



cornerstone

barristers

Brexit: Planning and the Environment Outside the EU

July 2016

The UK vote to leave the European Union raises significant questions around the potential impact on our domestic legislation. EU law is deeply embedded in our planning and environmental protection regimes. Until the UK formally leaves the EU, there is no change to the current legal landscape. For the future, much will depend on the terms agreed for Brexit, but there could be major changes on the horizon, creating both challenges and opportunities. This bulletin looks at some of the key planning and environmental issues.

Environmental Impact Assessment

Harriet Townsend

The EIA Directive 2011/92/EU. Note 2014/52/EU amendments which must be applied in member states by 16 May 2017.

Legislation that transposes directives

The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 are the main Regulations governing planning applications in England, as are the 2016 Regulations in Wales.

Made under section 2(2) of the European Communities Act 1972 and section 71A of the Town and Country Planning Act 1990.

Summary

EIA procedures are intended to improve the quality of decision making, and to increase public participation in planning decisions likely to have significant effects on the environment.

Non-EU regimes that underpin regime:

Although EIA predates the Aarhus Convention (to which the UK is a signatory) they have complementary objectives.

Disentanglement

Difficult for legal and practical reasons.

Points to consider

- Amended Directive: query the legal and practical effect if the UK fails to implement the 2014 Directive?
- Status of ECJ decisions on the meaning and effect of terms which have EU
- Directives as their source but are applied within the territory of an ex-member?

This is a summary of a note which can be read in full [here](#).

Strategic Environmental Assessment

Ashley Bowes

Directive 2001/42/EC Directive on the effects of certain plans and programmes on the environment ("SEA Directive").

Legislation that transposes directives

Transposed into domestic legislation by the Environmental Assessment of Plans and Programmes Regulations 2004/1633 (2004/1656 for Wales). The Regulations came into force 20 July 2004 and were made by operation of s.2(2) European Communities Act 1972.

Summary

The Directive requires the environmental effects of “plans and programmes” which “set the framework for future development” to be assessed in a structured way. In practice this includes all development plan documents and some supplementary planning documents. Importantly the Directive requires the preparation of an environmental report (Art.5), subject to public consultation (Art.6) which not only assesses the environmental effects of the terms of the plan or programme under consideration but the reasonable alternative strategies which might also meet the aims of the plan or programme (Art.5(1)).

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”) was adopted 25 June 1998 and ratified by the United Kingdom on 23 February 2005 and European Union on 17 February 2005. It provides for a looser framework than the SEA Directive for the assessment of plans and programmes and access to environmental information. The UK’s departure from European Union would not affect its other obligations at international law, including its binding obligation to adhere to the Aarhus Convention.

Disentanglement

Whilst the 2004 Regulations were made under s.2(2) European Communities Act 1972, and could be readily revoked on the repeal of the Act, the aims and objectives of the SEA Directive are embedded deep into the culture of plan making legislation and policy. For example, by s.19(5) Planning and Compulsory Purchase Act 2004 a local planning authority must carry out a “sustainability appraisal” of the proposals in a development plan document and prepare a report of the findings. Similarly, by paragraph 182 NPPF the Government considers that to be “sound”, a plan must, amongst other things, be “the most appropriate strategy, when considered against the reasonable alternatives”. It does seem likely that even if saving provisions are not brought forward to preserve the 2004 Regulations as a whole, the spirit of environmental assessment of plans and programmes will be retained.

Points to consider

Whether the giving of notice under Article 50 Lisbon Treaty triggers a requirement under Reg.9 SEA Regulations 2004 to consider

whether the UK’s departure from the EU “is likely to have significant environmental effects” and accordingly require an environmental report to be prepared.

Appropriate Assessment

Michael Bedford QC

Directive 92/43/EEC (“the Habitats Directive”)

Legislation that transposes directives

Conservation of Habitats & Species Regulations 2010 made pursuant to s.2(2) ECA 1972 and s.307 Criminal Justice Act 2003

Summary

The protection of the Natura 2000 network of European Sites (Special Areas of Conservation and Special Protection Areas as notified by the UK Government /Welsh Ministers to the European Commission) and the protection of European Protected Species as listed in the Annexes to the Regulations and the Directive

Non-EU regimes that underpin regime:

Almost all land-based Natura 2000 sites are also designated as Sites of Special Scientific Interest under the Wildlife & Countryside Act 1981 and many EPS are also protected under WCA 1981.

Disentanglement

If the ECA 1972 is repealed (so removing the need to comply with the Habitats Directive), the regulations could be readily revoked. Domestic protection for SSSIs and designated species would continue but the requirement for “appropriate assessment” would fall away. Removal would therefore be easy (but subject to the terms on which Brexit is to take place, e.g. membership of the EEA may require similar environmental protections to be in place, see **Waste** below).

Points to consider:

Appropriate Assessment (including the “in combination” test) impacts on plans & projects, and has been heavily litigated in the UK and in the CJEU. Protecting Natura 2000 sites has restricted development until SANGS type mitigation schemes have been established and delivery of SANGs has proved problematic, particularly when combined with CIL limitations. Licensing for EPS has slowed down development even for prevalent species in the

UK. On the other hand, without the rigours of the Habitats Directive cumulative degradations of habitats and species may not be adequately assessed. Freedom from the Habitats Directive could be a short term economic gain but a long term environmental disbenefit.

Waste

Matt Lewin

- Framework waste legislation: Waste Framework Directive 2008/98/EC; Shipments of Waste Regulation 1013/2006; List of Wastes Decision 2000/532/EC
- Waste treatment operations legislation: Industrial Emissions Directive 2010/75/EU; Landfill Directive 1999/31/EC
- Waste streams legislation (many, including): Mining Waste Directive 2006/21/EC; Waste Electrical and Electronic Equipment Directive 2012/19/EU; etc
- Waste planning: Environmental Impact Assessment Directive 2011/92/EU

Legislation that transposes directives

- Environmental Protection Act 1990
- Environment Act 1995
- Pollution Prevention and Control Act 1999
- Environmental Permitting Regulations 2010
- Waste (England and Wales) Regulations 2011
- Hazardous Waste (England and Wales) Regulations 2005
- List of Waste (England) Regulations 2005
- Transfrontier Shipment of Waste Regulations 2007
- Town and Country Planning (Environmental Impact Assessment) Regulations 2011

Summary

Provides an overall framework for waste management, especially a waste management hierarchy; promotes the objective of reducing landfilling of waste; promotes recycling of specific types of products, placing

responsibilities on producers; regulates the quality of products to facilitate their recycling.

Non-EU regimes that underpin regime

Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (but implemented in EU/UK law by Shipments of Waste Regulation).

Disentanglement

Potentially very complex: almost all UK waste management law derives from EU law (see below).

Points to consider

The majority of EU waste management law has been transposed directly into domestic law via secondary legislation. Therefore this legislation is not immediately or directly affected by the UK's withdrawal from the EU.

Once the UK has withdrawn from the EU, the structure of waste management law in the UK will depend on the nature of the legal relationship between the UK and the EU.

If the UK joins the European Economic Area (EEA), then it will be required to adopt the full body of EU law in domestic law which relates to the internal market (the *acquis communautaire*). As an EEA member and signatory to the Agreement on EEA, the UK would be subject to specific provisions on environmental protection (environmental protection is considered to be a "flanking and horizontal" policy area relevant to the four market freedoms). Chapter 3 of Part V and Annex XX of the Agreement on EEA incorporate the vast majority of EU environmental legislation which would therefore be required to remain part of UK law.

However, much of the impetus underpinning the Brexit vote was to "take back control" of law-making powers from the EU. If the UK remains subject to almost all EU environmental legislation this objective is undermined. If the UK opts not to join the EEA, there would be an obvious incentive for pro-Brexit legislators to repeal EU-derived legislation and replace it with home-grown waste management legislation. It is likely that this new legislation would seek to dilute environmental protection standards with the objective of reducing the regulatory burden on businesses.

Recall that in 2001, the Environment Select Committee's report on "Delivering Sustainable

Waste Management” lamented that UK waste management policy resulted in the majority of waste going to landfill. Under the influence of EU law (especially the waste hierarchy) that trend has been reversed dramatically to the extent that, for instance, household recycling is now widely accepted and part of our culture.

Aarhus

Estelle Dehon

- Environmental Information Directive 2003/4/EC; Public Participation Directive 2003/35/EC; INSPIRE Directive 2007/2/EC;
- Deliberate Release Directive 2001/18/EC;
- GM Food and Feed Regulation (EC) 1829/2003

Legislation that transposes directives

Environmental Information Regulations 2004; Environmental Information (Scotland) Regulations 2004; INSPIRE Regulations 2009; INSPIRE (Scotland) Regulations; Nitrate Pollution Prevention Regulations 2008; Genetically Modified Organisms (Deliberate Release) Regulations 2002; Genetically Modified Organisms (Deliberate Release)(Wales) Regulations 2002 (SI 2002/3188); Environmental Permitting (England and Wales) Regulations 2010; Infrastructure Planning (Environmental Impact Assessment) Regulations 2009; Town and Country Planning (Development Management Procedure)(England) Order 2010; Town and Country Planning (Environmental Impact Assessment) Regulations 2011; Civil Procedure Rules 1998/3132 Rule 45; Court of Session Rules 58A; Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013/81

Summary

The obligations in the Aarhus Convention rest on three “pillars”: the right to receive environmental information held by public authorities; the right to participate in environmental decision-making and the right to review procedures to challenge certain public decisions that have been made in relation to the environment.

The Convention also contains specific rules for public participation prior to a decision on whether to permit a deliberate release into the

environment and/or placing on the market of genetically modified organisms.

Non-EU regimes that underpin regime

Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed by the UK on 25 June 1998 and ratified on 23 February 2005)

Disentanglement

Both the EU and the UK signed and ratified the Aarhus Convention. The UK is thus a Party to the Convention in its own right and it required to comply with the obligations in the Aarhus Convention, whether or not it is a member of the EU. Some aspects of the Aarhus Convention have been implemented directly into the UK law – for example, the costs provisions underpinning access to justice in CPR 45.43 – and so will be unaffected by Brexit, and could not be removed without the UK breaching its obligations under the Convention. However, other aspects of the Convention have been implemented through transposition of EU Directives into UK law via secondary legislation – the Environmental Information Regulations 2004 (EIRs) being one of the key examples. Compliance with the Convention will require either retention of the existing EIRs under a new enabling statute, or for those rights to be brought under the umbrella of the Freedom of Information Act 2000 (FOIA), for example by removing the existing exemption in FOIA for environmental information or reducing the scope of some of the other FOIA exemptions.

Points to consider

Brexit will not affect the UK’s obligation to comply with the Aarhus Convention, nor the oversight of the UK’s compliance by the Aarhus Convention Compliance Committee.

IPPC

Clare Parry

Directive 2008/1/EC on integrated pollution prevention and control (this Directive consolidates a number of earlier Directives)

Legislation that transposes directive

Pollution Prevention and Control Act 1999
Environmental Permitting (England and Wales) Regulations 2010

Summary

This creates a set of common rules for permitting and controlling industrial installations. It requires some installations to obtain permits and others to register. The aim is to enable installations to operate in a way that avoids risks to the environment and to human health.

Non-EU regimes that underpin regime

There are some complementary domestic regimes such as the Food and Environmental Protection Act 1985. The regime has close links with a number of other EU regimes such as the Waste Framework Directive.

Disentanglement

The Regulations could be simply repealed or replaced but it is hard to envisage that there would be political appetite for removing all regulation from large potentially heavily polluting installations.

Points to consider

The Courts have accepted that where an installation will be controlled by a permit pursuant to this regime, while the impacts of the installation remain material considerations the Local Planning Authority is entitled to leave pollution control to pollution control authorities although they are not obliged as a matter of law to do so: *Hopkins Developments Ltd v First Secretary of State* [2006] EWHC 2823 (Admin). If the regime is removed and is not substantively replaced it is likely that the obligations on Local Planning Authorities in deciding whether to grant planning permission will be more onerous.

Water

Jonathan Clay

- The Water Framework Directive (2000/60/EC)
- Directive 2008/105/EC (Environmental Quality)
- Bathing Water (2006/7)
- Drinking Water (80/778, as amended by 98/83)
- Urban Wastewater Treatment (91/271)
- Nitrates (91/676)
- Integrated Pollution Prevention & Control (96/61, codified as Directive 2008/1/EC).
- Sewage Sludge (86/278)
- The Groundwater Directive (2006/118/EC)

Legislation that transposes directive

- Water Environment (Water Framework Directive) (England and Wales) Regulations 2003
- The Groundwater Regulations 2009
- The Environmental Permitting (England and Wales) Regulations 2010
- WATER RESOURCES The Bathing Water Regulations 2008 & 2013
- EUROPEAN UNION (DRINKING WATER) REGULATIONS 2014
- Urban Wastewater Treatment Regulations 1994, 2001, 2010
- Nitrates Action Programme (NAP) and Phosphorus Regulations 2015

Summary

The Water Framework Directive establishes (a) a legal framework to protect and restore clean water across Europe and ensure its long-term and sustainable use. (b) an innovative approach for water management based on river basins, the natural geographical and hydrological units and sets specific deadlines for Member States to protect aquatic ecosystems.

The directive addresses inland surface waters, transitional waters, coastal waters and groundwater. It establishes several innovative principles for water management, including public participation in planning and the integration of economic approaches, including the recovery of the cost of water services.

Directive 2008/105/EC of 16 December 2008 establishes Environmental Quality Standards for the 33 first priority substances.

Bathing Water (76/160) (now replaced by 2006/7) Drinking Water (80/778, as amended by 98/83) Urban Wastewater Treatment (91/271) Nitrates (91/676) Integrated Pollution Prevention & Control (96/61, codified as Directive 2008/1/EC). Sewage Sludge (86/278)

The Directive regards implementation of these other directives as a minimum requirement. The measures to implement them must be integrated into river basin management planning (Article 11.3(a)).

The Water Framework Directive is supported by other EU environmental legislation. The REACH Regulation controls chemicals in products to reduce the contamination of water bodies. The Directive on Plant Protection Products (i.e. pesticides) controls pollution from agricultural

chemicals and the Biocidal Products Directive regulates pest-control and anti-microbial substances used in other sectors. The Nitrates Directive limits nitrogen pollution from fertilisers and manure. The Directive on Industrial Pollution Prevention and Control (IPPC) regulates pollution from factories and other facilities.

Disentanglement

In the short term, in theory, simple confirmatory legislation could ensure that existing domestic legislation could continue to provide the statutory provisions to secure the continuation of the regulatory framework to secure the objectives of the Directives.

Points to consider

EU Environmental Directives are often intertwined with wider international treaties including the Ramsar Convention (169 countries) and the Bern Convention. This blurs the distinction between national, European and international perspectives.

The Environment Agency has been able to use European Grant Aid to create compensatory habitat under the Conservation of Habitats and Species Regulations 2010, (which transpose the Habitats Directive into UK law) as part of flood defence schemes, which would have been unlikely had the EU Habitats Directive not existed.

The extent to which Brexit is accompanied by withdrawal from other International and European treaties and conventions remains to be seen.

This is a summary of a note which can be read in full [here](#).

Air Quality

Martin Edwards

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

Legislation that transposes directive

Air Quality (Standards) Regulations 2010.

Summary

These Regulations implement the following Directives—

- Directive 2008/50/EC on ambient air quality and cleaner air for Europe (this Directive replaces Council Directive 96/62/EC on ambient air quality assessment and management, Council Directive 1999/30/EC relating to limits for sulphur dioxide, nitrogen dioxide, oxides of nitrogen, particulate matter and lead in ambient air, Council Directive 2000/69/EC relating to limit values for benzene and carbon monoxide in ambient air, Council Directive 2002/3/EC relating to ozone in ambient air.)
- Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air.

Non-EU regimes that underpin regime

Clean Air Act 1968 and statutory nuisance provisions in the Environmental Protection Act 1990. In addition there are the Environmental Permitting (England and Wales) Regulations 2010 and the common law of nuisance.

Disentanglement

Given the failure of the UK government to secure compliance with the Directive – see R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28 there must be concern that there will be no willingness on the part of the UK government to secure and maintain compliance with the Directive. Defra put out plans for consultation in September 2015 and finalised the plans in December 2015. They have been subject to much criticism and seen as inadequate. Continuing Government reluctance to comply suggests that an early repeal of the Regulations may be likely.

Public Procurement

Mark Lowe QC

Directive 2014/24

Legislation that transposes directive
Public Contracts Regulations 2015

Summary

Regulation of the letting of contracts for the procurement of goods and services by public bodies including organs of local government

Non-EU regimes that underpin regime
WTO Government Procurement Agreement
1979

Disentanglement

Repeal s.2(2) European Communities Act 1972
and revoke the above regulations

Points to consider

- An essential element of the free market
- Desirable in its own right in an open competitive economy
- Essential to continued membership of the WTO area

This is a summary of a note which can be read in full [here](#).

Renewable Energy

Rob Williams

Directive: Renewable Energy Directive
(2009/28/EC)

Legislation that transposes directive

There is no legislation which directly transposes the Renewable Energy Directive. Instead Member States are required to adopt a national renewable energy action plans which sets out targets for the share of energy from renewable sources consumed in transport, electricity and heating and cooling in 2020. The UK published its action plan in July 2010. See also the UK Renewable Energy Roadmap 2011 (and 2012/13 updates) which set out how the UK intended to meet its targets, and a reviewed its progress.

Summary

The Renewable Energy Directive set the United Kingdom a “mandatory” target of achieving 15% energy consumption from renewable sources by 2020. Additionally, at least 10% of transport fuels must come from renewable sources by 2020. Although the UK has met its interim targets to date, leaked correspondence in late 2015 indicated that DECC’s internal projections showed that the UK was not on course to meet the 2020 target.

Non-EU regimes that underpin regime

Although there is no non-EU regime which directly replicates the Renewable Energy

Directive, the UK is bound by national and international decarbonisation obligations. At a domestic level, the Climate Change Act 2008 commits the UK to reducing emissions by at least 80% in 2050 from 1990 levels. At an international level, the Kyoto Protocol set binding commitments in respect of emissions. However, the first commitment period has expired and the Doha Amendment – which seeks to extend the targets to the year 2020 - has not yet entered into force. In addition, when the Paris agreement comes into force it will require the UK and other signatories, including the EU, to set “nationally determined contributions” to the overall goal of limiting global temperature increase to well below 2 degrees Celsius. However, the targets set by the members states will not be legally-binding.

Disentanglement

In theory, once Brexit is completed the mandatory targets established by the Renewable Energy Directive will cease to have effect in the UK. In relation to the Paris Agreement, the UK’s obligations would have to be decoupled from the separate obligations imposed on the EU. Christiana Figueres, the Executive Secretary of UNFCCC, said in advance of the referendum that Brexit would require a “recalibration” of some kind, although it is not clear what that might entail.

Points to consider

It is expected that the primary impact of Brexit on the Renewable Energy sector will not be regulatory, but rather as a result of the financial uncertainty caused, at least in the short term. Since the referendum Amber Rudd, Secretary of State for Energy and Climate Change, has reiterated the Government’s commitment to climate action, but conceded that the Brexit vote may make it “harder” for the UK to tackle global warming. And whilst some green energy companies have downplayed concerns of the impact of Brexit, others (such as Siemens and Drax) have raised question marks over their continued involvement in UK-based projects.

This bulletin sets out a general overview only and is not intended as specific legal advice. If you require further information on how Brexit may affect the planning and environmental regimes for current or future development projects, contact Cornerstone Barristers.



● ● ● cornerstone

● ● ● barristers

e: clerks@cornerstonebarristers.com / t: 020 7242 4986 / 0333 240 0591

www.cornerstonebarristers.com

London | Birmingham | Cardiff
