

Following a referendum which has polarised the nation, the people of the UK have voted to leave the European Union. Stepping away from the political rhetoric and posturing, it is worth reflecting on some of the more practical issues which will arise from this decision, such as how it could affect our environmental law landscape.

From a historical perspective, the UK was once referred to as the ‘dirty man of Europe’, with relatively lax levels of environmental regulation and standards. Since joining the EU in the 1970s, environmental standards imposed, largely through EU legislation, saw a significant strengthening of the UK’s environmental protection regimes and of environmental standards. However, much of that change might have happened in any event as environmental issues have moved up the political and community agendas in the last 40 years.

The majority of environmental legislation in the UK is derived from the EU, largely from directives which have been implemented by UK domestic secondary legislation. Increasingly, however, we have absorbed EU regulations, such as REACH, CLP and the Biocidal Products Regulation, which are directly applicable in the UK, with national law only having to deal with enforcement and penalties.

So what now for environmental law from a practical and policy perspective?

Status of EU Based Environmental Laws

Exiting the EU will not be an instant event, but rather a long process which will take several years. At the end of the transitional period, EU treaties, regulations and directives will cease to apply to the UK. In the case of directives, the situation will be particularly complex because those are implemented by UK legislation which will not cease to apply, but which is interlaced with references to EU law.

Assuming there is no overall plan to abolish and revoke every single EU based measure, there will need to be a detailed review of all environmental legislation during the transitional period to work out what should continue to apply, and also the mechanics for retaining regulations where the legal text is directly in EU legislation rather than in domestic laws. Even if the UK wants to move away from some of the EU-based laws, care will have to be taken to avoid the gaps in coverage and uncertainty this could create. Further, a number of environmental laws derive from international treaties to which the UK is a signatory in its own right, for example the Basel Convention on transboundary shipments of waste, and so the UK will have to maintain laws to meet the requirements of those conventions.

The status of EU case law is another question. The interpretation of our EU derived environmental law is often based on or supplemented by case law of the European courts. What status will be given to that case law when the UK leaves the EU, and can a line be drawn between the effect of case law that pre-dated Brexit, and new case law after that date?

Environmental Standards for Market Access

Even though the UK has voted to leave the EU, it will still want and need access to EU markets, and this could be structured in a number of different ways. If the UK joins the EEA and/or EFTA then it will still have to meet the standards of key EU legislation, including environmental standards, and so will still be constrained by EU environmental law. Even if the UK does not join those groupings, in practical terms it will still need to meet environmental product and supply chain standards in order to be able to supply products and services into the EU (such as RoHS and CLP).

Environmental Policy Direction

What impact will the split with the EU have on future policy direction in environmental matters? If the UK retains the status quo at first, it is possible that legal standards could be adjusted over time to a more UK specific set of environmental legislation. This could mean less stability and certainty in understanding and anticipating environmental laws, as the UK legislative process is more susceptible to the political cycle than the EU legislative process. It could also lead to lower or less ambitious standards in environmental protection. A group of former heads of environmental charities and regulators wrote to the government during the campaign to that effect. Others argued that Brexit will allow the UK more freedom to make environmental laws that are adapted to UK-specific circumstances, rather than EU-wide ones. One rather perverse possible effect is that, without the UK there as a powerful influencer, EU law could change in a particular direction going forward, and the UK may then have to comply with those new or additional environmental requirements in order to gain EU market access.

In conclusion, the Leave vote is just the beginning of a long and complex process to unpick and separate out the UK’s environmental legislation into a stand-alone set of rules and regulations. Going forward it is very unclear what approach the UK might take to how much of that legislation it would maintain for its own policy objectives and to continue to be able to access EU markets.