elni REVIEW

ISSN 1618-2502

No 1/2017

ENVIRONMENTAL
LAW NETWORK
INTERNATIONAL

RÉSEAU
INTERNATIONAL
DE DROIT DE
L´ENVIRONNEMENT

INTERNATIONALES
NETZWERK
UMWELTRECHT

elni REVIEW

CONTENTS

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

UK Environmental Law Post Brexit

Veerle Heyvaert and Aleksandra Čavoški

1 Introduction

While much of the post referendum Brexit discussion has focused on economic and constitutional issues, the future of environmental law and policies has received much less attention.* Environmental protection barely featured as a campaign issue on either side of the referendum debate, and it is notably overlooked in the Brexit White Paper.[1] Yet UK environmental law is deeply rooted in EU law and policies, and departure from the EU may herald significant changes within national law. Environmental law covers a broad range of public policies including biodiversity protection, air and water quality control, climate change and waste management, and deeply impacts other key domestic policies such as agriculture, transport, industrial and energy policy. Moreover, uncertainty in environmental regulation significantly jeopardises its chance of effectiveness. Therefore, careful reflection on the impact of Brexit on environmental law is essential.

2 Areas of UK environmental law that will be impacted by Brexit

Environmental protection was not among the original European Economic Community policies. The first environmental measures were adopted in the early 1970s, initially to address the disruptive impact of different levels of national environmental protection on intra-EU competition.[2] It formally became an area of competence shared between the EU and member states in 1987.[3] Despite its late start, EU environmental policy has undergone a major expansion: beyond traditional areas such as air, water, and nature protection, the EU environmental agenda covers waste, chemicals, climate change, marine protection, biodiversity and urban environment. Moreover, EU law requires that environmental objectives and protection standards be integrated into other policy areas, notably agriculture, energy, industry and transport.

Much of the corpus of contemporary UK environmental law was either developed under the guidance of EU environmental law or is a direct application of EU law. Environmental law is an area densely populated with directives, which for the most part have been transposed into national law and implemented domestically. For example, the bathing water standards, which the UK famously struggled to implement in the 1980s,[4] and the EU air quality provisions which more recently have proved to be a bone of contention between the UK government and the European Court of Justice (CJEU),[5] are contained in directives. Measures regarding the environmental quality of commercial products such as chemicals, pesticides and genetically modified food and feedstuffs,[6] on the other hand, are increasingly frequently found in regulations, which do not call for transposition and are simply treated as part of domestic law after their entry into effect. In addition to the aforementioned sectors, EU law is the dominant source of UK environmental law on climate change abatement, energy efficiency and renewable energy development; water quality; waste; environmental impact assessment; nature and biodiversity protection; industrial emissions; biocides, nanotechnology and other emerging technologies; access to environmental information, participation in decision-making and access to justice. Moreover, EU law must be interpreted in compliance with key environmental principles, such as the precautionary principle, the sustainable development and polluter-pays principles, as well as with certain *sui generis* EU environmental law principles such as the principle of proximity and self-sufficiency specific to individual areas of environmental law.

Areas of law that are still chiefly domestic include common law litigation in environmental damage claims; planning law; the law regarding the remediation of contaminated land; and environmental criminal law. Moreover, as environmental policy is a shared competence between the EU and the Member States, it is possible for the UK to adopt environmental legislation in areas that are not (yet) governed by EU environmental law, for example, because they fall below the relevant EU threshold. Thus, nature sites of European importance in the UK are governed by the EU Habitats and Birds Directive;[7] whereas English[8] sites of 'mere' national importance are governed by the Wildlife and Countryside Act 1981 (as amended). However, even within the domestic sphere the influ-

* This article was first published in Michael Dougan (ed), The UK after Brexit – Policy and Legal Challenges, Intersentia, Cambridge, 2017.

1 HM Government, 'The United Kingdom's exit from and new partnership with the European Union', (Cm 9417, 2017) available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.

2 A good illustration is the Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles [1970] OJ L 76/1.

3 Single European Act [1987] OJ L 169.

4 C-56/90 Commission v United Kingdom ECLI:EU:C:1993:307.

5 Case C-404/13 ECLI:EU:C:2014:2382.

6 Regulation (EC) No 1829/2003 of the European Parliament and of the Council on genetically modified food and feed [2003] OL L 268; Regulation (EC) No 396/2005 of the European Parliament and of the Council on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC [2005] OJ L 70.

7 Implemented in UK law via the Conservation of Habitats and Species Regulations 2010 SI 2010/490 (as amended).

8 Domestically, nature conservation is a devolved matter.

ence of EU environmental law is felt. The Environmental Liability Directive intersects with some aspects of the contaminated land remediation regime; planning policy and law are affected by impact assessment requirements as well as designations under the EU's 'Natura 2000' nature protection project; and the EU has made attempts to criminalise certain behaviour in all Member States.[9]

In sum, when it comes to environmental matters, EU law and UK law are intimately entangled. Overall, it has been estimated that about 80 per cent of UK environmental law hails from the EU.[10] While the complexity of the subject matter cautions against taking any sweeping quantified estimates at face value, it is undeniable that UK law and policy on environmental protection has been fundamentally altered by forty years of EU membership and, correspondingly, that it is one of the areas with the most potential for large-scale change (and disruption) in a post-Brexit world.

3 Prospects for EU-UK law and policy cooperation post-Brexit

Prospective studies inevitably rely on a degree of speculation, but the most plausible assumption at the time of writing is that the UK will exit the single market and, hence, will not remain subject to single market legislation after Article 50 negotiations have concluded. The current Government's preference seems to be for a full break with the EU legal regime and its institutions, and the separate negotiation of bespoke agreements that will set out the new relationship between the EU and its former Member State. Although, to date, the UK Government has been silent on the question whether environmental protection would feature among the areas for which it would seek to negotiate a post-Brexit EU-UK agreement, there are several reasons why cooperation on environmental issues could and arguably should be continued. First, the 2014 Balance of Competences Review showed broad agreement that, in this policy area, the UK has benefitted from EU membership.[11] It has pushed the UK to 'up its game' in areas such as water quality and waste management, and conversely enabled the country to exercise formative influence on the development of a number of key EU environmental policies, such as climate change and integrated pollution prevention and control. It has afforded the UK a greater degree of control over the transboundary impact of pollution of foreign origin, and has helped to mitigate the potential anti-competitive effects of tighter environmental standards.

Secondly, the EU provides a robust institutional framework for addressing emerging environmental problems, which can facilitate the regulation of those issues at the national level. The EU has provided a forum for improving cooperation between states on transboundary challenges and put in place mechanisms to facilitate information exchange. The facilitating role of the EU as an environmental governance framework acquires even greater relevance when we consider the wealth of international environmental legal obligations to which the UK is subject, both as an individual signatory state and, currently, as part of the EU. The EU has positioned itself as a key environmental actor and raised the importance of EU and Member States' agendas at the international level, to a mutually beneficial effect. The scientific knowledge provided by the UK scientific, academic and business communities, together with the experience and negotiating skills of UK civil servants, has been invaluable in this policy area. At the same time, EU membership has enabled the UK to shore up its position in the international arena.

In the same vein, the EU actively fosters cooperation on research and development in environmental science, and enables the pooling of expertise via collaborative networks and EU institutions, such as the European Environment Agency. As its primary responsibility is to gather and disseminate information about the state of the environment to EU institutions and Member States, a continued relationship would be beneficial for the UK. The Agency has an impact on the environmental policy process by providing specific support to DG Environment. Thus, the maintenance of ties would assist the UK in continuing access to this knowledge community. Furthermore, it is important to recall that the EU's enforcement mechanisms also have facilitating aspects that the UK Government might be keen to retain. In light of the prominent 'take back control' rhetoric that continues to colour the Government's Brexit strategy, the prospect of EU involvement in enforcement of environmental regulation may seem unlikely to whet the appetite for post-Brexit cooperation. However, the EU also supports effective implementation and enforcement through data-gathering, reporting and transnational networking. The key purpose of IMPEL, the European Union Network for the Implementation and Enforcement of Environmental Law, is not to police and punish Member State non-compliance, but instead to help countries comply, or comply in a more cost-effective manner, by sharing knowledge, skills, and good practice. Post-Brexit, the mutual benefits of this form of enforcement facilitation may well persist for both parties.

9 Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law, [2008] OJ L 328.

10 Andrea Leadsom, speech on priorities for building world-leading food and farming industries at the National Farmers' Union Conference, 21.02.2017, https://www.gov.uk/government/speeches/environment-secretary-speaks-at-nfu-conference.

11 HoL, European Union Committee 'Brexit: Environment and Climate Change', 12th Report of Session 2016–17, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf. See also House of Commons Environmental Audit Committee, 'EU and UK Environmental Policy', Third Report of Session 2015–16, p. 3.

Finally, a major reason for the UK government to seek continued cooperation on environmental matters is its explicit desire to remain a main trading partner of the EU. As documented in decades of 'trade and environment' case law,[12] divergent environmental standards can constitute trade barriers. To avoid their resurgence in future EU-UK trade relations, either the UK would need to mimic new EU environmental standards on trade-related issues, or the EU would need to take its cue from the UK. Given respective market sizes, the latter scenario is less likely to materialise. In this context, the UK might prefer the prospect of sharing certain environmental competences with the EU over the alternative options of either becoming a 'policy taker' or facing trade barriers. Incentives for cooperation are all the more compelling in areas where manufacturing and trade are conditioned on EU registration or approval. For example, any chemical substance produced or traded on the EU market in quantities of at least one tonne per manufacturer per year, must be registered with the European Chemicals Agency (ECHA).[13] If the UK drops out of this scheme, it will no longer have any input in ECHA, yet any UK-based chemicals producer who wants to export to the EU still needs to comply with ECHA's registration requirements. Also, in order to retain control over the health and environmental quality of all chemical substances traded within the UK, a new domestic regulatory regime would need to be established. This would open space to tailor national chemicals regulation to fit the UK context, but would be a very costly endeavour. Moreover, given the intensity of EU-UK trade in this sector, the UK would be under fierce pressure from manufacturers and exporters to align new UK regulatory requirements closely with EU provisions. Hence, the sought-after freedom to make bespoke regulations may prove largely theoretical.

4 The Great Repeal Act and its likely consequences for UK environmental law

For the purpose of this study, we assume that a Great Repeal Act (GRA)[14] which, according to the Secretary of State for Exiting the European Union, should "*ensure that there is no black hole in our statute book*",[15] will indeed be adopted. The GRA is intended to be a multi-functional act. It will, first, repeal the European Communities Act 1972 (ECA) and abolish supremacy of EU law over national law. Up to now, the ECA provides the legal basis for the application of both existing and future EU law in the UK. To that effect, the EC Act makes a distinction between s. 2(1) which provides for EU law that does not require further enactment to be given legal effect, and s. 2(2) which authorises the adoption of Orders in Council or departmental regulations necessary to implement EU law. The former category includes EU treaties, regulations and other directly effective EU law (including directly effective provisions in EU directives). The latter category includes national measures transposing EU law, which predominantly relate to directives and decisions which are not directly effective. EU environmental law spans both categories, but is particularly rich in directives.

Many EU environmental directives have already been transposed into national law. Some were the subject of statutory adoption, but most have been introduced into domestic law via departmental regulations on the basis of s. 2(2) ECA.[16] Once the ECA is repealed, their legal basis is invalidated. Hence, in order to avoid gaps in legal provision, the GRA will need to introduce a stipulation that restores the legality of instruments that were formerly rooted in the ECA. This could be fairly straightforwardly achieved, but the challenges of successfully disentangling EU from domestic environmental law run deeper. The Secretary of State for the environment and rural affairs (DEFRA) pointed out that difficulties may arise "*where EU legislation is designed to organise cooperation between Member States, public authorities and businesses, as the relationship between these will fundamentally change*".[17] The UK's involvement in the EU Emissions Trading System (EU ETS), established by means of the 2003 Emissions Trading Directive, is a case in point.[18] In the absence of a special agreement between the EU and UK, after Brexit the UK will not be included in the Commission's calculation of the overall quota of emissions allowances per EU member State, and emissions allowances held by UK companies will no longer be tradeable on the EU market. In a similar vein, Member State responsibilities under EU environmental directives frequently include a requirement to report on implementation to the European Commission or another EU institution. It is difficult to imagine that such provisions, too, are intended to be repatriated upon the entry into effect of the GRA. Hence, the UK Government will need to identify which provisions in existing statutory instruments

12 E.g. Case C-302/86 Commission v Denmark ECLI:EU:C:1988:421; Case C-28/09 Commission v Austria ECLI:EU:C:2011:854.

13 Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L 396.

14 Theresa May announced the plans for the GRA on 02.10. 2016.

15 'Exiting the EU next steps': Ministerial statement 10.10.2016, https://www.gov.uk/government/speeches/exiting-the-eu-next-steps-ministerial-statement-10-october-2016

16 See, for instance national regulations governing environmental impact assessment, industrial emissions and nature conservation.

17 HoC Environmental Audit Committee Report, 'The Future of Natural Environment after the EU Referendum', Sixth Report of Session 2016–17, p. 17.

18 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32. See section on climate change below.

and domestic environmental regulations should be restored, and which modified or discarded.

Moreover, certain areas of environmental regulation, most notably environmental permitting rules, in recent years have relied increasingly heavily on 'legislation by reference', also known as the 'conveyor belt' approach to legal transposition.[19] Instead of fully transcribing the provisions of environmental directives into departmental regulations, conveyor belt provisions simply refer to 'the directive' and affirm that, in order to comply with the regulation, the parties affected must comply with the provisions of the directive. This was greeted as a cost-effective approach to transposition which was warranted by the increasingly detailed and articulated nature of EU environmental directive provisions. It also ensured that any amendments to environmental directives could be swiftly incorporated. However, it is questionable whether a sheer reference to the provisions in EU directives will be deemed sufficient or acceptable once the UK ceases to be part of the EU legal regime. It is expected that such issues will be resolved independently of the GRA in a greater inquiry of EU law that will follow the passing of this act. It is furthermore anticipated that the GRA will contain delegated powers which could be used, among other things, to make required amendments to existing national environmental provisions that implement EU directives. [20]

Directly applicable EU environmental law, including Treaty provisions, EU regulations, and directly applicable decisions, will require active transposition into UK law in order to not become defunct upon the entry into effect of the GRA. Precisely how this transposition is going to happen is as yet unclear. One mooted option is for the GRA to contain a 'continuance clause'; a broadly framed provision which transfers all directly applicable EU law into domestic law on Brexit day.[21] Additionally, a Schedule listing all EU legal instruments that are excluded from the effect of the continuance clause could be attached. Which EU environmental measures ought to be transposed, and which should be excluded, will hinge upon the progress and outcome of the Brexit negotiations. In all likelihood, therefore, final determinations on transposition and exclusion will only be completed after the 'divorce settlement' component of the Brexit negotiations has concluded. To that effect, as the Secretary of State for Exiting the EU pointed out, ministers will be vested with powers to "*make some changes by secondary legislation, giving the Government the flexibility to take account of the negotiations with the EU as they proceed*".[22]

Moreover, as with provisions in environmental directives, a significant proportion of directly applicable EU environmental law cannot be transposed into national law without further intervention. Regulations will require careful reviewing to identify provisions that are unworkable outside the EU context, such as safeguard clauses that allow national competent authorities to take emergency health and safety measures on the condition that they notify the European Commission. In other cases, exit from the EU may strip away the entire institutional infrastructure upon which regulatory provisions are built. The REACH Regulation, for example, is administered by ECHA, an institution in which the UK will no longer participate after Brexit, unless a bespoke agreement on the issue is reached. The fact that ECHA decisions would not be reviewable in accordance with national law, but instead fall under the jurisdiction of the CJEU, is a further complicating factor. The scope for transposition of the environmental principles contained in the Treaty on the Functioning of the EU, too, raises a host of challenging questions. Beyond the questions of whether the UK would want to domestically transpose these principles after leaving the EU, and how such transposition should be achieved within the GRA, there is also the question of what the reach would be of a former EU environmental principle in a post-Brexit landscape. Would it apply only to measures of EU ancestry, or across the board of environmental legislation?

5 Devolution before and after the Great Repeal Act

Environmental competencies are mostly devolved powers in the UK. [23] Hence, separate regimes secure the implementation of, for example, EU biodiversity protection, industrial permitting, waste, and air quality law in England, Wales, Scotland and Northern Ireland, respectively. Since much of EU environmental law is contained in directives, which typically leave the addressees some flexibility in implementation, devolved administrations have been able to tailor implementing instruments to a degree to suit local conditions.[24] At the same time, however, EU environmental law acts as a cohesive force across administrations and limits the scope for regional differentiation. The UK's decision to leave the EU could lead to devolved administrations

19 HoL, European Union Committee 'Brexit: Environment and Climate Change', pp. 16-17; S BELL, D McGILLIVRAY and OW PEDERSEN, Environmental Law, Oxford University Press, Oxford 2013, 518.

20 HoC Library Briefing Paper, Legislating for Brexit: The Great Repeal Bill, Number 7793, 21 November 2016, p. 35 http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7793#fullreport.

21 *Ibid*, p. 11.

22 'Government announces end of European Communities Act': Ministerial statement 2 October 2016, https://www.gov.uk/government/news/government-announces-end-of-european-communities-act.

23 See the Scotland Act 1998, Government of Wales Act 1998 and the Northern Ireland Act 1998. The legislative powers of the three devolved assemblies were further enhanced post 1998.

24 EA KIRK and KL BLACKSTOCK, 'Enhanced Decision Making: Balancing Public Participation against 'Better Regulation' in British Environmental Permitting Regimes' (2011) 23 Journal of Environmental Law, pp. 97-116.

taking greater ownership of environmental policy and ultimately result in a higher degree of legal and regulatory differentiation. However, it also creates a new host of challenges for devolved administrations.

A first set of challenges regards the involvement of devolved administrations in the process of converting EU environmental law into national laws. To date, what their role entails remains unclear, beyond noting that devolved administrations will be consulted and included in the process.[25] According to the Sewel Convention, "*Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament*".[26] Devolved administrations may well insist that this Convention be honoured with regard to the GRA, but the Supreme Court's recent ruling in *Miller* indicates that their consent is not formally required.[27] In his oral evidence on the impact of Brexit on the environment before the Welsh Parliament, Robert Lee asserted that whether the devolved administrations' consent is required would depend on the form of the GRA. If it simply features an open and general provision to repeal the ECA Act and retain EU law, consent would be unnecessary.[28]

Post Brexit, devolved administrations should have the discretion to decide if they want to retain the corpus of EU environmental law that falls within devolved competences or to repeal or amend it. However, securing this will in all likelihood require further legal reform. Presently, any amendment to statutory environmental law cannot be incompatible with the EU law, as guaranteed by the acts of devolved administrations. For example, s. 29 of the Scotland Act 1998 provides that an Act of the Scottish Parliament is not law if outside the legislative competence of the Parliament, which includes instances of incompatibility with EU law. It is not inconceivable that acts of devolved administrations would be amended simultaneously with the passing of the GRA.

The most likely scenario is that, initially, devolved administrations will by and large retain transposed EU environmental law. Over time, however, the environmental policies and laws of the various UK nations could drift further apart. Some devolved administrations could seize the opportunity of Brexit to develop a more ambitious environmental agenda that better responds to the particular needs and circumstances of the region. Others may want to repeal former EU provisions that are considered excessively costly or onerous. Further differentiation could foster the democratic legitimacy and effectiveness of environmental law, but it can also cause fragmentation and leave the country as a whole ill-equipped to confront transboundary environmental risks. Arguably, the short- and medium-term risk of fragmentation is modest. Moreover, the UK's membership of various international environmental agreements will continue to act as a convergent influence. Nevertheless, in the wake of Brexit the UK will need to consider the development of additional coordination strategies to protect the compatibility and sustainability of environmental decision-making across devolved administrations.

6 UK environmental law after Brexit

The successful extrication of UK environmental law from the EU legal sphere undoubtedly will be a challenging, complex process. It is also fair to anticipate that, in spite of the desire to ensure full coverage, some gaps may emerge which will need to be addressed quickly to safeguard the integrity of UK environmental law. Moreover, it is important to remember that the activation of the GRA is only the first step in a programme of gradual repatriation. After EU environmental law has been relabelled as national law, it will be the responsibility of the UK Government and devolved administrations to scrutinise and, where appropriate, initiate the updating, amendment or repeal of environmental legal provisions in line with the present Government's aspiration to be "*the first generation to leave the environment in a better place than it found it*".[29] The extent to which the UK will develop an environmental legal arsenal capable of delivering on this promise obviously depends on the executive's willingness to put their words into action. It is not the intention in this chapter to go into detailed speculation about the overall quality of future UK environmental law, but it must be acknowledged that current signs are worrying. We have seen with the most recent ministerial reshuffle the abolishment of the Department of Energy and Climate Change (DECC); the Brexit White Paper does not mention the environment, and the answer to a recent parliamentary question indicates that, so far, the Department of Environment, Food and Rural Affairs (DEFRA) has not commissioned any research on UK agricultural and environmental policy after Brexit.[30]

Some areas of environmental law may not be changed significantly, as it would be either detrimental for the UK or there is no incentive to change. For example, amending EU product quality regulation, which governs issues such as the permissible content of hazard-

25 'The Government's negotiating objectives for exiting the EU': PM speech, 17.01.2017, https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech

26 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, (Cm 5240 December 2001).

27 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.

28 Robert Lee, oral evidence to the External Affairs and Additional Legislation Committee 31.10.2016 http://www.senedd.tv/Meeting/Archive/bc4d752c-e33d-49db-bd28-1b861086e500?autostart=True#.

29 HoC Environmental Audit Committee Report 'The Future of Natural Environment after the EU Referendum', p. 41.

30 Parliamentary written Question 63096 of 06.02.2017 (C. Lucas) - Agriculture and Environment, at http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-02-06/63096/.

ous substances in certain products and vehicle emissions limits, would not only lower environmental protection but also impede the UK's ability to trade. In fact, in these areas the UK will have a clear incentive not only to retain EU standards, but also to follow and adopt future amendments to EU law. Failure to do so would saddle the UK with a range of technical regulations that are no longer up-to-date or capable of facilitating trade. Similarly, there are few incentives to change rules on environmental impact assessment (EIA), as they are firmly embedded in national law and any significant change would create unwelcome regulatory uncertainty for businesses and the legal profession. Other EU requirements, such as waste, air quality or renewable energy targets, are much more vulnerable to modification. Moreover, the UK enjoyed temporary derogations for the achievement of EU targets in certain areas, such as water quality standards under the Drinking Water Directive.[31] Post-Brexit, incentives to gradually push drinking water quality standards towards the EU level may whither, and the temporary state of exception may become the norm.

Alongside questions of the likely ambition of future UK environmental law, the full process of repatriation of environmental law will create a host of new challenges. The following sections review the anticipated impact of legal repatriation in key environmental policy areas and, in so doing, illustrate some of the most pressing dilemmas that lawmakers, administrators and courts will face as UK environmental law moves beyond Brexit.

6.1 Climate change

A large proportion of UK climate change law is either a direct application or implementation of EU legal measures on matters ranging from emissions trading, energy efficiency, fluorinated gases, transport fuel specifications and carbon capture and storage to the promotion of renewable energy.[32] However, the UK's core climate change text is a fully domestic product: the 2008 Climate Change Act (CCA). Vitally, the Act specifies the UK's long-term emissions reduction target: by 2050, the UK's net carbon account should be at least 80% lower than the 1990 baseline. To structure this process, the CCA requires the UK government to draw up five-yearly carbon budgets, which act as stepping stones toward the achievement of the overall 80% goal. The most recently adopted carbon budget covers the period of 2028 to '32 (Fifth Carbon Budget), and foresees a GHG emissions reduction of 57% by 2030. The carbon budgets are drawn up in consultation with the Committee on Climate Change, an independent statutory body which also monitors progress towards the achievement of the CCA's main objectives.

The CCA thus anchors UK climate policy to a number of fixed targets, and as a law of national origin it is likely to provide much-needed continuity during the Brexit transitional period. However, this does not mean the CCA is impervious to change: as an Act of Parliament it can, itself, be amended or repealed by subsequent parliamentary legislation. Indeed, former UK Environment Minister Owen Paterson has long been an advocate of precisely such a move.[33] Alternatively, the CCA allows the Secretary of State to alter either individual carbon budgets in the case of "*significant changes affecting the basis on which the previous decision was made*" (CCA s. 22) or even the 2050 target itself if "*it appears that there have been significant developments in …scientific knowledge about climate change, or (…) European or international law or policy*" (CCA s. 2). The anticipated scenario in drafting the latter provision was not, we submit, the UK's departure from the EU. Rather, it was primarily designed as a mechanism to ratchet up the UK's commitments should EU or international law demand a faster pace of change.[34] Yet, should the UK want to shift its targets downwards in coming years, it is not inconceivable that it would try to use the rather open-ended language of ss. 2 and 22 to accomplish this. The CCA therefore provides reassurance of continuity, but not an iron-clad guarantee.

EU climate change abatement policy rests on three key pillars: carbon reduction through emissions trading; energy efficiency; and the promotion of renewable energy.[35] EU legal instruments adopted towards the latter two objectives mostly take a meta-regulatory approach to environmental governance: instead of prescribing specific technical interventions, they require Member States to develop, document and report on national policies that contribute effectively both towards individual Member State and collective EU emissions reduction targets. Post-Brexit, in the presumed absence of a specific agreement, the reporting duties will fall away, which reduces opportunities for accountability. Nevertheless, the UK has put a reasonably robust legal infrastructure in place and this has supported the implementation of energy efficiency and renewable energy policies in compliance with EU obligations. With the necessary amendments, this infrastructure should be capable of delivering similar functions after Brexit. The same cannot be said, however, of the emissions trading component of UK climate change policy. Post-Brexit, the Commission will no longer have the competence to include a UK share in the calculation of overall allowances and, corre-

31 Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption [1998] OJ L 330.

32 S KINGSTON, V HEYVAERT and A CAVOSKI, European Environmental Law, Cambridge University Press, Cambridge 2017, pp. 273-275.

33 See http://www.telegraph.co.uk/news/earth/environment/climatechange/12046531/Why-we-have-to-scrap-the-Climate-Change-Act.html.

34 As the UK's emission reduction targets at the time of adopting the CCA were considerably more stringent than the EU's, it is very unlikely that the provisions were intended to respond to a future lowering of EU standards.

35 S KINGSTON, V HEYVAERT and A CAVOSKI, *supra* note 32, 273.

spondingly, the UK will no longer be able to issue or auction EU allowances to the approximately 1,000 UK facilities that are currently subject to the scheme. The UK's continued participation in the EU ETS would require a special agreement involving mutual recognition of EU- and UK-issued allowances. Such arrangements could however be complicated by the EU's legal restrictions on offsetting, which tightly limit the number of externally generated credits that can be converted into EU allowances.[36] Also, a linking agreement would subject the UK's management of emissions trading to a degree of Commission and, potentially, CJEU scrutiny. This may not be politically feasible. On the other hand, supplanting the EU ETS with a domestic emissions trading regime, or introducing alternative abatement obligations for ETS participant industries could be a high-cost, high-risk endeavour. The prospects for efficiency gains would be much weaker here, as UK facilities would no longer be able to trade, or would be compelled to trade on a much smaller market. A third option would be for the UK to seek access to an alternative emissions market in, for instance, the US or Asia. The California Regional Greenhouse Gas Initiative, or the nascent Chinese carbon market, could be plausible candidates. However, linking agreements with non-EU trading schemes may also expose the UK emissions market to both greater trading risks and external scrutiny.

A final point to consider regards Brexit's consequences for the UK's position in international climate change law. Currently, the UK's Nationally Determined Contributions (NDCs) under the Paris Agreement to the United Nations Framework Convention on Climate Change (UNFCCC) are subsumed within the EU NDC submission. Post-Brexit, the UK will need to prepare an individual NDC instead. One intriguing question is whether this submission would already be subject to the Paris Agreement's 'ratcheting expectation',[37] which requires successive NDCs to be more environmentally ambitious than their predecessors. More generally, Brexit will have a profound impact on the UK's ability to affect future negotiations and, correspondingly, the direction of international climate change law. As an EU member state, the UK is represented by the European Commission in most international environmental negotiations. The loss of membership may strengthen the UK's position, in that the UK gets to distinguish itself and represent its direct interests on the world stage. There is however a significant risk that in climate change negotiations, as in other international contexts, the UK will be a weaker player than as part of the EU28. As climate change negotiations are characterised by a particularly high level of coalition-building and negotiation in distinctive 'blocs', the UK is likely to lose influence as a sole operator. It could either join the EU as a negotiation partner, which might constrain the extent of future divergence between EU and UK climate change law and policy, or build a coalition with other states, such as Australia, the US and Canada. The latter choice could cause a fundamental shift in UK external and internal climate change strategy, and could potentially put the achievement of existing targets at risk.

6.2 Biodiversity

Like climate change, nature and biodiversity protection are multi-level governance issues, pursued at the international, European Union and national levels. Internationally, the UK is signatory to the landmark multilateral conservation and biodiversity protection agreements, including the World Heritage Convention, the Ramsar Convention on Wetlands, the Biodiversity Convention and the Convention on International Trade in Endangered Species. The chief instruments of the EU legal regime on nature and biodiversity protection, in turn, are the Birds and Habitats Directives,[38] both of which have been transposed into national law via delegated legislation. Moreover, nature and biodiversity protection are mostly devolved matters in the UK, which adds a further layer of regional decision making to the dense governance network in place.

This area of environmental protection is distinctive in that European and domestic conservation regimes do not only overlap in terms of shared competences, but also geographically. In England and Wales, a key instrument through which nature and biodiversity protection is organised is the designation of sites of special scientific interest (SSSIs). Where the government's advisory body for nature protection, Natural England (or the Natural Resources Council for Wales), considers an area of special interest for reasons of fauna or flora or for its geological or physiographical qualities, it should notify local authorities, owners and occupiers, and the Secretary of State that the area constitutes a SSSI. Importantly, this notification should include a management regime for the SSSI, identifying both actions likely to damage and to enhance the specialness of the area, which should be observed by the notified parties including owners and occupiers. Under EU law, the British regions have furthermore been required to identify special protection areas (SPAs), which are migratory bird habitats, and special areas of conservation (SACs), which are environmentally important habitats for species other than wild birds. Together, SPAs and SACs across the EU constitute Natura 2000, an integrated network of core breeding and resting sites for rare and threatened

36 Regulation (EC) No. 1123/2013 on Determining International Credit Entitlements pursuant to Directive 2003/87/EC of the European Parliament and of the Council [2013] OJ L 299/32.

37 Article 4(3) Paris Agreement, available at http://unfccc.int.

38 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L20/7; Council Directive 92/43/EEC on the conservation of natural habits and of wild fauna and flora [1992] OJ L206/7.

species, as well as some rare natural habitat types.[39] Member States must take steps to avoid the deterioration of SPAs and SACs, and must establish 'appropriate management plans'. In England and Wales, these requirements are typically met through the notification of a SSSI.[40] Hence, the overwhelming majority of SPAs and SACs are also SSSIs. However, compared to SSSIs of purely national importance, SPAs and SACs are subject to additional regulatory constraints. Most importantly, EU law requires that any development likely to significantly affect the site must be environmentally assessed, and in principle prohibits any development that is determined likely to negatively affect the integrity of the site.

The EU assessment requirement and development restrictions should be incorporated into national law by virtue of the GRA. Moreover, national courts are expected to continue to interpret former EU law provisions in accordance with EU case law on the subject, which is famously precautionary and known to err on the side of biodiversity over development.[41] Hence, theoretically SACs and SPAs should remain subject to a higher standard of protection than 'pure' SSSIs. However, once the EU context falls away, and particularly if funding for biodiversity enhancement via the EU LIFE Programme dries up,[42] this distinction may become difficult to justify. Conceivably, this could fuel a drive to extend the assessment and development conditions to non-EU SSSIs, but a swing in the opposite direction is arguably more plausible. If so, this would result in the removal of environmental safeguards to protect many of the country's most precious habitats against the eroding force of unchecked development. Alternatively, the provisions might remain on the books, but their weaker legitimacy could negatively impact developers' and public authorities' willingness diligently to observe regulatory conditions. At worst, the assessment and development conditions could devolve into 'zombie legislation' – corporeally present, but stripped of its essence.

A reduced willingness to enforce the EU aspects of nature and biodiversity conservation would place a greater onus on concerned citizens to act as watchdogs and avert the decline of legal provisions into zombie legislation, for example, by judicially challenging planning permissions granted in the absence of an appropriate assessment. However, as will be discussed in the section below, the disappearance of the EU legal framework may make it harder for third parties to fight and win such legal battles.

6.3 Air and water

The UK is famously the birthplace of the world's first air pollution agency, the Alkali Inspectorate. In the past forty years, however, the EU has been the main driving force in both air and water regulation. This is one of the most comprehensively developed parts of the EU environmental law. It regulates polluting activities, ranging from air pollution from mobile and stationary sources to point and diffuse sources of water pollution, and deploys a similar 'belt and braces' approach in both fields: it imposes emissions and environmental quality standards in combination with product and process standards. Member states are required to produce plans and programmes and to regularly monitor and assess air and water quality. Public involvement is an important feature in both areas and information on ambient air quality and water quality has to be made available to the public.

EU water and air law is mainly in the form of directives which have been transposed nationally via primary and secondary legislation. There is a broad consensus that EU law has had a particularly positive impact on water quality in the UK. The quality of bathing water has continuously improved over the years and this is largely due to advances in infrastructure, including sewerage and treatment facilities, imposed by the Waste Water Directive.[43] There is obviously room for improvement. For instance, too few water bodies within river basin districts under the Water Framework Directive have achieved 'good quality' status.[44] Furthermore, the UK's track record of delivering a high level of environmental protection with regard to air quality is unfortunately much less encouraging. Its emissions rates persistently exceed EU-determined maxima for several air pollutants, in particular nitrogen oxide and particulate matters. The UK's large-scale failings to meet ambient air standards were recently exposed in *Client Earth,*[45] in which the UK Supreme Court ruled that the government had breached its air quality protection obligations under EU law. The case highlighted that, in 2010, 40 of out 43 zones or agglomerations in the UK significantly exceeded several limits values for nitrogen dioxide prescribed in the EU Ambient Air Quality Directive.[46] In the following five years, levels of compliance deteriorated further, especially in urban areas.[47] In 2016 and 2017, London reached and breached its annual

39 S KINGSTON, V HEYVAERT and A CAVOSKI, *supra* note 32, 416-420.

40 J HOLDER and M Lee, Environmental Protection, Law and Policy, Cambridge University Press, Cambridge 2007, 648.

41 Case C-127/02 Waddenzee ECLI:EU:C:2004:482; Case C-258/11 Sweetman ECLI:EU:C:2013:220.

42 See http://ec.europa.eu/environment/life/index.htm.

43 In 2016, 287 bathing waters in England (69.5 per cent) met the excellent standard of the Bathing Water Directive. See more in Statistics on English Coastal and Inland Bathing Waters: A Summary of Compliance with the 2006 Bathing Water Directive, https://www.gov.uk/government/statistics/bathing-water-quality-statistics.

44 See https://www.gov.uk/government/collections/river-basin-management-plans-2015.

45 R v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28.

46 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 [2008] OJ L152/1.

47 *Supra* note 45, para 30.

nitrogen dioxide limit, which provides that hourly maximum levels may be exceeded at most 18 times per year, in the first weeks of January.[48]

As air and water pollution are textbook transboundary environmental issues, it is expected that post-Brexit UK-EU relations will be marked by at least some degree of cooperation. This is particularly pertinent to Northern Ireland and the Republic of Ireland, which are interconnected terrestrially, atmospherically and aquatically.[49] Cooperation could partner the UK's environment agencies with the European Environment Agency and could secure the sharing of environmental information and scientific knowledge related to air and water. Industry representatives also expressed an interest in continuing cooperation with European networks and counterparts in EU Member States.[50]

The key challenge for the UK after Brexit will be to maintain water standards, enhance air quality and ensure the effective enforcement of national legislation. The latter will be especially challenging since the UK's departure from the EU severely curtails the range of enforcement mechanisms available to civil society and countries affected by transboundary pollution. With the unavailability of the management and enforcement mechanisms under Arts. 258, 259 and 260 TFEU, a critical layer of accountability will be lost. The Commission, as a supervisory authority, effectively uses both mechanisms to ensure Member State compliance in the environmental policy area. Moreover, in the past decade it has made a concerted effort to embed citizens' concerns into its approach to environmental compliance and address the negative perception of the EU as an elite organisation. The Commission's invigilation is further backed up by the disciplining force of the CJEU, which has the authority to identify non-compliance and impose financial sanctions on Member States. The UK has been on the receiving end of this disciplining force on the very question of water regulation: in 1992 the CJEU found the UK in breach of its obligations to respect the 'maximum admissible concentrations' under the 1980 Drinking Water Directive.[51] Recently the Commission again exercised its supervisory powers and issued a final warning to the UK over continued air pollution breaches, in particular repeated breaches of air pollution limits for nitrogen dioxide before taking the matter before the CJEU.[52]

In the absence of the EU's enforcement machinery, the burden of monitoring Government compliance with legal air and water quality standards will increasingly rest on the shoulders of civil society organisations. However, the channels through which NGOs and other concerned citizens can voice their concerns are limited: the remit for intervention by the Local Government Ombudsman is extremely restricted, as is the scope for judicial review of public policy decisions, especially when the cause of complaint is a lack of government action, rather than an allegedly disproportionate or unlawful action. Moreover, even if the option of judicial review were available, UK courts will no longer have recourse to the preliminary reference procedure to pass on potentially controversial decisions to the CJEU. Without this mechanism, national courts may become more conservative in the interpretation of environmental provisions that have not yet been clarified through CJEU case law, and might adopt a more deferential attitude towards UK governmental authority.

7 Conclusion: Post Brexit Challenges for Environmental Law

The current UK Government likes to assert that the UK may be leaving the European Union, but it is not leaving Europe. In the case of environmental protection, this is not only a political slogan but also an inescapable physical reality. The effective regulation of local and global environmental problems will continue to require concerted action throughout the European region. Thus, the challenge for the UK is to ensure continued cooperation, as its absence would jeopardise the state of the environment in the UK and would moreover expose the country to significant potential trade barriers. The lack of any meaningful discussion on environmental protection in the light of Brexit to date is, therefore, greatly worrying.

Governmental reticence and the pervasive uncertainties surrounding the details of the GRA and its consequences complicate an informed, level-headed assessment of the extent to which Brexit will affect, and possibly impair, environmental legal protection in the UK. At best, post-Brexit environmental quality standards could go beyond EU ambitions, and UK product standards could remain compatible with EU counterparts. At worst, Brexit could become an opportunity to perform an environmental 'regulatory roll-back', especially in those areas where the UK is already performing badly, such as air quality.

The future of enforcement of environmental law in the UK, too, hangs in the balance. The loss of the EU's enforcement machinery removes a vital layer of accountability and an important environmental safeguard. This will put greater pressure on civil society and national courts to scrutinise and, if needed, challenge the adequacy of domestic accountability mechanisms.

48 D CARRINGTON, 'London Breaches annual air pollution limit for 2017 in just five days' The Guardian, 6 Jan. 2017, at: https://www.theguardian.com/environment/2017/jan/06/london-breaches-toxic-air-pollution-limit-for-2017-in-just-five-days.

49 HoL, European Union Committee 'Brexit: Environment and Climate Change', p. 37.

50 *Ibid*, p. 42.

51 Case C-340/96 Commission v United Kingdom ECLI:EU:C:1999:192.

52 See http://europa.eu/rapid/press-release_IP-17-238_en.htm.

Imprint

Editors: Martin Führ, Andreas Hermann, Gerhard Roller, Julian Schenten and Claudia Schreider (née Fricke)

Editors in charge of the current issue:
Martin Führ and Julian Schenten

Editor in charge of the forthcoming issue:
Gerhard Roller (roller@th-bingen.de)

The Editors would like to thank **Michelle Monteforte** (Öko-Institut) for proofreading the *elni Review*.

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.

The *elni Review* is published with financial and organisational support from Öko-Institut e.V. and the Universities of Applied Sciences in Darmstadt and Bingen.

Authors of this issue

Fatima Arib, Professor of sustainable development economics; Research Laboratory "Innovation, Responsibilities and Sustainable Development INREDD"; Cadi Ayyad University, Marrakech (Morocco);
f.arib@uca.ma.

Aleksandra Čavoški, Senior lecturer, teaching and research interests in the areas of environmental and EU law. particular interest in EU accession countries; University of Birmingham;
a.cavoski@bham.ac.uk.

Céline Charveriat; Executive Director at Institute for European Environmental Policy (IEEP); Specialist subjects are climate change, sustainable development, agriculture;
ccharveriat@ieep.eu.

Andrew Farmer, Director of Research and Head of Industry, Waste and Water Programme at Institute for European Environmental Policy (IEEP); specialist subjects are water, pollution control and effects of pollution, marine;
afarmer@ieep.eu.

Veerle Heyvaert, Associate Professor in law, specialised in European Union law, environmental law, risk regulation; London School of Economics and Political Science (LSE);
v.heyvaert@lse.ac.uk.

Ludwig Krämer, Senior environmental lawyer at ClientEarth, Brussels;
lkramer@clientearth.org.

Thomas Ormond, legal officer with the regional environmental administration (Regierungspräsidium Darmstadt) in Frankfurt am Main; from 2004-2008 seconded national expert for waste shipment matters with the EU Commission (DG Environment);
thomas.ormond@rpda.hessen.de.

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Contact

Freiburg Head Office:
P.O. Box 17 71
D-79017 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:
Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:
Schicklerstraße 5-7
D-10179 Berlin
Phone +49(0)30-40 50 85-0
Fax +49(0)30-40 50 85-388

www.oeko.de

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Contact

Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de

www.fh-bingen.de

sofia

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.
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Contact

Darmstadt Office:
Prof. Dr. Martin Führ - sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49(0)6151-16-8734/35/31
Fax +49(0)6151-16-8925
fuehr@sofia-darmstadt.de

www.h-da.de

Göttingen Office:
Prof. Dr. Kilian Bizer - sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49(0)551-39-4602
Fax +49(0)551-39-19558
bizer@sofia-darmstadt.de

www.sofia-research.com

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, focussing 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 researches, 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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elni, c/o Institute for Environmental Studies and Applied Research
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