

## The governance gap: why Brexit could weaken environmental protections

Briefing for parliamentarians and policy makers  
August 2017

### Summary

Under the UK government's current plans, it will be harder to enforce and uphold environmental laws after Brexit.

Great progress has been made in developing and improving environmental laws over the past 40 years. However, these laws are only effective when they have strong institutions and mechanisms to support and implement them in practice. Laws on paper are not self-executing, and governments often do not fully implement measures they have agreed to. Furthermore, robust enforcement mechanisms are needed for when environmental requirements and standards are not being met.

The practical need for oversight of environmental standards is clearly seen in the case of the UK's breach of legal air quality standards. ClientEarth has brought action in the UK courts under EU law and the UK may ultimately face infringement proceedings from the European Commission backed by fines in the European Court of Justice.<sup>1</sup> Clean air laws exist to protect people's health, but governments must act to implement them. Without a way to enforce legislation and hold governments accountable to environmental standards, the laws would be hollow and cleaning up the air in our cities would be even harder.

To ensure the high level of environmental protection that benefits the whole of society and nature, domestic governance institutions need to be sufficiently resourced, independent, empowered and expert. Otherwise, environmental law will fail. Current arrangements are far from perfect, but unless the government's stance changes, a damaging 'governance gap' will appear when the UK leaves the EU.<sup>2</sup>

Citizens and public interest organisations have a vital and recognised role in environmental decision making and environmental protection. These voices need accessible forums and the support of appropriately empowered institutions to stand up for the health and well-being of people and nature. Until now, we have been very reliant on EU institutions and processes to achieve this. While the precise role of EU or other bodies in overseeing future relationships between the UK and EU will depend on the outcome of the negotiations, we already know that the UK will have to replace some key oversight functions with new domestic arrangements.

## How can we avoid the 'governance gap' once the UK is outside the EU?

The UK, Scottish and Welsh governments have committed to saving current environmental laws on leaving the EU. However, simply transferring the letter of the law is not enough: we also need adherence to and upholding of that law. Action is needed to create governance arrangements that do the following:

- 1 **Monitor and measure** the state of the environment in a fully transparent fashion.
- 2 **Ensure proper implementation** of environmental law and policy. For example, by supervising plans that give effect to environmental law, overseeing permitting regimes (including responsibility for granting exemptions), and ensuring robust and consistent application of the law.
- 3 **Check compliance** with environmental law and policy by government, business and other actors. This includes reviewing progress against plans, assessing the legality of decisions and scrutinising whether targets, conditions and requirements are being adhered to.
- 4 **Enforce environmental law** by initiating investigations into possible breaches and responding to complaints from citizens and civil society organisations. Breaches must be identified and acted on, with the application of appropriate remedies and sanctions.
- 5 **Review and report** information regarding both the state of the natural world and performance against policy objectives.
- 6 **Publish environmental information** fully and transparently.

Although there are domestic institutions that perform some of these tasks, the majority are currently delivered by EU institutions. Post-Brexit, UK governance institutions must have (i) adequate resources (ii) full independence (iii) relevant expertise and (iv) sufficient legal powers to uphold and enforce that law.

A long term perspective is needed to respond properly to environmental problems. Short term political cycles need to be accompanied by mechanisms that take account of slower natural cycles and can act in the interest of future generations. Furthermore, environmental issues do not respect borders. It will therefore be essential for the UK and devolved administrations to work together to develop frameworks that can maintain similarly high standards of environmental protection across, and beyond, UK borders.

## Limitations of existing domestic governance arrangements

The UK government has recently asserted that Judicial Review can adequately provide the sole mechanism for civil society to challenge the application of environmental legislation post-Brexit.<sup>3</sup> However, this misunderstands both the breadth of functions currently performed by EU institutions and the limitations of judicial review. Even with the additional functions performed by domestic agencies, parliaments and government departments – and the assurance that all existing environmental laws will be saved – a governance gap will open up in achieving environmental requirements and standards unless further action is taken.

Environmental protection is dependent on robust governance, but existing domestic institutions do not have the resources, expertise, powers or independence needed. Neither the UK government nor any devolved government has made any firm commitments to introduce any new governance functions after the UK has left the EU.

## Limitations of domestic environmental agencies and bodies

Agencies such as the Environment Agency, Natural Resources Wales and Scottish Natural Heritage have important roles (eg monitoring, ensuring compliance and reporting on the state of the environment). However, they have been significantly eroded in terms of resources, expertise, powers and independence in recent years. More fundamentally, these agencies must be subject to external scrutiny because, as regulators of various laws, they cannot be both policeman and judge of their own activities and powers.

For example for a number of years, the UK authorities have allowed the damaging practice of burning blanket bogs within English Special Areas of Conservation (SACs), without the appropriate assessment required by the Habitats Directive. The European Commission is now taking steps to require appropriate action by UK authorities to address this; failure to do so could end in referral to the European Court of Justice.

## Limitations of domestic courts

The courts have important roles to play in environmental governance but are insufficient on their own to ensure effective implementation and enforcement of environmental law. In particular, judicial review is too narrow in terms of scope and remit, too restrictive in terms of access (including costs) and too limited in terms of remedies and sanctions. The domestic system is not equivalent to the existing arrangements for environmental governance within the EU, and where the UK courts apply and enforce EU environmental law, EU rules mean the courts need to follow a higher standard of review and provide remedies to address breaches of environmental law. For example, a judicial review into blanket bog burning could only have considered consent for one site due to the strict time limits, whereas the

European Commission is requiring action to be taken across the UK, beyond a single site.

Furthermore, the system has recently been weakened. We are particularly concerned by recent changes to the costs rules for environmental cases in England and Wales and proposed changes to the regime for protected expenses orders in Scotland. These changes remove financial certainty for claimants and reduce the time available to make a challenge. They are very likely to deter - and potentially prohibit - civil society from challenging actions and decisions in court.

### Limitations of domestic parliaments

Parliaments can, of course, scrutinise government action (including through select committees) and introduce new legislation if they feel laws are not being enforced or are ineffective. But they do not have the relevant scientific or technical expertise, or sufficient time or capacity to fill the expected governance gap, and nor are they completely independent of the executive. Furthermore, parliaments, which are sensitive to short term political needs, are not best placed to assess the long term effects of a failure to implement environmental law.

### Conclusion

Existing domestic accountability mechanisms, through the agencies, courts and legislatures of the four nations of the UK, have worked alongside EU mechanisms to give substance and impetus to environmental law. These national arrangements are necessary, but insufficient by themselves. With adequate resources, they will provide important safeguards but, on their own, and without reinforcement, they will not fill the post-Brexit governance gap.

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## Endnotes

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<sup>1</sup> European Commission press release dated 15 February 2017 *Commission warns Germany, France, Spain, Italy and the United Kingdom of continued air pollution breaches*. [http://europa.eu/rapid/press-release\\_IP-17-238\\_en.htm](http://europa.eu/rapid/press-release_IP-17-238_en.htm).

<sup>2</sup> As recognised by the House of Lords EU Committee, *Brexit: Environment and Climate Change* (12th Report of Session 2016–17) [84].

<sup>3</sup> Department for Exiting the European Union, 'The Repeal Bill, Factsheet 8: Environmental protections' p2.

Greener UK is a group of 13 major environmental organisations, with a combined public membership of 7.9 million, united in the belief that leaving the EU is a pivotal moment to restore and enhance the UK's environment.

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