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REVIEW

UK environmental law post Brexit

Veerle Heyvaert and Aleksandra Čavoški

The implications of Brexit
for future EU environmental law and policy

Céline Charveriat and Andrew Farmer

The EU as guarantor of environmental protection in Germany

Thomas Ormond

Emissions into the environment and disclosure of
information - Comments on ECJ C-442/14 and C-673/13P

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Promoting the Green Economy in Morocco:
Analysis of the contextual specificities

Fatima Arib

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Editorial

Brexit is definitively making the headlines in Europe and so too shall it be in the current issue of the *elni Review*.

How the United Kingdom will one day really be able to leave the EU is still very uncertain. But whatever the proposed scenarios, one cannot avoid the fact that such a rupture, necessarily, will also concern environmental law and policy. An impact that has not escaped many key actors, including Commissioner Barnier and the House of Lords (report on *Brexit: Environment and Climate Change, February 2017*). It will have an impact both in the UK but also possibly in the EU, as will be developed in the current issue.

The reader certainly knows that UK Environmental Law, like the law of every Member State, is very deeply europeanised. Its ambition, as brilliantly demonstrated in the recent case law on air pollution (CJEU, *Client Earth*, 2014), is decisively bound to the control of the CJEU. But the UK wants to quit the realm of the CJEU, according to the Great Repeal Bill White Paper, while ‘keeping’ the current *acquis*. What does this possibly mean, as far as environmental protection is concerned?

As to the other side of the coin, the rupture will also possibly affect, somehow, environmental law and policy in the EU. In the rich encounter of various conceptual approaches, the UK has indeed brought a wave of challenging new ideas, in the ‘big bowl’ in which EU law is being processed. And this not least because the UK is a country abiding by a strong common law tradition.

The two first contributions of this issue, one on the ‘UK Environmental Law Post Brexit’ and the other on ‘The Implications of Brexit for Future EU Environmental Law and Policy’, are the written tracks of presentations that were given by Prof. Veerle Heyvaert (LSE, London) and Céline Charveriat (IEEP, Brussels), on 11 May 2017 in Brussels, at the occasion of a new *elni* forum. That forum on Brexit and Environmental Law took place at the Université Saint-Louis Bruxelles, at the joint invitation of CEDRE and ELNI, under the chair of Prof. Delphine Misonne and Prof. Gerhard Roller.

In their contribution on UK Environmental Law Post Brexit, Veerle Heyvaert and Aleksandra Cavoski go beyond assumptions and investigate what a gradual repatriation of EU law might mean, for specific areas (climate, ETS, biodiversity, air and water), for public authorities but also for civil society – where will be the guarantees civil society shall still need in

order to challenge domestic policies? The authors also envisage how cooperation between the UK and the EU could actually proceed in the future, on environmental law issues. Because there is actually no escape, or rather “*an inescapable physical reality*”: environmental problems will continue to require concerted action.

In their paper on ‘The Implications of Brexit for Future EU Environmental Law and Policy’, Céline Charveriat and Andrew Farmer present their thoughts on the possible consequences of Brexit for EU environmental policy in a, by necessity, quite speculative context. But they actually demonstrate that the first effects of Brexit on EU policy are already at work. There is a “*general atmosphere of environmental policy making*”, that should not be underestimated. The context might further lead to a ‘distraction’ from important issues and even impede crucial discussions, such as on the possible renewed interest in an EU carbon tax.

Thomas Ormond in his programmatically entitled article ‘The EU as guarantor of environmental protection in Germany’ adds another perspective as to how the EU shapes Member State environmental law and policy, highlighting inter alia “*innovation from Brussels*” such as EIA, access to environmental information and climate protection, as well as the systematic and risk-based approach as hallmark of EU legislation.

Next, Ludwig Krämer comments on ECJ C-442/14 and C-673/13P (see already the case report in *elni Review* 2016/2) which concern the diverging interests of disclosing environmental information on the one hand, and protecting confidential business information on the other – two judgments which according to Krämer are likely to have a far-reaching influence on the disclosure of product information.

Finally, Fatima Arib in ‘Promoting the Green Economy in Morocco’ analyses the main contextual features, including socio-economic, environmental as well as regulatory aspects and identifies progress made by Morocco and the challenges lying ahead.

We hope you enjoy reading.

The editors welcome submissions of contributions addressing current national and international environmental law issues (e.g. transboundary EIA) for *elni Review* 2017/2 by 15 September 2017.

Delphine Misonne/ Julian Schenten
June 2017

The Implications of Brexit for Future EU Environmental Law and Policy

Céline Charveriat and Andrew Farmer

1 Introduction

Brexit is an unprecedented event for the EU. No Member State has ever left the Union previously.¹ At most, overseas territories with small populations have changed status, such as Greenland (Denmark) in 1985 and the Outermost Region Saint Barthélemy (France), which became an Overseas Country and Territory (OCT) in 2012. These cases may have limited lessons for the UK adapting its legislation post-Brexit, as they did not impact EU decision making and law and, therefore, are not precedents for the subject of this paper.

There has been quite a lot of analysis on the possible consequences of Brexit for the future of UK environmental law. However, less attention has been given to the implications Brexit may have for the future of EU environmental law and policy. This paper presents some thoughts on this subject.

It is important to stress that, at the time of writing, it is difficult to be certain of many of the consequences of Brexit. The UK leaving the EU will remove it from formal decision making in the European Council and Parliament. Beyond that, almost any other conclusion is speculation, as the degree of separation or integration of the UK with the EU in the future will depend upon the deal brokered during negotiations, which could end in any one of a broad range of possible outcomes. Some changes are more certain at a general level. For example, one consequence of Brexit will be a change in the proportion of Member States with a civil law approach to law-making, rather than a system based on common law, as practised in the UK. However, at this stage the consequences, if any, of this are far from clear as EU legislation has developed a consistent style, based more closely on civil law systems.

The two-year deadline for negotiations runs through some key national elections and finishes during the 2019 European Parliament campaign. This makes the process open to significant politicisation; politicians will (usually) aim to appear tough during campaigns, rather than pragmatic and conciliatory; and they will emphasise national interests, rather than the complex context of negotiations and the reasons for compromise. As a result, the messaging (on all sides) can become confused and unhelpful, in particular as officials undertake detailed and delicate negotiations while potential avenues to a solution are ruled out at the political level.

Having said this, there are a number of broad potential pathways for the future status of the UK in relation to the EU, and each with consequences for the future of EU environmental law and policy. First, there are, of course, significant chances of the Brexit negotiations finishing without a deal, at least for an interim period. This would result in a UK departure without clarity on future trading arrangements, and without obligations on environmental and social issues in exchange for single market access. There is also the risk of getting the wrong deal, where EU negotiators give away too much or conversely act too tough, damaging some EU interests and creating a bad precedent.

The EU's guidelines for the negotiations with the UK² also make clear that many issues will not be discussed until three high priority issues relating to Brexit are agreed upon (or at least progressed sufficiently). This means that even if a deal with the UK is reached by 2019, any likely conclusions on the environment will probably be (at this time) at most general principles. It may well take some further time, potentially, for specific details to become clear.

This paper begins with a consideration of the impact of Brexit on the general political and economic atmosphere of EU environmental policy making. It then considers the issues of trade and the external border. Some specific policy areas are examined, including chemicals, climate policy and agriculture. The paper ends by considering the implications of a possible future dispute mechanism with the UK.

2 Distraction, chilling or warming?

Of concern to overall future EU environmental policy is whether Brexit might lead to a distraction from progress in EU policy development, have a chilling effect on environmental policy development or, conversely, create new opportunities for previously blocked policy options.

The distraction hypothesis is that Brexit will absorb the attention of the time and political investment of politicians and officials alike in the Commission, Council and Parliament. They will have less time and motivation to take forward other issues, including environmental policy. There is some potential for this, but the Commission, for example, is continuing its policy work on the environment largely un-impacted by Brexit negotiations, which is being taken forward by dedicated staff. Overall, perhaps surprisingly the big Brexit issues are less likely to be a distraction to

¹ Note that this paper was written in May 2017. Therefore, any developments that may have taken place since will not have been taken into account.

² European Council (2017). (Art. 50) Guidelines for Brexit negotiations. Brussels, 29 April 2017. EUCO XT 20004/17.

EU environmental law and policy specifically, but if later negotiations (or issues to be resolved after Brexit) descend into a focus on the details of individual items of EU law, this could form a distraction (at least temporarily).

The chill hypothesis is that the reaction in the EU institutions to Brexit could be a reluctance to develop further EU environmental policy. There might be various reasons for this. For example, a Brexit deal might allow some UK access to the single market if it continues to implement specific EU environmental laws to ensure a level playing field. In this case, further development of EU law would create divergence and the playing field would no longer be level³. More widely hypothesised is the concern that some of the UK electorate (and in some other Member States) will become disillusioned with the EU due to ‘red tape’ from EU law impacting on businesses and individuals. Therefore, the reaction would be to restrict future development of such ‘red tape’. However, such a reaction would not be justified given that environmental protection is one of the areas where EU citizens consistently most value EU-level intervention. There are of course some environmental files where the UK’s influence was largely beneficial, such as the emissions trading system (ETS), where it argued consistently on the side of ambition. The UK’s absence from further debates might embolden opponents to reform and make it more difficult to reach a qualified majority.

Further, a chill effect was already visible in the work of the Juncker Commission. Since the arrival of the current Commission, few significant new developments in EU environmental law have taken place (and indeed many of these were already in the pipeline); and the temporary withdrawal of proposals on the circular economy and on air quality early in the Commission’s period in office sent a clear signal. In March 2017 the Commission published its White Paper on the Future of Europe.⁴ It set out five scenarios for the future of the EU. Effectively, these included retreating to just the single market, much greater integration, multi-speed Europe, etc. Although the paper does not say so, there has been speculation that its preferred option is ‘doing less more efficiently’, the messaging of which is entirely consistent with previous statements from the current Commission. Nowhere in the White Paper was a consideration mentioned of where the EU ought to do more of some things and maybe less of others, or of ‘doing more, more efficiently’. The messaging at the moment is not about seeking to address environmental challenges through new instruments at EU level. Thus at this

stage the prospect of much post-Brexit environmental policy development is limited. However, in 2019 there will be a new Commission (and possibly a new Commission President), so the political climate for policy development may change.

The warming hypothesis is the reverse of the chill. This is that the removal of the UK would unblock development in certain policy areas, and more generally it would stimulate EU policy development to strengthen the EU project as a common endeavour. There is something to be said for this hypothesis. However, the most obvious area for further integration is on the governance of the Euro or defence, such that ‘warming’ would be more likely to focus here than on the environment. Further, ‘sceptical’ Member States might remain difficult to ‘warm’. Removal of the UK from the negotiating equation makes it theoretically easier to get traction on issues such as EU environmental taxes, or legislation on soils (see below); but it is not sufficient in itself for these to become a reality.

3 Environment and trade

The link between environmental protection and trade is a complex one. This is clear from the debate and controversies surrounding all free trade agreements (FTA) negotiated to date by the EU, such as with Korea (2010), Singapore (2012) and currently with Canada and the US. The Commission has made it clear that any agreement of trade between the EU and UK would not be allowed to take place in a situation where the UK retreated from environmental standards leading to so-called environmental dumping. As a principle this is clear. In practice, the devil is in the detail.

Of course the situation between the EU and UK is totally different from any other FTA context. In this case the UK has been integrated into the single market and all of its associated conditions, so that rather than bringing the UK into alignment with EU market conditions, the emphasis will be on stopping it from moving out of alignment. Again, the extent of permitted non-alignment would depend on the degree of market access/free trade agreed upon (e.g. would it exclude specific sectors?).

With third countries, the EU can argue for ‘equivalent’ standards to be applied for market access. With the UK, which is already implementing the environmental acquis, the starting point can be EU law itself. However, the following should be noted:

- Not all of the environmental acquis would be likely to be included. For example, directives that are already not required to be implemented by EEA countries (e.g. the Habitats Directive) are unlikely to be required to be implemented by a third country if a conventional trade agreement model is followed. A more co-operative model could include most or all measures.

³ The UK is very unlikely to agree to a blank cheque deal where it signs up to whatever evolves out of the EU on environmental law in the future.

⁴ European Commission (2017). White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025. COM(2017)2025, 1 March 2017. See https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf.

- There is an issue with the UK response to EU policy as it evolves – how will future equivalence be understood and determined? Will the UK accept the validity of future decisions of the Court of Justice on interpretation of legislation, and be willing to conform to them?
- What happens if there is a dispute?

The question of a dispute mechanism and its implications for EU environmental law is addressed later in this paper. However, a further question is whether there is reciprocity in the agreement – do both sides commit to equivalent standards? If so, what if the UK wanted to raise a standard, would this have implications for the EU?

4 The EU border

Brexit changes the EU external border. A number of EU environmental laws concern the movement of products, materials, wildlife and waste in and/or out of the EU external border. Illegal waste may be shipped out of the EU, illegal products of endangered wildlife may be smuggled in. As a result systems have been developed to share intelligence between Member States and for common tracking systems for the items that move. Taking the UK out of the system is manageable, but much will depend on the nature of a future EU/UK deal on market access and the customs union. If relatively free movement of goods and other items were able to continue from the UK to the EU, then it would be important not only to ensure that the UK continues to apply EU environmental trade-related legislation, but also that the UK remains as fully integrated in the enforcement and monitoring systems as possible, as this is in both the EU's and UK's interest to tackle issues such as environmental crime. Further, there is likely to be pressure to achieve such an arrangement due to the complications that would arise from introducing a hard border with the Republic of Ireland, and the risks that would pose to the peace process.

5 Issues released from UK blocking

One area where Brexit could affect future EU environmental law is where the UK is currently blocking specific developments at EU level which (many) other Member States support. Progress on these issues might be made when the UK is no longer part of the decision making process. In looking at the range of recent policy debates, this blocking effect could be witnessed most visibly in two areas. The first is a possible EU directive on soil protection. This was first proposed in 2006, but there has been too much opposition in Council for it to progress. It is important to note that a soils directive would be adopted by QMV and the UK has been only one of several Member States, including France and Germany, opposed to its adoption.

The second area where the UK has historically opposed EU legal development has concerned a possible carbon tax. This area of law requires unanimity for adoption. As the UK has been reluctant to see the adoption of EU level taxes, a carbon tax has not yet been adopted. Of course, adoption of such an instrument would be complicated in its relation to other EU climate instruments. But Brexit might allow further consideration of the appropriateness of this type of instrument as part of the suite of instruments to tackle climate change. This applies to other environmental tax-related files, as well as to innovative financial instruments such as the Financial Transaction Tax, with the potential to address long-standing issues such as the EU's Own Resources debate.

6 Chemicals

EU chemicals law is probably the area of EU environmental law which has caused the most headaches in the UK. Almost all of the EU law in this area is through regulations (so are directly applicable) and they establish EU-wide systems of regulation which cannot simply be maintained after Brexit. Of course, this is a UK problem, rather than an EU one.

The UK House of Commons Environmental Audit Committee⁵, for example, noted that creating a UK system mirroring REACH would be difficult, and a stand-alone system “*is likely to be expensive for both the taxpayer and for industry*”. Such a system would simply be what would be needed to deliver an equivalent regime that might allow chemicals to be placed onto the EU single market. As a result, the Environmental Audit Committee argued, the UK should try to retain some relationship with the single market, at least retaining access to registration under REACH – “*We believe that, as a minimum, the UK should negotiate to remain a participant in this system, including paying for access if necessary. This would allow UK companies to place products onto both the UK and the EU markets without the need to generate additional testing data or incurring additional costs. Continuing to share data with the EU would allow the UK to decide whether to follow the regulatory decisions made through REACH, or whether it wishes to take a different approach. Any alternative approach which involved lower environmental or health standards than the EU would not only expose UK consumers to greater risks, but would subject industry to the additional burdens of complying with two different sets of regulation.*”

Haigh⁶ considers that there are two broad possibilities (with many possible variations). The UK could follow Switzerland and produce a body to create a UK register and replicate all of the European Chemical Agen-

5 Environmental Audit Committee (2017). The Future of Chemicals Regulation after the EU Referendum, 29 April 2017, HC 912 2016-17.

6 Haigh, N. (2017). Brexit promises a nasty chemical reaction. See <https://infacts.org/brexit-promises-a-nasty-chemical-reaction/>.

cy's decisions. Standards in the UK and the EU would not diverge, but the UK would effectively be subject to changes in EU law. The second possibility would be to create a completely new UK Chemicals Agency with a sufficient number of qualified staff to evaluate chemicals registered in the UK in the same way as the European Chemicals Agency (ECHA). This would require those exporting from the UK to the EU or the EU to the UK to go through two registration processes – adding costs for businesses and major administration costs for the UK.

Overall, the consequences of Brexit for chemicals policy is a major problem for the UK (and of concern for much of the chemicals sector across Europe). The UK is a major chemical producer and has been an important voice in the development of EU chemicals policy. Brexit would be likely to result in that voice being lost (unless some agreement on continued integration in REACH were reached and some UK say in it retained, the latter of which seems unlikely). UK views on chemicals policy have been shared by some Member States and diverged with others. Therefore, while this area of EU environmental policy is likely to have quite some focus in the Brexit process, the implications for future EU chemicals policy and law are not likely to be great.

7 Climate policy

A key policy area that might be affected by Brexit is EU climate policy. The UK has a positive history of supporting ambition on overall greenhouse gas reduction. However, the UK has been sceptical of the value of some types of instruments to support mitigation goals, and the policy area is further complicated by the critical international dimension of climate policy. *Gaventa*⁷ sets out a series of different types of threats of Brexit to EU climate policy. These are:

- Distraction: political distraction from progressing climate policy in the EU because of Brexit, which results both in less engagement in international negotiations and in EU policy development. As a result policy development slows.
- Deregulation: this threat could arise either from a possible lowering of environmental standards because of Brexit, or less directly if it creates the conditions for a stronger voice for those Member States, such as Poland, which are more resistant to EU climate policy development.
- Policy risk: Brexit poses direct challenges to other Member States' implementation of climate policy. Also, UK withdrawal from the EU-ETS Directive will create 'hot air' in the system from

legacy UK emissions allowances, unless corrected.

- Policy opportunity: in contrast, Brexit would allow for development of EU policies in areas where the UK has previously been reluctant or opposed, such as on renewable energy or taxation.
- Investment risk: Brexit will mean that there is a 16% loss of capital for the European Investment Bank (EIB), so reducing its potential for climate lending. Similarly, the net reduction in the EU budget may result in less funding for climate projects via all relevant EU funds (depending on future budgetary priorities). These impacts may in turn be dwarfed by the impact of economic disruption following the UK's departure on investor certainty and the availability of private lending.
- Market risk: Brexit may cause specific market disruption affecting supply chains for low carbon goods and services, for example as a result of the introduction of tariffs on components.

These are, as stated, threats rather than predictions of future outcomes of Brexit. Much will depend on any future settlement of the relationship with the UK. For example, there may be an agreement for the UK to remain part of the EIB. Further, some threats seem less likely as time progresses. For example, 'distraction' seems currently to be managed adequately by the EU institutions, which are compartmentalising Brexit negotiations while normal policy processes continue.

Overall, however, based on recent history, Brexit is not good news for future EU climate policy. The UK has consistently pushed for the development of EU climate policies and contributed to promoting those at the international level. Of course a future UK government could take a different attitude, but the probability is that Brexit will have a net negative impact on the EU's ambition in this policy area. The Council guidelines for Brexit negotiations state that the Council "*expects the United Kingdom to honour its share of all international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common approach towards third country partners, international organisations and conventions concerned should be engaged*". In the area of climate change, the UK is likely to remain a positive voice at international level and so, in this instance, should meet the Council's expectations. However, it will be isolated from the EU collective voice, so whether this will affect international policy development remains to be seen.

8 Agriculture

EU agricultural law and policy is not environmental law, but the impact of agriculture on Europe's environment is significant. Further, the outcomes of the implementation of instruments under the Common Agricultural Policy (CAP) on farms can have signifi-

7 Gaventa, J. (2017). Brexit and the EU Energy Union Keeping Europe's Energy and Climate Transition on Track. Working Paper April 2017. E3G. See https://www.e3g.org/docs/E3G_Brexit_and_the_EU_Energy_Union_030417.pdf.

cant impacts on the environment, and some explicit legal links exist with individual environmental laws.

For decades there have been efforts to reform the CAP, seeking to reduce its negative impacts on the environment and to use its provisions to deliver environmental improvements in rural areas. Historically the UK has strongly pushed for this reform on most occasions. It has argued for major change, but due mainly to pressure from other Member States, such reforms have not been sufficient to address the pressures from agriculture on the environment (let alone other issues for the sector).

Brexit will remove a major player in CAP reform. The next CAP should begin in 2020 and already consideration is being given to what it should contain. Therefore, it will not be long before we will see if and how the nature of the debate will change between the Member States. In particular, the predictable pattern of previous MFF negotiations – with the UK calling for radical CAP reform, and then reducing its ambition in return for agreement on the continuation of the UK rebate – will not be repeated.

The UK government has committed to continue to provide current levels of support to UK farmers after Brexit, up to 2020. There is obvious politics as well as economic concerns underlying this. Many decisions will be made by the devolved administrations, rather than centrally. However, of interest to future EU legal development is whether the UK will, having been released from the strictures of the CAP, develop a different type of agricultural policy and whether it will put in place the types of approaches it has argued for at EU level, including lower levels of expenditure. Current signs are that there will be greater focus on the delivery of environmental and other public goods, and significantly less emphasis on income support, particularly for larger farms. If the UK moves in this direction, it would provide interesting evidence (positive or negative) for the potential future evolution of the CAP.

9 UK membership of other bodies and use of its expertise

Brexit does not necessarily mean UK withdrawal from all EU institutions or all bodies that focus on the EU. An important example is the European Environment Agency. Its membership in Europe is much broader than the EU and there would seem to be little benefit for the UK to withdraw its membership. Similarly, networks such as IMPEL⁸ have a broader membership, and the UK has strongly supported exchange of experience on practical implementation problems. Again, it would seem unlikely for it to leave this network (or similar networks in other areas).

The importance of such bodies and networks is the exchange of information and experience. The UK is

an important source of both. Its loss in direct EU policy development would be important. For example, the UK has by far the best record of detailed assessment of the economic consequences of EU environmental policies, and information on such assessments is regularly drawn upon in EU policy development and evaluation. Of course, such knowledge need not be lost (and indeed studies often seek experience from other regions of the world). However, adopting informal collaborative approaches and ensuring that dialogue with specialists remains open will help to keep such exchange of experience and information open (to the benefit of both sides).

10 Ensuring implementation in the UK

The issue of ensuring implementation of environmental law was addressed by the House of Lords European Union Committee⁹ in a recent report. It noted the importance of the European Commission and the Court of Justice of the European Union in monitoring compliance and ensuring implementation and that “[b]oth institutions have played a key role in driving improvements to the UK’s environment over the course of the UK’s membership of the EU”. The Committee concluded that “[g]overnmental self-regulation will not be an adequate substitute post-Brexit. An equally effective domestic enforcement mechanism, able to sanction non-compliance, will be necessary to ensure that the objectives of environment legislation continue to be met in practice”. While UK implementation is not directly relevant to the development of EU environmental policy post-Brexit, it could nevertheless have an impact. Weak enforcement in the UK could lead to perceived unfairness, with reluctant EU 27 Member States using it as an argument for weakening enforcement approaches within the EU. By the same token, a strong and independent UK monitoring and enforcement mechanism could provide EU 27 countries with precisely the sort of reassurance against environmental dumping that they seek in the negotiating guidelines.

11 Future UK interpretation of EU environmental law?

If Brexit were to result in a complete divorce of the UK from EU environmental law, then its influence over the future of that law would end. However, if a Brexit deal were to require the UK to implement some EU environmental law (e.g. to allow for some access to the single market), then this could potentially have consequences for the future of that law (or future law), particularly if compliance with specific EU laws is stressed rather than the need for a UK ‘equivalent’.

First, let’s consider existing legislation. Take directives such as those concerning end of life vehicles,

⁸ The EU network for the implementation of environmental law.

⁹ House of Lords. European Union Committee (2017). Brexit: environment and climate change, 14 February 2017, HL 109 2016-1.

waste electrical and electronic equipment, restrictions on hazardous substances and similarly on producer responsibility and product quality. An EU\UK deal allowing some access to the single market might require such directives to continue to be implemented in the UK. This in itself would not have implications for EU environmental law. A UK statutory instrument (secondary legislation) currently transposing a directive could remain in force. However, this would not be sufficient.

The provisions of many directives require interpretation as they are implemented. The Commission, working groups, etc., produce vast quantities of guidance to support this. At times, the interpretations placed on provisions in a directive are interpreted through judgements of the Court of Justice. However, the UK may interpret a directive it has inherited in a way that the Commission, for example, may object to. If this were to be significant enough to raise concerns, then this interpretation would presumably need to be settled through a future dispute mechanism to be established so as to arbitrate between the two parties. The question would be – would this arbitration system clarify the interpretation of the directive for both parties? If so, this would potentially be a separate system for interpreting EU law from the Court of Justice¹⁰. The EU is unlikely to agree to such a situation, but a dispute mechanism arbitrating on how the UK interprets EU law may raise such complications.

Similarly, there are a number of areas of legislation where Member States may seek additional time for implementation, or apply for issue-specific derogations, with the Commission taking on the role of approving such requests, or of assessing their conformity with the legislation. Does continued UK implementation of the legislation allow it to determine for itself the conformity of any requests for derogations?

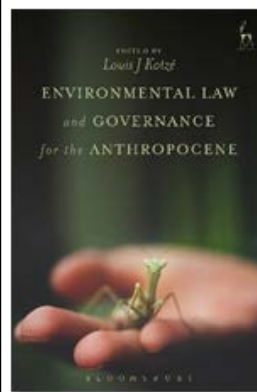
Of course, these issues only arise if the Brexit deal requires the UK to continue to implement EU law (this is what would make it different to any other relationships the EU has with third parties).

12 Conclusions

Much of this paper is hypothesis, albeit drawn from the history of the positions of the EU and UK and from parallel processes. While the EU has set out a stepwise negotiating plan, environment is not scheduled to be discussed first. Further, even if the UK accepts this plan, it has said that nothing is agreed until all is agreed, so certainty on any issue is unlikely to emerge in the near future.

The impact of Brexit on future environmental policy will vary in the different policy areas. For some it will be marginal, but might be more important in others. In

any case it is probable that there will be impacts that cannot be predicted at this stage. The Brexit negotiations may be a bumpy process; and at this stage it seems unlikely that environmental considerations will drive the outcomes. For stakeholders with an interest in environmental issues, however, it will be important to keep a close focus on potential models for the future UK/EU relationship, and identify the implications for environmental policymaking.



Environmental Law and Governance for the Anthropocene Edited by Louis J Kotzé

The era of eco-crises signified by the Anthropocene trope is marked by rapidly intensifying levels of complexity and unevenness, which collectively present unique regulatory challenges to environmental law and governance. This

volume sets out to address the currently under-theorised legal and consequent governance challenges presented by the emergence of the Anthropocene as a possible new geological epoch. While the epoch has yet to be formally confirmed, the trope and discourse of the Anthropocene undoubtedly already confront law and governance scholars with a unique challenge concerning the need to question, and ultimately re-imagine, environmental law and governance interventions in the light of a new socio-ecological situation, the signs of which are increasingly apparent and urgent. This volume does not aspire to offer a univocal response to Anthropocene exigencies and phenomena. Any such attempt is, in any case, unlikely to do justice to the multiple implications and characteristics of Anthropocene forebodings. What it does is to invite an unrivalled group of leading law and governance scholars to reflect upon the Anthropocene and the implications of its discursive formation in an attempt to trace some initial, often radical, future-facing and imaginative implications for environmental law and governance.

Louis J Kotzé is Research Professor of Law at the Faculty of Law of the North-West University, South Africa.

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¹⁰ This assumes, following international practice, that in an agreement between two parties, one party (the UK) would not agree to the judicial system of the other party (the EU) arbitrating on disputes between the two parties.

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We invite authors to submit manuscripts to the Editors by email.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed once or twice a year at the following prices: commercial users (consultants, law firms, government administrations): €52; private users, students, libraries: €30. Non-members can order single issues at a fee of €20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

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The views expressed in the articles are those of the authors and do not necessarily reflect those of elni

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If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the elni Coordinating Bureau, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

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The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

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- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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