

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

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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 regulation<sup>1</sup> is one of the more obvious and long-standing examples. The REACH Regulation<sup>2</sup> is a more modern development.

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<sup>1</sup> 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).

<sup>2</sup> 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

Another concern lies in cross border environmental issues, such as air pollution, but also migrating birds. That's probably one reason why the Birds Directive<sup>3</sup> was passed much earlier than the Habitats Directive<sup>4</sup> 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

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(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).

<sup>3</sup> 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).

<sup>4</sup> 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).

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 Station<sup>5</sup> and Aberthaw Power Station<sup>6</sup> where the Court found the rules on emissions had not been respected and one of the

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<sup>5</sup> Judgment of 22 April 2010, *Commission v United Kingdom* (C-346/08, EU:C:2010:213).

<sup>6</sup> Judgment of 21 September 2016, *Commission v United Kingdom* (C-304/15, not published, EU:C:2016:706).

older judgments on the practical infringement of EU environmental law, the Blackpool bathing water case.<sup>7</sup> 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 quality<sup>8</sup> adds an important element to the enforcement of environmental law in the UK. You are aware that the Directive on Ambient Air Quality<sup>9</sup> 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

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<sup>7</sup> Judgment of 14 July 1993, *Commission v United Kingdom* (C-56/90, EU:C:1993:307).

<sup>8</sup> Judgment of 19 November 2014, *ClientEarth* (C-404/13, EU:C:2014:2382).

<sup>9</sup> 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).

government to adopt the necessary measures would exceed the powers of the UK courts.<sup>10</sup>

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.<sup>11</sup>

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,<sup>12</sup> and as to whether officials can be imprisoned if they refuse to implement a court order requiring the establishment of an air quality plan.<sup>13</sup>

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,<sup>14</sup> 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.<sup>15</sup> 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

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<sup>10</sup> High Court (Mitting J) of December 2011 [2011] EWHC 3623 (Admin)] at paragraph 15.

<sup>11</sup> Judgment of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257).

<sup>12</sup> Case C-723/17 – *Craeynest and Others*, pending.

<sup>13</sup> Case C-752/18, pending.

<sup>14</sup> 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).

<sup>15</sup> Opinion of Advocate General Kokott in *Commission v Bulgaria* (C-488/15, EU:C:2016:862, at 93 to 99).

balance between the competing interests.<sup>16</sup> 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 Assessment<sup>17</sup> 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.<sup>18</sup> 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,<sup>19</sup> but also by the EU legislator with the recent amendments to the Directive.<sup>20</sup>

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.<sup>21</sup> And the Court echoes this position when it requires that a substantive legislative process be opened, enabling the achievement of the objectives

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<sup>16</sup> 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.

<sup>17</sup> 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).

<sup>18</sup> – Judgment of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468, at 49 et seq.).

<sup>19</sup> 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 Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, at 78 et seq.).

<sup>20</sup> Article 2(5) of the amended EIA Directive.

<sup>21</sup> – 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).

of the directive.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup>

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,<sup>26</sup> 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

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<sup>22</sup> – 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).

<sup>23</sup> 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).

<sup>24</sup> – [2014] UKSC 3, Paras 203 to 208.

<sup>25</sup> Judgment of 2 October 2018, *France v Parliament (Exercise of budgetary powers)* (C-73/17, EU:C:2018:787).

<sup>26</sup> Council Document 9065/14.

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 TEU<sup>27</sup> 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”.<sup>28</sup> And subsequently the Court required that at least certain NGOs were given the keys.<sup>29</sup> 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 Convention<sup>30</sup> 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*,<sup>31</sup> and then an infringement action of the Commission,<sup>32</sup> on this issue.

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<sup>27</sup> [2017] UKSC 5.

<sup>28</sup> Opinion of Advocate General Sharpston in *Trianel Kohlekraftwerk Lünen* (C-115/09, EU:C:2010:773, at 77).

<sup>29</sup> Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289).

<sup>30</sup> 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).

<sup>31</sup> Judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221).

<sup>32</sup> Judgment of 13 February 2014, *Commission v United Kingdom* (C-530/11, EU:C:2014:67).

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.<sup>33</sup>

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.<sup>34</sup> 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 justice<sup>35</sup> 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.<sup>36</sup>

## **IV The Future**

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

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<sup>33</sup> [2013] UKSC 78, para 12.

<sup>34</sup> Ibid.

<sup>35</sup> Opinion of Advocate General Bobek in North East Pylon Pressure Campaign and Sheehy (C-470/16, EU:C:2017:781).

<sup>36</sup> [https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/TF11-2018/statements\\_and\\_presentations/11TFAJ\\_Item3\\_A2JUK\\_EnvironmentLinks.pdf](https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/TF11-2018/statements_and_presentations/11TFAJ_Item3_A2JUK_EnvironmentLinks.pdf)

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,<sup>37</sup> and this transition period can be extended. During this period EU law would, in principle, continue to apply<sup>38</sup> and the Court of Justice would remain competent for all cases initiated before the end of the transition period, including infringement proceedings.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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-

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<sup>37</sup> Art. 126 et seq. of the BREXIT Agreement.

<sup>38</sup> Article 127 (1) of the BREXIT Agreement.

<sup>39</sup> Articles 86 and 131 of the BREXIT Agreement.

<sup>40</sup> Article 6(1) of the Protocol and Article 2 of Annex 4.

<sup>41</sup> Article 6(1) of the Protocol and Article 3 of Annex 4.

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.<sup>42</sup>

## **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.

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<sup>42</sup> See Article 24 of CETA and Article 13 of the EU-Vietnam trade agreement.