulations.
- A suggestion that any review of planning obligations should consider whether one agreement could be both a planning obligation and a highways agreement. *[This seems eminently sensible].*
- A suggestion that such a review also consider the introduction in Wales of a disputes resolution procedure for planning obligations, similar to that envisaged by Schedule 9A 1990 Act, which is to be introduced in England by the Housing and Planning Act 2016 (the 2016 Act).
- A suggestion that the review also consider if Welsh Ministers should be able to limit the enforceability of certain clauses in obligations, again provided for by the 2016 Act.
- Planning authorities should be able to bind their own land and persons other than owners (such as prospective purchasers) should be able to enter into planning obligations.

Chapter 11: Appeals and other supplementary provisions

- All appeals to be decided by inspectors unless otherwise prescribed by the Welsh Ministers.
- Power to appoint assessors to assist inspectors should cover all appeals, including those by written representations.
- The 12 months' time limit to serve a purchase notice following an unsuccessful appeal should run from the date of the appeal decision.

Chapter 12: Unauthorised development

- Various minor amendments to improve planning enforcement mechanisms are suggested including:
 - one unified procedure to obtain ownership/land use information to be called a 'planning information order'
 - restrictions on enforcement (notice of entry) relating to 'dwellinghouses' should apply to all dwellings, including flats.
- Clarify that the steps required to remedy a breach of planning control can be either or both of the purposes in section 173(4) 1990 Act ((sub-s. (4)(a) making development comply with a permission/discontinuing a use/land restoration or (sub-s. 4(b)) remedying any injury to amenity. *[It is unclear why this is needed given that the preceding sub-section (3) already says "any [emphasis added] of the following purposes"].* Also enable the removal of building works integral to a change of use.
- Abolish the concept of a deemed application for permission when appealing on ground (a) and enable the Welsh Ministers to grant permission, discharge the condition in question, or grant a certificate of lawfulness.
- Stop notice to be 'issued' not 'served', with copies served as appropriate, thus mirroring the enforcement notice procedure.
- Bring more consistency to the penalties for enforcement offences.

Chapter 13: Works affecting listed buildings and conservation areas

- Merge listed building consent with planning permission by extending the definition of 'development' to include any works affecting the special character of a listed building.
- Demolition should only require planning permission, not conservation area consent.
- Heritage partnership agreements should be able to grant planning permission for works to a listed building.
- Grounds of appeal on planning permission refusal should be extended to include the grounds pertaining to listed buildings and conservation areas.
- Unauthorised works/demolition to remain a criminal offence.
- Time limits for enforcement action should not apply to unauthorised works to listed buildings and demolition in conservation areas.
- Grounds of appeal against enforcement notices should be extended to include the grounds pertaining to listed buildings and conservation areas.
- Scheduled monument consent to remain separate from planning permission.
- Clarify the extent of protection afforded to objects and structures within the curtilage of a listed building.
- Abolish areas of archaeological importance as they have never been used in Wales.

Chapter 14: Outdoor advertising, Chapter 15: Protected trees and woodlands and Chapter 16: Improvement, regeneration and renewal

Please refer to the Report *Summary*.

Chapter 17: High Court challenges

No change to the present statutory arrangements in Part 12 of the 1990 Act.

Chapter 18: Miscellaneous and supplementary provisions

- This Chapter covers a variety of topics relating to the entire Bill and its' application, including:
- Rationalising the categories of statutory undertakers, what is operational land, and the Minister responsible.
- Rationalising the statutory definitions pertaining to minerals and mining.
- Enable Welsh Ministers to amend and publish (as opposed to stating in regulations) the scale of fees for planning functions performed by them or planning authorities.
- Include in the Code Bill the principle that a party claiming appeal costs must be able to show unnecessary expense because of unreasonable behaviour.
- Change the statutory definitions of 'dwellinghouse' to ensure consistency by replacing with the term 'dwelling' to include a house and a flat and by implication other forms of dwelling. *[Surely it is better to have the definition expressly stated to cover all dwelling scenarios, and not rely on any 'implication'?.]*
- Define the 'curtilage' of a building as land closely associated with it. Whether a structure is within a curtilage should be determined by physical layout of the site plus present and historic ownership and uses. *[Interesting to see that the Commission discussed the issue of a curtilage not being a land use, something that some practitioners seem to overlook, e.g. applying for a certificate of lawfulness for use as residential curtilage].*
- Rationalise and simplify the definitions of 'agriculture', 'agricultural land' and 'agricultural unit'.

The future

Undoubtedly, we are going to see further diversification of Welsh planning law and procedure from the English model. This was only to be expected after devolution. Consequently, there is likely to be the emergence of a distinct Welsh planning jurisprudence. There are already calls for a separate Welsh legal system administering Welsh law. The Administrative Court already holds sittings in Cardiff. Further, the precise ramifications of Brexit are unknown. Whatever the final outcome, the Welsh Government has indicated that it is looking to develop Welsh-specific policies, building on EU requirements for the environment, health, farming and fisheries to meet Welsh needs⁸. On-going Welsh planning and

environmental law and related policy development and divergence can therefore be expected.

Nicholas Whitsun-Jones is a non-practising chartered legal executive advocate. He retired after 47 years in private practice and local government legal departments working as a litigator specialising in planning and environmental law. With a Master's degree in Environmental Law (De Montfort University), he is now pursuing academic interests in environmental law and legal history, including researching the extent to which manorial and other local courts dealt with environmental harm. He also does voluntary work for CPRE.

Endnotes

- 1 The author is indebted to Huw Williams, Solicitor & Partner at Geldards LLP, and Dr Victoria Jenkins of Swansea University for some of the background information in published papers used in the compilation of this paper. See in particular *The Planning (Wales) Act 2015: a case study in evidence-based planning reform under devolution*: <https://cronfa.swan.ac.uk/Record/cronfa26769>
- 2 <https://www.ukela.org/content/page/6500/UKELAConResponse%20-%20Planning%20Law%20in%20Wales.docx>
- 3 <https://www.lawcom.gov.uk/project/planning-law-in-wales/>
- 4 Special rules apply to National Infrastructure Projects with currently three types of consenting regime as not all powers are yet devolved: <https://seneddresearch.blog/2018/06/07/a-new-infrastructure-consenting-process-for-wales/>
- 5 <https://gov.wales/docs/desh/publications/150223-three-bills-diagram-en.pdf>
- 6 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/21_Appendix-B.pdf
- 7 Report para. 18.99
- 8 Statement by Lesley Griffiths, Cabinet Secretary for Environment and Rural Affairs.

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Operations Director
Alison@ukela.org
01306 500090

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“The Contribution of the case law of the CJEU to the Development of Environmental Protection in the UK” by Juliane Kokott and Christoph Sobotta¹

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Greetings and introduction

Dear Lord Carnwath, Ladies and Gentlemen,

Thank you for asking me to speak about the relationship between the case law of the Court of Justice and the development of environmental protection in the UK. If there is something positive about BREXIT, then it is the opportunity to reflect about such topics.

Being a German lawyer working in the Court of Justice of the European Union, I am very much aware that I cannot really provide you with an insider's perspective on the "Development of Environmental Protection in the UK". Most attendants today are probably in a much better position than me to do this. Moreover, as I assume that we are mostly lawyers, I won't investigate technical environmental questions such as the relationship between limit values for PM10, target values for PM2.5 and the London fog. If we wanted to analyse such issues exhaustively and in detail, we would probably need a lecture series instead of today's event.

However, I can provide you with some examples where, from the perspective of Luxembourg, it appears likely that the Court's jurisprudence had an impact on issues I feel most at home with. To do this I will first discuss the EU as a framework for environmental policy, and then Commission enforcement, as well as the enforcement of EU environmental law through Member State courts. To conclude I will make some very preliminary remarks on possible future developments.

I The EU as a Framework for Environmental Policy

One important factor when considering the jurisprudence of the Court in environmental matters is that the EU provides a framework for environmental policy for all Member States. In practice, it can even be considered *the* framework because very little environmental policy is being developed by Member States without EU involvement.

How did we arrive at this stage? Several motivating factors came together.

A classical common market concern is the harmonisation of standards to allow for free movement between Member States. Relevant measures are often based on single market powers. The waste shipment regulation² is one of the more obvious and long-standing examples. The REACH Regulation³ is a more modern development.

Another concern lies in cross border environmental issues, such as air pollution, but also migrating birds. That's probably one reason why the Birds Directive⁴

was passed much earlier than the Habitats Directive⁵ and why the former requires site protection for all migrating birds, but only for some sedentary birds.

However, the final and most far-reaching concern is the level playing-field between Member States, along with a level playing field between the EU and our trading partners. That's why, today, most environmental law in all Member States is either EU law or based on EU law. And for the same reason the EU is an active player in the area of international environmental law where many EU measures are mirrored by international agreements.

As a consequence, environmental law is one area where the Court of Justice can actually be considered the supreme appellate court for all of the European Union, with respect to the interpretation of the relevant rules. Up to now this obviously includes the United Kingdom, but after BREXIT it would become necessary to reconsider the relevance that should be attributed to this jurisprudence with regard to UK environmental law that retains its source in EU law.

II Commission Enforcement

However, the fact that the EU adopts environmental legislation that is binding on Member States and that the Court interprets it, does not necessarily guarantee that this legislation will be applied in practice.

One very important avenue to achieve *practical* effect is the supervision of implementation by the European Commission. As you are aware, under Article 17 of the Treaty on European Union, the Commission shall oversee the application of Union law under the control of the Court of Justice. And Articles 258 to 260 of the Treaty on the Functioning of the European Union provide the legal tool; namely the infringement procedure. This procedure allows the Commission to apply to the Court for a finding of infringement of EU law by a Member State. Moreover, if the Member State fails to implement such a judgment, the Commission can ask the Court to impose a lump sum and/or a daily penalty on the Member State. These instruments can be very effective. In Commission practice, there are three types of cases.

A Non-Transposition

Firstly, non-communication or non-transposition cases: The Member State has failed to transpose a Directive within the time-limit or at least failed to communicate transposition. These cases are extremely straight-forward and can be handled very efficiently by the Court. In spite of their limited legal appeal, they are tremendously important because Member State legislation transposing EU law is an indispensable step to ensure that EU environmental law is effectively applied in practice. Direct effect of Directives is only a makeshift remedy.

The Treaty of Lisbon has made the enforcement of transposition even more effective. The failure to transpose a Directive can now, directly, as a result of the initial Court proceedings, lead to the imposition of a lump sum and/or a daily penalty payment. Since this modification was introduced Member States are aware of this risk and it has not been necessary to issue a judgment for non-transposition while such judgments were not rare beforehand. However, from the perspective of the UK, this probably appears of very limited relevance because historically non-transposition has not been a significant problem.

UK policy in this regard has always been very professional. Concerns with proposed EU legislation have normally been voiced during the legislative process and, as a consequence, been integrated into the legislative outcome. Moreover, a centralised Member State with strong coherence between the government and the legislature, with the support of a professional system of administration, can transpose EU law much more efficiently than Member States with coalition governments, federal systems or less efficient systems of administration. Nevertheless, without BREXIT the increasing responsibilities of some UK regions in the area of environmental law could give rise to more problems in this area than have occurred in the past.

B Non-conformity

The second type of case is about the conformity of transposition. In general, these cases are rarer than non-transposition cases, but for Member States with well-developed legal systems, such as the UK or Germany, they can pose special problems. Member States that build up their environmental law by transposing EU directives will mostly follow the directives very closely. The risk of bad transposition is very limited. Conversely, a Member State that needs to modify existing legislation to transpose a directive will normally try to keep as much of this legislation as possible intact by limiting changes. Obviously, this approach is much more likely to result in imperfect transposition. Moreover, in well-developed legal systems, there is a significant risk that an EU instrument will come into conflict with well-established legal principles or values. Active participation in the EU legislative process can help to identify and avoid such problems, but as we will see later, the famous HS2 case brought an issue to light where this did not occur. Cost protection in environmental cases probably is another example.

C Poor Application

And finally, poor application remains a problem, including in specific individual cases. Let me just mention Lynemouth Power Station⁶ and Aberthaw Power Station⁷ where the Court found the rules on emissions had not been respected and one of the older judgments on the practical infringement of EU

environmental law, the Blackpool bathing water case.⁸ Obviously, the Commission cannot bring every case of poor application to the Court of Justice, but even the limited risk of a court case creates an important incentive to apply EU law in practice.

Moreover, the Commission accepts complaints from individuals and NGOs. While these complainants do not enjoy any legal rights with regard to the pursuit of an infringement procedure, the complaints mechanism provides them with an additional path to voice their grievances. And many of the more important infringement cases result from complaints.

III Enforcement through Member State Courts

Of course, the judicial enforcement of EU environmental law is not limited to Commission action. Member State courts are probably much more important in practice, in particular where politically sensitive issues are at stake and the Commission might hesitate to bring proceedings. The preliminary reference procedure helps to make sure that Member State courts apply EU law correctly. However, for the effectiveness of enforcement through Member States courts the conditions of judicial review are also relevant. Looking specifically at the UK, three issues appear to be of particular interest. First, judicial powers, illustrated by the ClientEarth case on air quality. Second, constitutional limits to judicial powers as explained by the UK Supreme Court in the HS2 case. And third, the relationship between access to justice and costs.

A Judicial Powers

The ClientEarth reference on air quality⁹ adds an important element to the enforcement of environmental law in the UK. You are aware that the Directive on Ambient Air Quality¹⁰ sets up ambitious limit values for certain pollutants, but doesn't specifically set out how these values are to be achieved. Member States need to develop and implement air quality plans if the limit values are breached. In many areas in the UK as such breaches occur, and the NGO ClientEarth was not satisfied that sufficient measures had been adopted to comply with the Directive. However, their action was rejected by the High Court and by the Court of Appeal, before the Supreme Court made a reference to the Court of Justice.

The most interesting part of the High Court's reasoning is related to the powers of the courts with regard to the air quality standards. It is well known that the necessary measures would have severe impact and, as a consequence, raise serious political and economic questions. For example, this year in Germany the courts have started to impose local driving bans for most Diesel cars. Already in 2011 the High Court was aware of this sensitivity and had

therefore considered an order requiring the government to adopt the necessary measures would exceed the powers of the UK courts.¹¹

The reference to the Court of Justice addressed this issue and asked what (if any) remedies a national court must provide if the limit values are breached. The Court's answer is based on the traditional doctrines of direct effect and effective judicial protection. They require the competent Member state court to take any necessary measure, such as an order in the appropriate terms, so that the responsible authority establishes the plan to achieve the air quality required by the directive.

This outcome should not have surprised anybody because the fundamental political decision had already been taken when the EU adopted the limit values. It would be quite dishonest to invoke some kind of political question doctrine at the stage of implementation, in particular as EU legislation had allowed for very generous implementation periods. Nevertheless, I am aware that in particular from the perspective of the UK legal and political system, such far-reaching court powers are not the most natural fit. In fact, the case evokes the much earlier *Factortame* case where UK courts needed to be empowered to provide interim relief against Acts of Parliament.¹²

To anybody familiar with this area, it is clear that this ruling can only be a starting point for effective enforcement of air quality standards. There are currently references pending in our Court on the measuring of air quality,¹³ and as to whether officials can be imprisoned if they refuse to implement a court order requiring the establishment of an air quality plan.¹⁴

But the real difficulties are to be found in the identification of the necessary measures. The Court itself recognises that the development of clean air plans incorporates an element of proportionality,¹⁵ and is yet to determine the precise limits of Member State discretion in this regard. Moreover, even if the authorities establish a plan, courts will need to tackle the difficult scientific question of whether the measures foreseen are sufficient to achieve the air quality standards.

Once we finally reach this level of legal discourse, the UK legal and political system will likely realise that the findings of the Court in the *ClientEarth* case are far less revolutionary than they appear. It is extremely unlikely that the Luxembourg court would require Member State courts to put themselves in the position of the authorities that are bound to establish these measures. On the contrary, if the court applies the typical standard for such complex assessments it will, most likely, recognise that these authorities need to enjoy a margin of discretion that courts can only

supervise at its limits.¹⁶ After all, courts will in most cases not have the necessary expertise; nor will they enjoy the democratic legitimacy that is necessary to justify the striking of a balance between the competing interests.¹⁷ What *ClientEarth* highlights, however, is that the courts cannot completely abdicate their supervisory role..

B Constitutional Limits to Judicial Powers?

If we speak about judicial powers and their limits in the UK we must also consider UK constitutional law. This is so because, in the *HS2* case, a case about EU environmental law, the Supreme Court took the opportunity to make some very important findings about the constitution.

This case concerns the preparation of a legislative decision on the second stage of the UK high speed train network, in particular the routing between London and Birmingham and further extensions. The interesting issue here is whether the requirements for an exemption from the Directive on the Environmental Impact Assessment¹⁸ were met. According to this exemption the directive shall not apply to projects which are adopted by a specific act of national legislation, since the objectives of this directive are achieved through the legislative process. Beginning with the *Linster* case the Court of Justice perceives this exemption as requiring that the objectives of the directive must be achieved through the legislative procedure.¹⁹ If the objectives are not met, the project at hand is not exempt from the directive. It seems obvious that the Court of Justice wanted to safeguard the objectives of the directive, and its decision might be based on the consideration that the legislator can't have intended a loophole. This jurisprudence was not only confirmed by subsequent jurisprudence,²⁰ but also by the EU legislator with the recent amendments to the Directive.²¹

The objectives of the directive require that the legislature be supplied with sufficient information on the environmental impacts of the project at issue. In this regard, Advocates General Sharpston and Kokott argued that these objectives also imply that the legislature should be able to examine and debate the environmental effects of the project properly.²² And the Court echoes this position when it requires that a substantive legislative process be opened, enabling the achievement of the objectives of the directive.²³ This implies that a national court must be able to verify whether the legislature really had the opportunity to assess environmental impacts, and whether it in fact occurred.²⁴

The Appellants in the *HS2* case took this argument several steps further and claimed that the conditions of parliamentary work in the UK made a proper examination and debate impossible, or at least

unlikely. They criticised in particular the parliamentary whip, and the practical restrictions imposed on the voting of members of the government. Reading the HS2 judgment it seems that these claims are unfounded in substance because the Supreme Court describes in detail how Parliament could exercise appropriate scrutiny of the project. However, in the end these parts of the judgment are not decisive because the Supreme Court tells us that the operation of Parliament is beyond judicial scrutiny in the UK.

This position is based on Article 9 of the Bill of Rights of 1688. This article provides that the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. According to material cited by the Supreme Court, this must be understood as to mean that any matter concerning either House of Parliament ought to be examined, discussed, and adjudged in that house to which it relates, and nowhere else. This seems to mean, in particular, that there is no room for any judicial review as to whether Parliament was able to properly examine and debate the environmental effects of a project that is authorised by legislative action.²⁵

From the perspective of a German lawyer, accustomed to the background supervision of a strong constitutional court, such limitations on judicial review were surprising. It should also be noted that the Court of Justice sees no difficulties in scrutinising parliamentary proceedings. Recently, it had to decide whether the annual budget had been adopted properly, when the European Parliament approved it in Brussels instead of Strasbourg.²⁶

Nevertheless, this does not mean that Member State courts must inevitably enjoy similar powers. In this regard, the Treaty of Lisbon has codified an obligation that should be self-evident. The EU must respect national identities of Member States, inherent in their fundamental structures, political and constitutional. If the immunity of parliamentary operations from judicial scrutiny is part of the fundamental political or constitutional structures of the UK, then EU law should not require such scrutiny.

On the other hand, the duty of loyal co-operation prevents Member States from excessive reliance on national identity, and it should also require them to warn the EU of potential conflicts. In this regard, I note that after the HS2 case the UK voted for the recent amendments to the directive,²⁷ thus confirming the case law of our Court. There does not seem to be a declaration of the UK highlighting potential conflicts with fundamental constitutional structures. Therefore, it seems that the jurisprudence on the exemption, including the requirement of a substantive legislative process, has been considered acceptable at least to the government.

However, the position of the government cannot be decisive for privileges that Parliament enjoys. Therefore, it would not be surprising if the Supreme Court retained its stance on the Bill of Rights of the HS2 case. On the other hand, I am wondering whether the Miller case on Article 50 TEU²⁸ implies that the judiciary has some role in reviewing the operation of Parliament.

Be that as it may, the question remains as to what is to be done if a Member State's courts cannot verify whether the conditions for the parliamentary exemption to the EIA directive are fulfilled. In this regard, it should be taken into account that effective judicial protection is a core value of the EU, as enshrined in the Charter of Fundamental Rights. Therefore, it can reasonably be argued that a Member State like the UK would have to refrain from using the procedure of legislative authorisation if judicial scrutiny cannot be ensured in such cases.

C Access to Justice

Now we have some idea about the court powers that EU environmental law requires, but such power can only become relevant if access to the courts is open. You will remember that Advocate General Sharpston compared the German system of judicial review in environmental cases to "a Ferrari with its doors locked shut".²⁹ And subsequently the Court required that at least certain NGOs were given the keys.³⁰ I don't know what automobile brand she would have associated with the UK judicial system, an Aston Martin or a Jaguar perhaps? Anyhow, after ClientEarth a turbo charger seems to have been added. Still, the question who gets the keys is another issue. And here the sports car comparison appears to be relevant too because it appeared that in the past you could only go to court over environmental issues if you could afford the Ferrari.

This created some tension with the Aarhus Convention³¹ and its implementation in the EU, in particular by way of the EIA Directive. Both require that certain court proceedings in environmental matters should "not [be] prohibitively expensive".

The English judiciary was well aware of this tension and developed some jurisprudence to address the issue. Nevertheless, within a very short time-frame the Court received a preliminary reference from the Supreme Court, *Edwards & Pallikaropoulos*,³² and then an infringement action of the Commission,³³ on this issue. The judgment on the reference provides some criteria how to apply cost protection, in particular that the proper costs should be appreciated objectively and subjectively, that an element of the case's merits could be taken into account, that actual deterrence from bringing an action is not needed for cost protection and that it applies to all instances dealing with a case. The judgment on the infringement

procedure additionally clarifies that judicial discretion is not completely incompatible with the EU provisions on cost protection, but that it must be clear how this discretion is to be exercised to guarantee cost protection. Moreover, the second judgment found that cost protection also applies to interim relief and in particular to cross-undertakings required in this context.

I don't expect many people to be happy with this jurisprudence. Defendants, in particular developers and public authorities, will be unhappy that NIMBYS, standing in the way of progress, are strengthened. Moreover, they will not be compensated for some of the expenses that they had defending projects against activism. And they can be substantial. In the *Edwards and Pallikaropoulos* case the defendants claimed more than 80.000 pounds for the proceedings before the House of Lords alone.³⁴

But people and NGOs bringing actions to protect the environment, and their lawyers, won't be too happy either. There still remains some residual risk that the plaintiffs are exposed to significant costs. In *Edwards and Pallikaropoulos* the Supreme Court finally issued a cost order of 25.000 pounds.³⁵ And the fees for their own lawyers have not yet been discussed by the Court of Justice.

And finally the courts will not be happy because if they need to apply the criteria handed down from Luxembourg, they must undertake a complex balancing exercise.

All of this may in fact be insufficient to achieve the objectives of cost protection. Advocate General Bobek has recently highlighted the importance of certainty about cost risks to ensure wide access to justice³⁶ and an ex post balancing exercise won't provide this certainty. Protective cost orders, however, issued at a very early stage, may be much more effective.

I am aware that already during the infringement case the UK government had adopted some transposing legislation on cost protection. Such legislation obviously can help most effectively to provide certainty about cost risks. And if it sets appropriate limits for such risks it is most welcome. Regrettably, however, it seems that there is some dispute whether the actual limits are appropriate.³⁷

IV The Future

Finally, some words about the future. As we all know, the future is always uncertain and particularly at the present time.

On the one hand, if BREXIT should be stopped all that I've been talking about would of course continue to apply. On the other hand, if we should get a no deal BREXIT obviously all binding effect of EU law and

jurisprudence would end on 29 March 2019. The only remaining issue would be whether the UK courts would draw inspiration from EU jurisprudence on environmental law that is based on EU law. But this would be unilateral decision.

But in November 2018 the draft BREXIT Agreement was published. Though it appears to be extremely contentious, it could define the legal regime for the coming years and already provide some limited orientation for later. Obviously, a caution is necessary that on this issue, more than on any other that raised in this presentation, only the personal and very preliminary opinion of the authors is expressed and in no way the opinion of the Court. Additionally, these remarks are not based on a detailed analysis of all 585 pages of the draft agreement.

The agreement provides for a transition period until 31 December 2020,³⁸ and this transition period can be extended. During this period EU law would, in principle, continue to apply³⁹ and the Court of Justice would remain competent for all cases initiated before the end of the transition period, including infringement proceedings.⁴⁰

After the transition period we should either have a Trade Agreement, or the Protocol on Northern Ireland attached to the BREXIT Agreement, the so-called Backstop protocol, will apply. This protocol provides for some powers of the Court of Justice with regard to environmental law. They cover among other areas EU legislation on chemicals, pesticides, waste or the trade in protected species. In general, the rules in question embody the Common Market dimension of EU environmental law. Therefore, they are only relevant for products and trade and their application would be limited to Northern Ireland, and would not cover the rest of the UK.

Moreover, there is a non-regression clause to ensure a level playing field. It obliges both parties to maintain the level of environmental protection that is achieved at the end of the transition period.⁴¹ However, this clause is not subject to the powers of the Court, or to the rules on arbitration provided in the Agreement. Any disputes with the EU would need to be addressed in a committee established by both parties.

Additionally, the UK is required to ensure access to courts for private and public parties and to establish an "independent body" that can investigate and prosecute infringements of environmental law.⁴² These mechanisms appear to be modelled on the avenues of judicial enforcement that I have discussed. With regard to these internal enforcement mechanisms arbitration is possible.

An interesting point in this context is that some language appears to be inspired by the Aarhus

Convention, namely the reference to “effective and timely action” and “effective remedies, including interim measures”. However, there is no indication that court proceedings should not be “prohibitively expensive”. On the other hand, non-regression shall apply to “public participation and access to justice in environmental matters” and both parties “reaffirm their commitment to implement effectively the multilateral environmental agreements to which they are party” and that includes the Aarhus Convention.

Finally, we should be aware that these provisions on non-regression, as contentious as they possibly appear, are inspired by EU practice in the area of trade agreements.⁴³

Conclusion

Ladies and Gentlemen, this concludes the lecture. To sum it up: A core contribution of the Court’s jurisprudence to the development of UK environmental law is the strengthening of the judicial enforcement of environmental rules. It should not be surprising that this strengthening created tensions with UK legal principles and values. After all, the previously existing mechanisms were an expression of these principles and values. However, such adaptation and tension are necessary consequences of integration. The experience of the UK in this regard is not unique, but can be felt in similar ways by other Member States.

Thank you for your attention.

Endnotes

- 1 Respectively Advocate General and Legal Secretary (référénaire), Court of Justice of the European Union, Luxembourg. The Garner Lecture was given by the Advocate General at the United Kingdom Environmental Law Association in London on 23 November 2018. The authors are grateful to Angela Ward who provided invaluable support in its preparation.
- 2 Originally Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (OJ 1984 L 326, p. 31), now Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).
- 3 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1).
- 4 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), now Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 (OJ 2010 L 20, p. 7).
- 5 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, 7.1992, p. 7).
- 6 Judgment of 22 April 2010, *Commission v United Kingdom* (C-346/08, EU:C:2010:213).
- 7 Judgment of 21 September 2016, *Commission v United Kingdom* (C-304/15, not published, EU:C:2016:706).
- 8 Judgment of 14 July 1993, *Commission v United Kingdom* (C-56/90, EU:C:1993:307).
- 9 Judgment of 19 November 2014, *ClientEarth* (C-404/13, EU:C:2014:2382).
- 10 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1).
- 11 High Court (Mitting J) of December 2011 [2011] EWHC 3623 (Admin)] at paragraph 15.
- 12 Judgment of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257).
- 13 Case C-723/17 – *Craeynest and Others*, pending.
- 14 Case C-752/18, pending.
- 15 E.g. judgments of 19 November 2014, *ClientEarth* (C-404/13, EU:C:2014:2382, at 57) and of 5 April 2017, *Commission v Bulgaria* (C-488/15, EU:C:2017:267, at 106).
- 16 Opinion of Advocate General Kokott in *Commission v Bulgaria* (C-488/15, EU:C:2016:862, at 93 to 99).
- 17 Cf. Kokott/Sobotta, *The Evolution of the Principle of Proportionality in EU law – towards an anticipative understanding?*, in: Vogenauer/Weatherill, *General Principles of Law: European and Comparative Perspectives*, Hart 2017, S. 167 – 177.
- 18 Now Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1) as amended by Directive 2014/52 of the European Parliament and the Council of 16 April 2014 (OJ 2014 L 124, p. 1).
- 19 Judgment of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468, at 49 et seq.).
- 20 Judgments of 16 September 1999, *WWF and Others* (C-435/97, EU:C:1999:418, at 57 et seq.), of 18 October 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, at 36 et seq.), and of 11 September 2012, *Nomarchiaki Aftodioikisi Aitolokarnanias and Others* (C-43/10, EU:C:2012:560, at 78 et seq.).
- 21 Article 2(5) of the amended EIA Directive.

- 22 Opinion of Advocate General Sharpston in case *Boxus and Roua* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:319, in particular para 87) and Opinion of Advocate General Kokott in case *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2011:651 para 137).
- 23 Judgment of 18 October 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, at 48).
- 24 Judgment of 18 October 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, at 54 and 55).
- 25 [2014] UKSC 3, Paras 203 to 208.
- 26 Judgment of 2 October 2018, *France v Parliament* (Exercise of budgetary powers) (C-73/17, EU:C:2018:787).
- 27 Council Document 9065/14.
- 28 [2017] UKSC 5.
- 29 Opinion of Advocate General Sharpston in *Trianel Kohlekraftwerk Lünen* (C-115/09, EU:C:2010:773, at 77).
- 30 Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289).
- 31 Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed at Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).
- 32 Judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221).
- 33 Judgment of 13 February 2014, *Commission v United Kingdom* (C-530/11, EU:C:2014:67).
- 34 [2013] UKSC 78, para 12.
- 35 *Ibid.*
- 36 Opinion of Advocate General Bobek in *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2017:781).
- 37 https://www.unece.org/fileadmin/DAM/env/pp/a.toj/TF11-2018/statements_and_presentations/11TFAJ_Item3_A2JUK_EnvironmentLinks.pdf
- 38 Art. 126 et seq. of the BREXIT Agreement.
- 39 Article 127 (1) of the BREXIT Agreement.
- 40 Articles 86 and 131 of the BREXIT Agreement.
- 41 Article 6(1) of the Protocol and Article 2 of Annex 4.
- 42 Article 6(1) of the Protocol and Article 3 of Annex 4.
- 43 See Article 24 of CETA and Article 13 of the EU-Vietnam trade agreement.