

UKELA Nature Conservation Working Party



Brexit and nature conservation fact sheet

5 September 2017

At a glance

The implementation of the EU wildlife Directives has received 'bad press'. However, reviews undertaken at national and European levels conclude that their implementation does not impose an undue burden and that the measures are proportionate and effective. The legislation should therefore be retained in full post Brexit.

[Misinformation](#), [misconceptions](#), [distortion](#) and [inaccuracy](#) have long characterised the debate surrounding the provisions of the Habitats Regulations, which transpose the Habitats Directive from European law into national law. Although the Government has committed to 'rolling-over' the UK's environmental laws after Brexit, there have been persistent rumours that Habitats laws will go after Brexit. This factsheet sets out to debunk some common myths about this area of law.

Does the Habitats Directive prevent development, such as [important infrastructure projects](#) because it might damage a protected site?

No. Whilst the framework is robust in setting out tests that must be satisfied, the aim of the Directive is to prevent damaging plans and projects having a negative effect on the integrity of Natura 2000 sites, a network of vital breeding and resting sites for rare and threatened species. These tests ensure that only those schemes for which there are no alternatives and are imperative for reasons of overriding public interest (IROPI), are permitted. Where development is permitted then compensation is required to ensure the overall coherence of this important ecological network is maintained.

Does the European Commission block developments in the public interest?

No. For the most protected sites, where there has been a negative assessment of the implications for the site and in the absence of alternative solutions,

development may nevertheless be carried out if it is for IROPI, but the European Commission has to be consulted for its opinion as to whether the tests have been satisfied. The Commission's opinion, even if negative, is not legally binding on Member States; however, in practice, in the vast majority of cases the Commission has given a positive opinion, allowing development. In a case before the European Court of Justice in 2012 [the British Advocate General, Eleanor Sharpston QC noted](#) that, "Whilst the requirements laid down [to justify IROPI] are intentionally rigorous, it is important to point out that they are not insuperable obstacles to authorisation. The Commission indicated at the hearing that, of the 15 to 20 requests so far made to it for delivery of an opinion under that provision, only one has received a negative response."

If the UK weakened Habitats law after Brexit would this be good for business?

Not necessarily. The Department for Environment Farming and Rural Affairs (Defra) undertook a [review of the implementation of the Habitats and Wild Birds Directives](#) in England in 2011. Particular reference was made to the burdens placed upon business by the authorisation process. Their [report](#) concluded that in the large majority of cases the implementation of the Directives worked well, allowing both development and key infrastructure and ensuring a high level of environmental protection is satisfied (paragraph 27). It was recognised that there is a need for improvement in addressing national infrastructure projects, the provision of guidance, use and availability of data and customer experience (chapter 3). [28 measures were identified](#) in the review; 25 of which had been implemented [as of June 2013](#).

Outside the EU, would the UK would have the opportunity for taking a more innovative and less restrictive approach to protecting Habitats?

This is already underway. In 2017 [Natural England announced](#) that an innovative approach to the conservation of great crested newts trialled with

Woking Borough Council in Surrey was to be rolled out across England. In May 2016, Natural England had [awarded the Council an organisational licence](#) allowing it to authorise operations that may affect newts on development sites at the same time as granting planning permission, thereby removing the need for expensive surveys prior to building works and individual licences to disturb newts if they are present. As part of the project, newt habitat is enhanced or created prior to any development taking place, saving developers time and money, and making newt populations more healthy and resilient. This has been achieved under the current legislative regime.

Does the [EU want to remove the habitats Directive](#)?

No. In 2014 the European Commission initiated under the Regulatory Fitness and Performance Programme an [evaluation of the EU Birds and Habitats Directives](#). The review addressed relevance, effectiveness, efficiency, coherence and EU added value. Following an extensive consultation process the European Commission published their [report](#) in 2016. The overall conclusion reached was that within the framework of broader EU biodiversity policies the Directives remained highly relevant and fit for purpose; however, to meet the objectives of the Directives in full, Member States would be required to

make improvements to deliver practical results on the ground for nature, people and the economy in the EU (page 96). Following this evaluation an [action plan for nature, people and the economy](#) was developed by the Commission to address these issues. Most of these 15 actions will be launched in 2017 so that the Commission can report on their delivery before the end of its current mandate in 2019. The Commission has also published a [factsheet](#) providing more information on each action.

Will the UK need to change its nature conservation rules anyway as we take back control over agriculture and fisheries?

No. It is likely that the prescriptions to accompany those policies replacing the EU Common Agricultural Policy (CAP) and the Common Fisheries Policy (CFP) will be developed in the context of the existing legal framework. Policies not underpinned by law may be weakened and possibly vulnerable to challenge.

A review of wildlife (species only) legislation in England and Wales was undertaken by the Law Commission. Their [report](#) together with a [draft Bill](#) was published in 2015. These will be key documents to inform any future review of EU derived and national legislation.

The UK Environmental Law Association is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law. UKELA is composed of 1,400 academics, barristers, solicitors, consultants, and judges involved in the practice, study and formulation of environmental law across England, Scotland, Wales and Northern Ireland.

UKELA remained neutral on the Brexit Referendum. In order to ensure regulatory stability and continued environmental protection UKELA considers it imperative that the UK's current environmental legislation is preserved pending proper review, and full and open consultation on options for change. UKELA's full position on Brexit can be found on [our website](#).

UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK. The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. With the assistance of UKELA's specialist working parties the Task Force aims to inform the debate on the effect of withdrawal from the EU, and draw attention to potential problems which may arise.

The UKELA Brexit Briefing Papers have been produced under the guidance and approval of UKELA's Brexit Task Force chaired by Andrew Bryce and Professor Richard Macrory, and with input from relevant UKELA Working Parties and individuals. They do not necessarily and are not intended to represent the views and opinions of all UKELA members.