

11 February 2021

Environmental Law & Governance Post-Brexit

An analysis for ClientEarth

Introduction

1. This report presents a high-level overview of some gaps and challenges facing environmental law in the United Kingdom post-Brexit. It was prepared for ClientEarth by DLA Piper UK LLP¹ and Rachel Jones of Blackstone Chambers, acting *pro bono*, and is correct as of 11 February 2021. This report is for reference purposes only. It does not constitute legal advice and should not be relied upon as such. Specific legal advice about your particular circumstances should always be sought separately. We accept no responsibility for any actions taken or not taken on the basis of this publication.
2. The report proceeds in four parts:
 - 2.1 **Chapter 1:** an overview of the challenge to law and governance presented by the loss of supranational ‘architecture’ used to enforce environmental standards across the UK.
 - 2.2 **Chapter 2:** the replacement of the EU legislative framework – in particular Regulations and Directives, which had primacy over national law – with new, UK-specific laws and processes known as ‘retained EU law’.
 - 2.3 **Chapter 3:** a reflection on the UK Government’s plans for environmental protections going forward, highlighting key points from the Environment Bill (2019-21) and the UK/EU Trade and Cooperation Agreement (2020) and considering case studies on air quality and pesticides.
 - 2.4 **Chapter 4:** an outline of rule of law developments more broadly, in particular the Independent Review of Administrative Law and greater use of secondary legislation.
3. By way of context the key dates relevant to the United Kingdom’s withdrawal from the European Union (i.e. ‘Brexit’), are as follows:
 - 3.1 **23 June 2016:** the UK votes to leave the European Union in a referendum.
 - 3.2 **26 June 2018:** The European Union (Withdrawal) Act 2018 receives Royal Assent, providing for ‘retained EU law’ i.e. transposing many EU laws into domestic legislation.
 - 3.3 **19 October 2019:** the UK and the EU publish the Withdrawal Agreement and Northern Ireland Protocol; *inter alia* providing for a ‘transition period’ after Brexit.

¹ ClientEarth thanks Sarah Crowe, Angus Eames, Naomi Lawrence and Harry Thompson, assisted by Sadhie Abayasekara, of DLA Piper UK LLP for their generous support in preparing this report

- 3.4 **23 January 2020:** the European Union (Withdrawal) Act 2020, implementing the Withdrawal Agreement, receives Royal Assent.
- 3.5 **31 January 2020:** at 11 pm, the UK leaves the EU and the transition period begins.
- 3.6 **24 December 2020:** the UK and the EU agree a Trade and Cooperation Agreement, to come into effect after the end of the transition period.
- 3.7 **31 December 2020:** the transition period ends.

Chapter 1 – Loss of EU architecture

The European Commission and the Court of Justice of the European Union

- 4. Article 3 of the Treaty on European Union (“**TEU**”) specifies, as one of the EU’s objectives, “*a high level of protection and improvement of the quality of the environment*”. Title 20 of the second foundational document, the Treaty on the Functioning of the European Union (“**TFEU**”), is dedicated to the environment; Article 191(2)-(3) provides that EU policy “*shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay*”, taking account of various factors, including available scientific data. The EU treaties ceased to apply to the UK upon its withdrawal from the EU on 31 January 2020.²
- 5. EU ‘secondary’ law (i.e. Regulations and Directives) imposes various duties on the Member States; for example, to improve air quality,³ to assess any significant impact of proposed developments on protected habitats,⁴ and to develop a ‘marine strategy’.⁵ Two institutions in particular are charged with enforcing EU law under the Treaties:
 - 5.1 **The European Commission** monitors compliance with EU law and has specific enforcement powers if it considers Member States to be in breach of their obligations; it can bring ‘infraction’ proceedings and, ultimately, apply to the Court of Justice of the European Union (“**CJEU**”) (Article 258 TFEU). Most EU environmental laws oblige Member States to report to the Commission, on a regular basis, about implementation.⁶
 - 5.2 **The CJEU** is empowered to declare that a Member State has failed to comply with EU law, in which case the state must put an end to the breach; and the Court may impose a financial penalty if its judgment is not complied with (Articles 258-260 TFEU). The CJEU may also make rulings about the meaning and effect of EU law if questions are referred by a national court (Article 267 TFEU).

² Article 50(3) TFEU and Article 185 of the EU/UK Withdrawal Agreement, agreed on 17 October 2019, available [here](#)

³ Directive 2008/50/EC available [here](#)

⁴ Council Directive 92/43/EEC available [here](#)

⁵ Directive 2008/56/EC available [here](#)

⁶ UKELA, ‘Brexit and Environmental Law – Enforcement and Political Accountability Issues’, July 2017, at [10]

6. In respect of events after 31 December 2020, i.e. after the end of the ‘transition period’, the Commission and the CJEU no longer have any role in enforcing environmental law in the UK.⁷
7. The UK Environmental Law Association (“**UKELA**”) has explained the practical importance of the Commission’s enforcement role:

“the Commission has been especially active in the environmental field ... in most jurisdictions, including the UK, public bodies ... have a particular responsibility for environmental protection – but it is often those same bodies that face conflicting policy priorities and financial constraints, making it all too easy for their environmental obligations to be compromised or underrated. The supervisory role of the Commission in ensuring that the obligations of these bodies under European environmental law are properly implemented has, as a consequence, been especially important ... It has developed a citizens’ complaint procedure under which anyone can alert the Commission of a potential breach without any cost ... The Commission also relies upon implementation reports sent by Member States as well its own studies and issues highlighted by MEPs’ questions ... Many of its infringement proceedings have been concerned with instances where the formal law is in place but has not been effectively implemented”. [Emphasis added]⁸

8. The Commission’s unique role as ‘Guardian’ of EU environmental law is not easily replicated. UKELA argued that the possibility of judicial review is no substitute for the Commission’s “*systematic enforcement role*”, with its technical expertise, access to data, and special duty to police compliance. Nor do national courts have powers equivalent to the CJEU, e.g. imposing financial penalties.⁹
9. In 2017, then-Secretary of State for the UK Department for Environment, Food and Rural Affairs (“**DEFRA**”) Michael Gove MP accepted that “*unless you have some means of holding Governments and other public bodies to account there is always the danger that environmental damage can be generated or inflicted without an appropriate means of ensuring that, in the broadest sense, justice can be done... Outside the European Union the question is what replaces the Commission, how do we have the [CJEU] as a role replicated. This is an absolutely important question.*”¹⁰
10. In addition, in seeking to develop and enforce environmental standards, the UK will no longer have access to the expertise of specialist EU bodies, for example:
 - 10.1 The European Chemicals Agency, which works with the Commission and Member States to “*identify substances that give cause for concern*” and “*helps companies comply with specific EU legislation on chemicals*”, notably ‘REACH’¹¹ (EC 1907/2006: the Registration, Evaluation, Authorisation and Restriction of Chemicals). An analysis

⁷ Article 126 of the Withdrawal Agreement specifies the end date of 31 December 2020. Article 86(1) provides that the CJEU “*shall continue to have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period.*” Article 87 provides that, within 4 years from that date, the Commission may bring new infringement cases against the UK before the CJEU in respect of breaches of EU law occurring before the transition period ended

⁸ UKELA, ‘Brexit and Environmental Law – Enforcement and Political Accountability Issues’, July 2017, at [5-7]

⁹ *Ibid* at [20-23]

¹⁰ Environmental Audit Committee Oral evidence: The Government’s Environmental Policy, HC 544, 1 November 2017

¹¹ https://europa.eu/european-union/about-eu/agencies/echa_en

by the Institute for Government (“IFG”) suggests that the ECA’s functions will be split between the Health and Safety Executive and the Environment Agency, post-Brexit.¹²

10.2 The European Food Safety Authority (“EFSA”), which provides independent scientific advice on food-related risks. The EU Commission approves ‘active ingredients’ in pesticides, i.e. evaluates their safety for consumers before they can be placed on the market,¹³ and sets the maximum residue levels (“MRLs”) of pesticides which may be present in food.¹⁴ This involves evaluations by representatives of EU Member States (in a ‘Standing Committee’) and the Commission, informed by a process of scrutiny and scientific risk assessments by EFSA: e.g. assessing the toxicity of a pesticide and considering potential effects on different groups of consumers, such as children.¹⁵ A briefing paper for the UK Trade Policy Observatory (“TPO”), analysing secondary legislation¹⁶ passed by the UK Government, has argued that the new domestic rules: *“replace the roles of EFSA, the Standing Committee and the European Commission with discretionary powers for UK ministers to amend, revoke or make pesticide regulations and issue guidance on how approval processes for new pesticides and maximum residue levels are to be carried out... Provision in EU law for the integration of independent scientific assessments is replaced with discretion for ministers to decide whether or not to obtain independent scientific advice”*.¹⁷

Devolution

11. It is not possible to replace supranational EU processes with a single, national framework because of the UK’s devolution settlement. Except for a small number of areas ‘reserved’ to the UK government, the environment is generally a devolved matter, which means that power was transferred from the Westminster Parliament to the administrations of Scotland, Wales and Northern Ireland to create their own, bespoke environmental laws.
12. The scope for divergence between the four parts of the UK on environmental protection has therefore increased as a result of Brexit, as the whole country is no longer bound to observe a common, supranational framework of EU law.¹⁸ Absent that common EU framework, the increasing fragmentation of environmental policy between the constituent parts of the UK could frustrate progress on common, cross-border environmental objectives.
13. It could also result in some parts of the UK lagging behind others; in 2017, then-Secretary of State for DEFRA, Michael Gove MP, observed that: *“I have to be honest, there are things that both the Scottish and Welsh Administrations have done that have been admirable and in advance of what we have done in England, so they have set the standard in the UK.”*¹⁹

¹² IFG, ‘Preparing Brexit – How ready is the UK?’ 3 November 2020, available [here](#)

¹³ Regulation (EC) No 1107/2009, available [here](#)

¹⁴ Regulation EC 396/2005, available [here](#)

¹⁵ https://ec.europa.eu/food/plant/pesticides/max_residue_levels/eu_rules_en

¹⁶ The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/556); the Pesticides (Maximum Residue Levels) (Amendment etc) (EU Exit) Regulations 2019 (SI/2019 557)

¹⁷ https://blogs.sussex.ac.uk/uktpo/publications/brexit-food-safety-legislation-and-potential-implications-for-uk-trade-the-devil-in-the-details/#_ftn15

¹⁸ See e.g. HL Paper 109, House of Lords EU Select Committee, ‘Brexit: environment and climate change’, chapter 9 ‘Devolution and the environment’, available [here](#)

¹⁹ Oral evidence to the Environmental Audit Committee, HC 544, 1 November 2017, Q28, available [here](#) (“The Government’s Environmental Policy Inquiry”)

14. However, different approaches may reflect different local conditions, and regulators and governments may learn from each other's approaches (as Mr Gove's statement suggests).²⁰ Moreover, the Westminster Parliament could create some UK-wide arrangements or standards, with the consent of devolved administrations; in the case of the Environment Bill, for example, the Northern Ireland Assembly has consented to the UK legislating in this devolved area.
15. The unique and complex position of Northern Ireland more generally is beyond the scope of this paper. In brief, the Northern Ireland Protocol (the agreement between the UK and the EU in 2019 to obviate the need for a 'hard border' between the north and south of the island of Ireland)²¹ places it in a different regulatory position to the rest of the UK. It remains to be seen what impact the Protocol has, in practical terms, in keeping Northern Ireland more closely aligned to EU environmental policy (i.e. that of Ireland) than the rest of the UK.

Possible replacements to enforce public authorities' environmental obligations in the UK

16. The Environment Bill currently before Parliament will, if it receives Royal Assent, create a new Office for Environmental Protection ("OEP"). The Bill is discussed further in Chapter 3. In the Queen's Speech in October 2019, the OEP was described as: *"A new, world-leading independent regulator...to scrutinise environmental policy and law, investigate complaints and take enforcement action"*.²² The Government intended the OEP to be operational by the end of the transition period, i.e. January 2021; but the passage of the Bill has been delayed.²³
17. Much of the Bill applies to England only, although the OEP will also have functions in Northern Ireland (Schedule 3). In 2019, the House of Commons' Environmental Audit Committee ("EAC") expressed disappointment that, in its view: *"limited effort has been made to co-design a body and governance framework to cover all four nations of the UK"*.²⁴ The Chair of the Commons' Environment, Food and Rural Affairs Committee ("EFRAF") has recently said that the OEP *"will pick up the environmental regulatory responsibilities from the EU, working with the equivalent bodies in Scotland and Wales, which is a vital role"*.²⁵
18. The OEP's principal aim is to contribute to environmental protection and the improvement of the natural environment (Clause 22). Its non-executive members, including its Chair, have been appointed by the Secretary of State, and must *"have regard to the need to protect [the OEP's] independence"* (Schedule 1, para 1(2), 17).
19. Chapter 2 of the Environment Bill sets out the OEP's proposed functions:

19.1 The OEP must publish a strategy on how it will exercise its functions, which must contain an 'enforcement policy', including how it intends to prioritise cases (clause

²⁰ See also evidence given to the House of Lords: HL Paper 109, House of Lords EU Select Committee, 'Brexit: environment and climate change', chapter 9 'Devolution and the environment', available [here](#)

²¹ Available [here](#) and see further, the Cabinet Office 'Command Paper' on the Protocol, December 2020, [here](#)

²² <https://www.gov.uk/government/speeches/queens-speech-2019>

²³ NAO, 'Achieving government's long-term environmental goals' 11 November 2020, summary, para 21 available [here](#)

²⁴ Environmental Audit Committee, 'Scrutiny of the Draft Environment (Principles and Governance) Bill' (25 April 2019) available [here](#)

²⁵ UK Parliament website, 'MPs give green light to Dame Glenys Stacey as UK's new environmental watchdog' (18 December 2020) available [here](#)

22(3) and (6)). The Secretary of State has a controversial²⁶ power to give ‘guidance’ to the OEP on its enforcement policy, to which the OEP “*must have regard*” (clause 24).

- 19.2 The OEP has ‘scrutiny and advice functions’ to monitor progress on environmental improvement plans and targets set under the Bill, including an annual progress report to be laid before Parliament; monitoring the implementation of environmental law; and advising Ministers on proposed changes to environmental law (clauses 27-29).
- 19.3 The OEP has ‘enforcement functions’: it can investigate potential failures by public authorities to comply with environmental law and can receive complaints on such matters (time limits for making complaints are set out in clause 31(6) of the Bill), and may instigate an ‘environmental review’ by the court. The court “*must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review*”. If so, the court must make a ‘statement of non-compliance’, which does not affect the validity of the public body’s conduct. The public authority must then publish a statement of steps it intends to take (clauses 30-37). In ‘serious’ and ‘urgent’ cases, the OEP may instead apply for judicial review of the public body’s conduct (clause 38).
20. The proposed OEP has been subject to various criticisms. Two Parliamentary Committees have recommended that the OEP have greater independence. These suggestions were rejected:²⁷
- 20.1 The EAC “*recommended that the OEP should report to Parliament, similar to the National Audit Office, and a statutory body of parliamentarians, modelled on the Public Accounts Commission, should set its budget, scrutinise its performance and oversee the governance of the oversight body.*” Further, the EAC recommended that a Parliamentary Committee should have the power to veto Ministerial appointments to the OEP.²⁸
- 20.2 The EFRAC was, similarly, concerned that the OEP should not be viewed as “*just another arm’s length public body attached to Defra, given its elevated watchdog status.*” Further, the EFRAC “*did not consider that the Office for Environmental Protection will have anything close to the same level of independence as currently exercised by the European Commission*”; the Government was advised to “*provide greater independence than a standard Non-Departmental Public Body allows... [EFRAC] also supported strengthening the appointment process for the Chair, recommending that the Secretary of State’s appointment should be subject to confirmation by the relevant Select Committee.*” [Emphasis added]²⁹

²⁶ BBC news, Fears over ‘weakening’ of UK green watchdog, 27 October 2020, available [here](#)

²⁷ HC 1042, House of Commons, Environment, Food and Rural Affairs (‘EFRAC’) and Environmental Audit Committees (‘EAC’), Pre-appointment hearing for the Chair - Designate of the Office for Environmental Protection (OEP) First Joint Report of the EFRAC and the EAC (18 December 2020), available [here](#)

²⁸ *Ibid*, HC 1042, 18 December 2020 joint report, citing EAC, The Government’s 25 year plan for the Environment, Eighth Report of Session 17–19, HC 803, 18 July 2018, available [here](#); and EAC, Scrutiny of the Draft Environment (Principles and Governance) Bill, Eighteenth Report of Session 2017–19, HC 1951, 25 April 2019, available [here](#).

²⁹ *Ibid*, HC 1042, 18 December 2020 joint report, citing EFRAC, Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill, Fourteenth Report of Session 2017–19, HC 1893, 30 April 2019 available [here](#)

21. Various commentators have expressed other concerns about the OEP:
- 21.1 At the Committee stage, the Government tabled amendments to the Bill on the OEP. In particular, ‘environmental review’ will now be before the High Court (or the Court of Session), rather than the Upper Tribunal (clause 37). Greener UK has argued that: *“This change represents a fundamental weakening of the environmental review mechanism and, by extension, the OEP itself”*: for instance, unlike the Upper Tribunal, the High Court does not sit in panels including environmental experts.³⁰
- 21.2 Greener UK further criticised restrictions on remedies in the Bill. On an ‘environmental’ review, a statement of non-compliance by the court does not affect the validity of the conduct; the court must be satisfied that any other remedy would not *“(a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or (b) be detrimental to good administration”*; and it cannot order damages (clause 37).
- 21.3 The Government also added a new power for the Secretary of State to give ‘guidance’ to the OEP about its enforcement policy (clause 24). Dr Stephanie Wray, on behalf of an environmental consultancy, told the BBC that: *“This would allow the government to potentially override the independence of the OEP by directing it towards or away from particular cases to suit political motives”*.³¹
22. In a briefing published after the Committee stage amendments, ClientEarth has argued that:
- “New government changes to the Bill undermine the OEP’s independence by allowing for increased government influence. They also weaken the enforcement process and fail to make provision for the use of technical experts in decision-making. All of this inhibits the watchdog’s effectiveness. Taken together, these changes limit the OEP’s ability to hold the government and public authorities to account, threatening environmental standards.”*³²

Broader concerns

23. As the UK exits the EU, some commentators have also expressed concern about underfunding and skills shortages in the UK’s existing bodies involved in environmental protection, including DEFRA. For example:
- 23.1 Chair of the Environment Agency (“EA”), Emma Howard Boyd, has warned that the EA *“now has only the resources to attend the most serious environmental incidents.”* She further argued that the EA *“no longer has the investment we need to protect and enhance the environment in all of the ways asked of us”*; pointing to funding cuts of more than 50% to its enforcement budget, alongside the imposition of increased

³⁰ Greener UK, ‘Environment Bill: briefing for Commons Committee – Response to proposed government amendments on the Office for Environmental Protection (G203 to G220, NC24)’ (November 2020)

³¹ BBC news, Fears over ‘weakening’ of UK green watchdog, 27 October 2020, available [here](#)

³² ClientEarth, ‘Why the UK environment bill matters’ (1 Dec 2020), available [here](#)

statutory duties. Further, she said that key indicators of environmental health are flatlining or deteriorating, with serious incidents up 27% between 2017 and 2018.³³

23.2 The Prospect trade union, in a recent report, argued that Natural England does not have the resources required to adequately fulfil its responsibilities. Quoting the Chair of Natural England, the report states: *"We are now running with some serious risk to our core, statutory functions, which will have consequences for our customers as well as for wildlife."* The report argues, further, that: *"Due to cuts Natural England does not have the resources or sufficient numbers of suitably skilled and experienced staff to perform its functions fully and effectively"*.³⁴

24. On 3 November 2020, the National Audit Office ("**NAO**"), the UK's independent public spending watchdog, released a report examining how the UK government will deliver on its long-term environmental goals. The report identifies risks concerning resource constraints and skills shortages for local authorities and DEFRA, both having a critical role to play on a range of environmental issues. The report notes further that Natural England, the Environment Agency and the Forestry Commission raised concerns with the National Audit Office around funding or skills shortages, and that the Committee on Climate Change reported that it considers climate change adaptation is under-resourced at present across government.³⁵

25. In evidence to the NAO, the Treasury accepted that there were skills gaps at DEFRA as a result of previous spending cuts. DEFRA pointed however to the 'Green Recovery Challenge Fund', introduced as a response to the coronavirus pandemic and with funding of £80 million for projects which, the department estimates, will *"create around 3,000 new jobs and safeguard around 2,000 existing jobs in a range of nature and conservation activities."* (Chapter 2, paragraphs 14-16 of the NAO's report).

Case study on EU architecture: air quality

26. The CJEU and the EU Commission both played an important role in holding the UK government to account in relation to improving air quality, prior to Brexit.

27. For example, in 2011 ClientEarth brought a claim in the High Court seeking an order that the Government revise its air quality plans to ensure that they demonstrate how conformity with air quality limit values established by Directive 2008/50/EC would be achieved as soon as possible (and by 1 January 2015 at latest), in line with legislative requirements. Although the Secretary of State acknowledged the UK's breach of the relevant limit values, both the High Court and Court of Appeal refused to impose any mandatory order on the Government to produce the necessary air quality plans. A preliminary reference to the CJEU followed and in a landmark decision in 2014, the CJEU held that where a Member State like the UK had failed to comply with the limit values, it is up to the national court to take necessary measures to ensure that the authority establishes an air quality plan in accordance with the relevant

³³ The Times 'We don't have the money to beat polluters, Environment Agency admits' 28 December 2020 available [here](#)

³⁴ Prospect 'The state of Natural England 2020-21 – A view from Prospect trade union' 10 November 2020 available [here](#)

³⁵ National Audit Office, 'Achieving government's long-term environmental goals' 11 November 2020 p.45 available [here](#)

provisions of the Directive.³⁶ In 2015, following the CJEU's decision, the UK Supreme Court ordered the Secretary of State to draw up an updated air quality plan.³⁷ The CJEU's ruling has since provided the basis for two further successful legal challenges against the UK government's ongoing failure to comply with obligations stemming from the Ambient Air Quality Directive.^{38 39}

28. Further, in February 2014 the Commission commenced formal infringement proceedings against the UK for failing to meet nitrogen dioxide limit values.⁴⁰ And in May 2018, the European Commission referred the UK (in addition to France, Germany, Hungary, Italy and Romania) to the CJEU due to its continued breaches of EU air quality legislation.⁴¹ Although the UK's case has been heard, judgment from the CJEU is still pending.
29. It is unclear to what extent national authorities in the four parts of the UK will be able to fill the gap left by these independent, supranational actors. As discussed above, some have criticised the Environment Bill (as presently drafted) as insufficient to ensure the OEP's independence from the Government. The Mayor of London, Sadiq Khan, has stated that he is *"concerned there has been no indication of how the legislative, monitoring and enforcement frameworks which have secured these improvements will be replicated and how standards, in particular for air quality, will be enhanced"*.⁴²

Chapter 2 – Replacement of EU law with 'retained EU law'

30. In addition to its foundational Treaties (see Chapter 1), EU law also comprises 'secondary' law, including, under Article 288 TFEU:
 - 30.1 'Regulations'. These EU legislative acts are directly applicable and binding in all EU Member States, without Member States needing to adopt any national, implementing measures. For example, the 'REACH' Regulation (EC 1907/2006) as to protecting health and the environment from risks associated with chemicals.
 - 30.2 'Directives'. These legislative acts are binding as to the result to be achieved, but Member States have a choice as to how to implement them, i.e. Directives are adopted (or 'transposed') by Member States passing national laws. For example, Directive 2008/50/EC (the **"Air Quality Directive"**), which established EU-wide objectives for improving air quality and was transposed into English law by the Air Quality Standard regulations (SI 2010/1001).
31. EU law is also found in the authoritative judgments of the CJEU. EU law is 'supreme', i.e. it takes primacy over any conflicting provision in the national law of a Member State,⁴³ and courts in Member States are bound to follow case-law of the CJEU.

³⁶ Case C-404/13 *ClientEarth v Secretary of State for the Environment and Home Affairs*

³⁷ *R (ota ClientEarth) v Secretary of State for EFRA* [2015] UKSC 28

³⁸ *R (oao ClientEarth (No.2) v Secretary of State for EFRA* [20156] EWHC 2740

³⁹ *R (oao ClientEarth (No.3) v Secretary of State for EFRA and others* [2018] EWHC 315

⁴⁰ *Ibid*, at [22]

⁴¹ ClientEarth, 'Clean Air: Our Right But Whose Responsibility' (September 2018), p.17

⁴² Mayor of London, 'London's Global and European future' (March 2017), p.3

⁴³ Case 6/64 *Costa v ENEL*

32. By the European Union (Withdrawal) Act 2018 (“EUWA”), the UK created ‘retained EU law’ as a new category of domestic law. In essence, this is a snapshot of certain⁴⁴ types of EU law as they stood immediately before the transition period expired on 31 December 2020, including Regulations and national laws implementing Directives: see sections 2-4 EUWA.
33. The Act imported some of EU law into domestic law to create regulatory certainty; rather than sudden, large gaps appearing in the law. At the same time, the EUWA 2018 gave Ministers extensive powers to repeal or modify retained EU law other than by an Act of Parliament; in particular section 8, which empowered Ministers to make such regulations as they considered “appropriate” to cure “deficiencies” in the law arising from Brexit.
34. In addition, in interpreting retained EU law, UK courts are not bound by CJEU decisions made after the end of the transition period; and the Act empowers the UK Supreme Court to overrule ‘retained’ EU case law (section 6 EUWA). The Government has since extended this power to other courts including the Court of Appeal (the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020).
35. As to the principle of ‘supremacy’, this continues to apply in respect of laws made before the end of the transition period; but retained EU law is not supreme over laws made on or after 31 December 2020 (section 5).
36. The EUWA, in tandem with Brexit, has therefore effected important changes to the laws of the United Kingdom which will have a wide-ranging effect on environmental governance. In particular, the vast body of ‘retained’ EU environmental laws will not take precedence over domestic laws which are enacted in future; and they may be repealed or significantly amended.

Chapter 3 – Future Government plans & the Environment Bill

37. The Government has committed to maintaining environmental protections post-Brexit. Asked about the effect of the UK’s withdrawal on our environment, DEFRA Minister Rebecca Pow MP said: *“Our high regulatory standards are not dependent on EU membership. The UK has an exceptional track record on environmental protection and this will not change.”*⁴⁵

The Environment Bill 2019-21

38. In October 2019, the Government announced a new Environment Bill, which creates the OEP and makes provision for setting targets and plans for improving the environment. As explained in Chapter 1, much of the Environment Bill applies to England only, as in general the environment is a devolved matter. For example, the OEP will have only a limited remit in Scotland: the Holyrood Government has established its own body, ‘Environmental Standards Scotland’, under the Scottish ‘Continuity Act’ 2021.⁴⁶

⁴⁴ Certain types of EU law are not included, e.g. the Charter on Fundamental Rights: see section 5(4)

⁴⁵ PQ 2941 on environmental protection, answered on 25 October 2019, available [here](#)

⁴⁶ The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, [here](#). Section 19 establishes the ESS.

39. The Government claims that the Environment Bill “sets a gold standard for improving air quality, protecting nature, increasing recycling and cutting down on plastic waste”,⁴⁷ and “maximises the opportunities created by leaving the European Union, underpinning our goal of delivering a Green Brexit.”⁴⁸ However, the Bill has been criticised by some in opposition; Caroline Lucas MP recently stated that it “does not even come close to making up for what we have lost by leaving the EU.”⁴⁹
40. The Bill is at Report stage,⁵⁰ progress having been delayed by the Covid-19 pandemic.
41. The Bill incorporates five environmental principles into policy making (clause 16.5), as follows (the latter four are drawn from Article 191(2) TFEU):
- 41.1 Integration of environmental protection into the making of policies;
 - 41.2 Preventative action to avert environmental damage;
 - 41.3 The precautionary principle (so far as relating to the environment);
 - 41.4 Rectification of environmental damage, as a priority, at source; and
 - 41.5 The polluter pays principle.
42. The Secretary of State has to prepare a policy statement explaining how the above environmental principles should be “interpreted and proportionately applied by Ministers” in making policy.⁵¹ Ministers must have ‘due regard’ to that policy statement when making policy decisions, with certain exceptions e.g. defence or national security; but they are not obliged to act in accordance with the five environmental principles.⁵²
43. The Bill also requires the Secretary of State to:
- 43.1 Set ‘long-term’ targets in respect of four ‘**priority areas**’: air quality, water, biodiversity and resource efficiency and waste reduction. The deadline for compliance with these targets must be no shorter than 15 years (clause 1).
 - 43.2 Prepare an ‘**environmental improvement plan**’ and produce annual reports on its implementation (clauses 7-8).
 - 43.3 Set ‘**interim targets**’ towards meeting “priority area” targets in clause 1 (clause 10).
44. Clause 3(9) requires the Government to set out its “long-term” targets in secondary legislation, i.e. regulations which it must lay before Parliament by **31 October 2022**. Clause

⁴⁷ DEFRA, ‘Environment Bill sets out vision for a greener future’ (30 January 2020), available [here](#)

⁴⁸ DEFRA, 30 January 2020: Environment Bill 2020 policy statement, available [here](#)

⁴⁹ Hansard vol. 668 (debate, 26 January 2021), available [here](#)
⁵⁰ <https://services.parliament.uk/bills/2019-21/environment.html>

⁵¹ Clause 16(1)-(2)

⁵² Clause 18

4 places a duty on the Secretary of State to meet any such long-term targets. However, it is unclear what will happen if such targets are *not* met: the Bill is silent on this.

45. Greenpeace has also pointed out that the Bill's provisions mean that the earliest deadline by which the Government must comply with legally-binding, long-term targets that it sets out in regulations made under the Bill will be **2037**.⁵³ Liberal Democrat MP Wera Hobhouse MP has also criticised this as unduly slow.⁵⁴
46. The Government's first environment improvement plan is entitled: "*A green future: our 25 year plan to improve the environment*" (11 January 2018).⁵⁵ The (non-binding) targets in this 25-year plan include:
 - 46.1 Banning the sale of new conventional petrol and diesel cars by 2040 (the Prime Minister has since revised this target to 2030);⁵⁶
 - 46.2 Planting 180,000 hectares of woodland in England by 2042; and
 - 46.3 Zero avoidable waste by 2050 and eliminating avoidable plastic waste by 2042.⁵⁷
47. The National Audit Office has criticised the deliverability of this 25-year plan, expressing concern at the "*complex mix of aspirations and policy commitments for action, with varying and often unclear timescales*" as well as stating that it is "*difficult to determine how the ambitions relate to pre-existing national, EU and international environmental targets*".
48. The NAO has recommended that the Government clarify its environmental goals, so that by the time it puts forward legislative targets under the Bill (October 2022), "*these are part of a coherent suite of objectives that set specific and measurable ambitions for medium-term (2030) and long-term (2040 onwards) outcomes for each of its environmental goals*".⁵⁸
49. Chapter 2 of the Bill establishes the new OEP. According to DEFRA, the OEP will "*scrutinise environmental policy and law, investigate complaints and take enforcement action against public authorities, if necessary, to uphold our environmental standards*".⁵⁹ However, as set out in more detail in Chapter 1 of this report, some concerns have been expressed that the OEP will not be sufficiently independent from the Government.
50. The Bill has also been criticised for its omission of a binding '**non-regression**' clause: i.e. the lack of any binding commitment to maintain present levels of environmental protection. Instead, the Bill places an obligation to Ministers to state whether any new law containing environmental provisions will reduce current levels of protection and, if so, whether they still plan to proceed; and obliges the Secretary of State to review and report every two years on "*significant*" developments in international environmental protection (clauses 19-20).

⁵³ Greenpeace, 'A major loophole in the Environment Bill will give the government nearly two decades to meet future legally-binding targets' (16 October 2019)

⁵⁴ Hansard vol. 668 (debate, 26 January 2021), available [here](#)

⁵⁵ By virtue of Clause 7(7) of the Bill. The plan is available [here](#)

⁵⁶ Prime Minister's Office, Ten Point Plan for a Green Industrial Revolution (18 Nov 2020), available [here](#)

⁵⁷ DEFRA, 'At a glance: summary of targets in our 25 year environment plan' (16 May 2019) available [here](#)

⁵⁸ NAO, 'Achieving government's long term environmental goals' (11 November 2020), available [here](#)

⁵⁹ DEFRA, 'Environment Bill sets out vision for a greener future' (30 January 2020), available [here](#)

51. In its evidence to the Public Bill Committee (paras 38-39), ClientEarth argued: *“a clear and binding non-regression provision in the Bill would demonstrate robust commitment to the government’s pledge to deliver “the most ambitious environmental programme of any country on earth”. However, despite the Government’s repeated assurances that leaving the EU and striking new trade deals will not result in lower environmental standards, the Bill disappointingly fails to lock this commitment into law. The Bill should include a binding legal provision that prevents regression of environmental standards.”*⁶⁰

The EU-UK Trade and Cooperation Agreement (December 2020)

52. On 24 December 2020, the United Kingdom and the European Union agreed a new, post-Brexit deal, i.e. the ‘EU-UK Trade and Cooperation Agreement’ (“TCA”), which came into force on 1 January 2021. As summarised by the Commission, this complex agreement:

*“sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in Union programmes. It is underpinned by provisions ensuring a level playing field and respect for fundamental rights.”*⁶¹

53. Leaving aside climate change, the key provisions of the TCA with respect to environmental protection generally are the provisions in Part 2, Title XI: *“Level playing field for open and fair competition and sustainable development”*. Chapter 7 of Title XI is entitled *“Environment and climate”*. These ‘level playing field’ provisions include the following:

53.1 Both parties *“recognise that sustainable development encompasses... environmental protection”* (Article 1.1(2)), and *“are determined to maintain and improve their respective high standards in the areas covered by this Title”* (Article 1.1(4)).

53.2 The ‘**non regression**’ principle in Article 7.2(2) provides that neither party will *“weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or climate level of protection...”* [emphasis added].

53.3 The normal dispute settlement provisions for the TCA do not apply. Instead, *“The Parties shall make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement”* on the application of Chapter 7 (Article 7.1(1)) and Chapter 9 provides that they may have recourse to a panel of experts to produce a report. However, that report is not binding on the parties.

53.4 The ‘**rebalancing**’ mechanism in Article 9.4, however, allows either party to take steps to ‘rebalance’ the agreement where *“significant divergences”* in future environmental laws or policies have *“material impacts”* on trade or investment. Such measures, e.g. tariffs, must be *“strictly”* necessary and proportionate and based on *“reliable evidence*

⁶⁰ EB19: Environment Bill Public Bill Committee, ClientEarth written evidence (March 2020), available [here](#)

⁶¹ https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en

and not merely on conjecture or remote possibility” (Article 9.4(2)). The other party may request an arbitral tribunal to determine whether such measures are consistent with the agreement before they are enacted.

54. Greener UK has criticised the non-regression provision in Chapter 7, doubting it will prevent lowering of environmental standards: *“This trade and investment test is notoriously difficult to prove and has been ineffective in previous trade agreements”*.⁶² The IPPR agrees:

*“the commitments on labour and environmental standards are considerably weaker than expected; there is only a commitment not to lower current levels of protection to the extent that any reductions may affect trade or investment. Given it is notoriously difficult to prove that any lowering of protections affects trade or investment, the deal is unlikely to prevent the UK government from weakening EU-derived labour and environmental policies if it so chooses... In aiming for an agreement which guarantees maximal sovereignty, the UK government has watered down the ‘level playing field’ requirements on areas such as labour and environmental protections and secured only limited benefits in market access ...The results of these challenging negotiations are a complex compromise.”*⁶³ [Emphasis added]

55. The TCA has however been praised by some for enshrining a collective commitment to tackling climate change. For instance, the Agreement states: *“Each Party reaffirms its ambition of achieving economy-wide climate neutrality by 2050”* (Part 2, Title XI, Article 1.1(3)). Carbon Brief UK reported:

*“Some welcomed [the TCA] as the best free trade deal on climate ever agreed – a potential “game changer” that enshrines in the text both sides’ net-zero targets and a commitment to the Paris Agreement...Overall, the word “climate” is used 51 times in the final document, including three times in the opening paragraphs. There are also 13 mentions of “emissions”, nine of “Paris Agreement” and climate change is referred to as an “existential threat to humanity” twice.”*⁶⁴

Case study (1) on the Government’s future plans: air quality

56. Directive 2008/50/EC (the **“Air Quality Directive”**) established EU-wide objectives for improving ambient air quality and reducing air pollution. It requires Member States to assess levels of pollutants and ensure that they meet legal limits throughout their ‘zones’. Where a limit value has been exceeded, Member States must devise a plan to resolve the issue which ensures that the duration of exceedance is as short as possible. The UK transposed the Air Quality Directive through the Air Quality Standards Regulations 2010.
57. Directive 2016/2284/EU (the **“National Emission Ceilings Directive”**) set emissions reduction targets in respect of five air pollutants, to be met by 2020 and 2030. The UK transposed this Directive through the National Emission Ceilings Regulations 2018.

⁶² Greener UK, ‘Initial environmental analysis of the EU-UK Trade and Cooperation Agreement’ (29 December 2020)

⁶³ IPPR, ‘The agreement on the future relationship: a first analysis’ December 2020

⁶⁴ Carbon Brief UK, ‘Q&A: What does the Brexit deal say about climate change and energy?’ (18 January 2021) available [here](#)

58. At present, these statutory instruments continue in force, as part of the body of ‘retained EU law’ as amended pursuant to the EUWA. However, as explained in Chapter 1, going forwards the UK Government’s progress on air quality will no longer be monitored and enforced by external, supranational actors: notably, the Commission. And as explained in Chapter 2, ‘retained’ EU law can be amended or repealed at the national level.
59. The Government has pointed to three “*key actions*” going forward to reduce sources of air pollution in the UK:⁶⁵
- 59.1 The Environment Bill, which “*introduces a duty on the government to set a legally-binding target for fine particulate matter (PM2.5), the pollutant of most concern for health, alongside at least one further long-term air quality target. It also ensures local authorities have a clear framework and simple to use powers to address air quality in their areas, and provides the government with powers to enforce environmental standards for vehicles.*” However, the Bill is not yet in force and it is unclear how these new targets will improve on those set out in existing legislation.
- 59.2 The Government’s ‘Clean Air Strategy’, published in January 2019.⁶⁶
- 59.3 The ‘UK Plan for Tackling Roadside Nitrogen Dioxide Concentrations’, published in July 2017: “*This focuses on resolving the most immediate air quality challenge, which is nitrogen dioxide concentrations around roads, to ensure we meet our statutory air quality limits.*”

Case study (2) on the Government’s future plans: pesticides

60. Pesticides can contaminate soil and water, and can be toxic to birds, fish, beneficial insects, and non-target plants. There are concerns that changes to ‘retained’ EU law may not provide sufficient environmental protections in relation to the authorisation and regulation of pesticides post-Brexit. For example:
- 60.1 Regulation 9 of The Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020 (S.I. 2020/1358) amends Article 5 of Directive 2008/98 (the “**Waste Framework Directive**”) so that there is no longer a requirement that detailed criteria on the uniform application of conditions on by-products “*shall ensure a high level of protection of the environment and human health and facilitate the prudent and rational utilisation of natural resources*”.
- 60.2 Regulation (EC) No. 396/2005 requires that maximum residue levels of pesticides be reviewed within 12 months of an active substance being authorised. The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/557) extends the review period for maximum residue levels of pesticides once they have been authorised from 12 months to 36 months. It also provides that current pesticides approvals may be extended further ‘where the competent authority considers it necessary.’ The Public Law Project has argued that this “*means the UK will*

⁶⁵ DEFRA Policy Paper ‘10 March 2020: Air quality factsheet (part 4)’, updated 21 October 2020, available [here](#)

⁶⁶ The Clean Air Strategy (2019) is available [here](#)

not be applying the latest scientific advice because those products will exist on the market for longer and longer periods.”⁶⁷

- 60.3 Regulations 12(6) and 12(7) of The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/556) replace Articles 77, 78 and 79 of Regulation (EC) No. 1107/2009, which set out a scrutiny procedure for amending requirements around pesticides, including the input of a Standing Committee on the Food Chain and Animal Health. Regulation 12(6) gives the Secretary of State and devolved Ministers the power to amend requirements around pesticides without any further consultation or input from an expert advisory body. Similarly, the requirements for independent scientific advice on new pesticides from the European Food Safety Authority and the integration of scientific assessments into approval processes set out in Regulation (EC) No. 396/2005 have not been retained in UK law. For example, Regulation 4(9) of the Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/557) allows the Secretary of State and devolved Ministers to assess existing maximum residue limits without being required to consider scientific advice from a specialist advisory body.
61. Further, the UK Government has been criticised for approving the emergency use of a pesticide believed to kill bees, despite EU legislation severely limiting its use.
62. In 2013, the EU adopted Regulation no.485/2013, which seriously restricted the use of pesticides containing three “*neonicotinoids*”, including **thiamethoxam**, following scientific advice from the EFSA in 2012 as to the risks they posed to honeybees. There followed an open call by EFSA for further data and a comprehensive review of the evidence by EFSA, the Commission and Member States of the EU; leading to a general ban on the outdoor use of this active substance, thiamethoxam, in 2018 (subject to exceptions in the event of an emergency): Regulation no. 2018/785.⁶⁸ Supporting the ban, then-environment secretary Michael Gove MP wrote at the time: *“Unless the evidence base changes again, the government will keep these restrictions in place after we have left the EU.”*⁶⁹
63. However, in January 2021, the media reported that the Government has sanctioned thiamethoxam for emergency use on sugar beet seeds because of the threat posed by beet yellows virus.⁷⁰ The decision has been described as “*environmentally regressive*” by conservationists.⁷¹ The Wildlife Trusts has argued that: *“Using neonicotinoids not only threatens bees but is also extremely harmful to aquatic wildlife because the majority of the pesticide leaches into soil and then into waterways.”*⁷²
64. In DEFRA statements on the decision to approve emergency use of the pesticide, the Government has explained that: *“The coverage of this news does not reflect the fact that*

⁶⁷ PLP, “*Plus ça change? Brexit and the flaws of the delegated legislation system*” 13 October 2020 p.23 available [here](#)

⁶⁸ EU Commission, ‘Neonicotinoids’ available [here](#). The 2013 Regulation is [here](#) and the 2018 amending regulation as to the neonicotinoid, thiamethoxam, is [here](#)

⁶⁹ The Guardian, ‘The evidence points in one direction – we must ban neonicotinoids’ 9 November 2017 available [here](#)

⁷⁰ The Guardian, ‘Government breaks promise to maintain ban on bee-harming pesticide’, 9 January 2021 available [here](#); The Independent, ‘Government to let farmers use bee killing pesticide banned by EU’, 13 January 2021 available [here](#)

⁷¹ *Ibid*, the Guardian article.

⁷² Wildlife Trusts “*The Wildlife Trusts explore legal challenge to Government decision to allow emergency use of neonicotinoid*” 27 January 2021 available [here](#)

under EU legislation, member states may also grant emergency authorisations in exceptional circumstances” and that the Government considers the risk to the environment, people and animals, and in particular to bees, to be “acceptably low.”⁷³

Chapter 4 – Developments for the rule of law in the UK

The Independent Review of Administrative Law

65. The Independent Review of Administrative Law (“IRAL”) was launched in July 2020 to consider reforms to judicial review.⁷⁴ The review asks: *“Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?”*
66. The IRAL Panel is currently considering responses to the Call for Evidence, which closed in October 2020. The timescale for reform is unclear.⁷⁵ Possible reforms could include procedural changes, for example shorter time limits for bringing a judicial review claim, changes to costs rules, or changes to the rules on ‘standing’, i.e. who can bring a claim in judicial review.⁷⁶
67. ClientEarth notes that judicial review has real, practical importance in that the decisions reviewed and issues they encompass often have tangible implications for people’s lives and the quality of the natural environment.⁷⁷ Other environmental groups have argued that, in the post-Brexit era, the importance of the availability of judicial review for environmental decisions is heightened, following the loss of access to EU accountability mechanisms, such as the European Commission’s complaints (infraction) process.⁷⁸
68. ClientEarth has expressed concern that the IRAL *“could lead to fundamental judicial review reforms, catalysed by a knee-jerk political reaction to recent judgments that were critical of the government – even though such reforms may not be in the public interest and could damage the reputation of the UK’s legal system.”*⁷⁹ Similarly, Friends of the Earth has stated that *“our main concern remains that a potential review process is taken forwards on a dubious and politically driven premise, without any compelling evidence.”*⁸⁰
69. Some respondents have also expressed concerns about the potential negative impact of the IRAL on environmental standards and access to justice in environmental cases specifically:

69.1 The RSPB emphasises the loss of EU architecture: *“environmental NGOs used the European Commission’s complaints (infraction) process, which was instrumental in*

⁷³ DEFRA ‘Statement on the decision to issue – with strict conditions – emergency authorisation to use a product containing a neonicotinoid to treat sugar beet seed in 2021’ 8 January 2021 available [here](#); DEFRA, ‘Reporting of strict controls for emergency pesticide authorisation’ 10 January 2021 available [here](#)

⁷⁴ <https://www.gov.uk/government/groups/independent-review-of-administrative-law>

⁷⁵ House of Lords Library ‘In Focus: Judicial review: Time for change?’ 18 January 2021 available [here](#)

⁷⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf

⁷⁷ ClientEarth ‘Independent Review of Administrative Law: Call for Evidence – ClientEarth submission’ pp.5- 6 available [here](#)

⁷⁸ RSPB ‘RSPB Submission to Lord Faulks QC Panel of Experts on Judicial Review’ p.8 available [here](#); and Wildlife and Countryside Link ‘Evidence submitted by Wildlife & Countryside Link’ p.13 available [here](#)

⁷⁹ ClientEarth ‘Independent Review of Administrative Law: Call for Evidence – ClientEarth submission’ p.8 available [here](#)

⁸⁰ Friends of the Earth ‘Friends of the Earth England, Wales and Northern Ireland Submission to the Call for Evidence from the Independent Review of Administrative Law’ p.13 available [here](#)

*maintaining environmental standards across the whole of the UK. In the absence of that (slow but free) process, the UK courts are now our remedy of last resort.”*⁸¹

69.2 Wildlife and Countryside Link (“Link”) argues that, in the context of the environmental crisis and the climate change emergency, as well as the consistent failure of the UK Government in meeting environmental targets, such cases must be heard by courts.⁸² Link and Friends of the Earth have also raised concerns regarding the fall in environmental judicial reviews in recent years, indicative of the barriers facing claimants in these cases.⁸³

69.3 Further, the UK Government has repeatedly been found to be in breach of the Aarhus Convention, which enshrines the right to access justice in environmental cases. ClientEarth is concerned that hasty changes to judicial review could result in further non-compliance with the Aarhus Convention, as well as undermining the rule of law and the critical role that individuals and NGOs play in protecting the environment.⁸⁴

70. The IRAL also presents opportunities to improve the process of judicial review which some commentators have welcomed. For example, the Administrative Justice Council notes that the IRAL can provide an opportunity to *“to build upon in terms of widening access to justice for claimants and for enhancing the effectiveness of judicial review in terms of checking the legality of government action and its impact upon government.”*⁸⁵

71. Link highlights that, given that the ability of the future OEP to replace the EU’s scrutiny and enforcement functions is unknown (see Chapter 1), one opportunity for judicial review reform is to open up the standard of review in environmental cases so as to provide more in-depth review of the substantive legality of certain decisions, acts and omissions.⁸⁶

Increased use of secondary legislation

72. Secondary legislation (also known as delegated or subordinate legislation) is law created by ministers (or other public bodies) under powers given to them by an Act of Parliament.

73. The Bingham Centre for the Rule of Law observes that, in practice, there is less political supervision of such laws by Parliament; scrutiny is more technical in character.⁸⁷ The Public Law Project (“PLP”), in a recent report, identified a number of concerns about secondary legislation, including: inconsistent and insufficient scrutiny procedures, use of secondary legislation for significant policies leading to a lack of appropriate Parliamentary oversight of important legal changes, and limited opportunity for public participation.⁸⁸

⁸¹ RSPB “RSPB Submission to Lord Faulks QC Panel of Experts on Judicial Review” p.2 available [here](#)

⁸² Link, “Evidence submitted by Wildlife & Countryside Link” p.4 available [here](#)

⁸³ *Ibid* p.7; Friends of the Earth “Friends of the Earth England, Wales and Northern Ireland Submission to the Call for Evidence from the Independent Review of Administrative Law”, available [here](#)

⁸⁴ ClientEarth “Independent Review of Administrative Law: Call for Evidence – ClientEarth submission” p.9, available [here](#)

⁸⁵ Administrative Justice Council ‘Submission by the Administrative Justice Council to the Call for Evidence by the Independent Review of Administrative Law’ October 2020 p.2 available [here](#)

⁸⁶ Wildlife and Countryside Link “Evidence submitted by Wildlife & Countryside Link” p.11 available [here](#)

⁸⁷ Bingham Centre for the Rule of Law “Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny” 20 April 2020 p.9 available [here](#)

⁸⁸ PLP, “Plus ça change? Brexit and the flaws of the delegated legislation system” 13 October 2020 p.9 available [here](#)

74. Even before Brexit, the increased volume of secondary legislation had prompted concerns. The PLP Report (p.3) observes that Brexit led to a *“tsunami of delegated legislation, provoking a re-examination of long-held anxieties about the role of delegated legislation in the contemporary constitution.”* In the context of Brexit, by Exit Day on 31 January 2020, there had been 622 Brexit Statutory Instruments (“SIs”) laid; 297 laid in 2018, 318 in 2019, and 7 laid in January 2020.⁸⁹
75. As explained in Chapter 2 above, under section 8 of the EUWA, Ministers are given broad powers to amend retained EU law by making regulations (i.e. secondary legislation) which the Minister considers appropriate to address any failure of ‘retained’ EU law to work properly as a result of Brexit. Controversially, regulations made under this Act can also amend other Acts of Parliament (i.e. *primary* legislation): known as ‘Henry VIII powers’. During the passage of the 2018 Act, the House of Lords Constitution Committee described the powers in the Bill as *“unprecedented and extraordinary”* and added that they *“raise fundamental constitutional questions about the separation of powers”*.⁹⁰
76. Brexit-related Statutory Instruments are numerous; and many are long and complex. The Public Law Project observes that given the limited capacity of Parliament, some complex pieces of secondary legislation have received little Parliamentary debate or scrutiny.⁹¹
77. The PLP Report also argued that drafting of Brexit SIs has been of poor quality. For example:
- 77.1 The Environment (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019 corrected a number of errors, including a mistake that prevented certificates being issued to allow movement within the UK of CITES specimens of endangered species. This ‘wash up’ SI also corrected an amendment which *“inadvertently altered the operation”* of a Regulation relating to pesticide products.⁹²
- 77.2 The Pesticides (Amendment) (EU Exit) Regulations 2019 amended the *“erroneous omission”* of a prohibition of the approval of active substances, safeners or synergists which have hormone disrupting properties being used in pesticides.⁹³
- 77.3 The Import of and Trade in Animals and Animal Products (Amendment etc) (EU Exit) Regulations 2019 removed the requirement to retest horses entering the UK whose test results came back as inconclusive for disease. After environmental groups lobbied DEFRA, this obligation was reinstated.⁹⁴
78. Some observers have raised concerns that Brexit-related SIs have been used to introduce substantive policy changes to environmental standards. For example, the UK Trade Policy

⁸⁹ PLP, *“Plus ça change? Brexit and the flaws of the delegated legislation system”* 13 October 2020 p.21 available [here](#)

⁹⁰ House of Lords, 3rd Report of Session 2017-19, HL Paper 19 (7 September 2017) ‘Summary’, available [here](#)

⁹¹ PLP, *“Plus ça change? Brexit and the flaws of the delegated legislation system”* 13 October 2020 p.21-22 available [here](#)

⁹² Explanatory Memorandum: Environment (Miscellaneous Amendments And Revocations) (EU Exit) Regulations 2019 2019 No. 559 available [here](#)

⁹³ Explanatory Memorandum: Pesticides (Amendment) (EU Exit) Regulations 2019 2019 No. 1410 para 7.12 available [here](#)

⁹⁴ Animal Health, Alien Species in Aquaculture and Invasive Non-native Species (Amendment) (EU Exit) Regulations 2019; UK Constitutional Law Association *“Alexandra Sinclair and Joe Tomlinson: Brexit Delegated Legislation: Problematic Results”* 9 January 2020 available [here](#)

Observatory (“TPO”), analysing secondary legislation⁹⁵ on pesticides, has pointed out that the new domestic regulations omit the requirement that the penalty regime be effective, proportionate and dissuasive.⁹⁶

79. As PLP points out at p.27 of its Report, given that the majority of Brexit SIs only came into force on 31 December 2020, it is likely that Government use of secondary legislation will generate more legal challenges going forward.

Concerns over compliance with international law – the Internal Market Bill

80. The Internal Market Bill was published in September 2020, with a view to preventing trade barriers within the UK as a result of Brexit. It received Royal Assent on 17 December 2020.
81. The Bill sparked controversy in September 2020, as it contained clauses permitting the Government to breach the UK’s international obligations under the Withdrawal Agreement with the EU (in particular, the Northern Ireland Protocol). The Secretary of State for Northern Ireland stated that the Bill would “*break international law in a very specific and limited way*.”⁹⁷ Professor Mark Elliott, a constitutional law scholar, argued however that the controversial clauses were “*a fundamental attack on the rule of law*”.⁹⁸
82. The UK Government subsequently withdrew the controversial clauses.⁹⁹ However, some commentators argued that the drafting of the Internal Market Bill has seriously damaged the UK’s reputation as a defender of the rule of law.¹⁰⁰

Conclusion

83. As explained in Chapters 1 and 3, the Environment Bill, which will establish the OEP, is currently before Parliament. In the meantime, DEFRA has put in place an ‘interim’ secretariat which, as it explained in its recent evidence to the National Audit Office, “*will be able to make assessments around reported breaches of environmental law by public bodies. It will then be up to the [OEP] to catch up on these assessments once it is established*”. The Chair of the OEP, Dame Glenys Stacey, has already been appointed.¹⁰¹
84. Campaigners have argued that the urgency of the environmental crisis, particularly in respect of air pollution, means that the Environment Bill cannot wait until the coronavirus pandemic is over; and have warned that further delays may undermine the UK’s credibility at the United Nations Climate Change Conference (COP26), which the UK is hosting in November 2021.¹⁰²

⁹⁵ The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/556); the Pesticides (Maximum Residue Levels) (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/557)

⁹⁶ https://blogs.sussex.ac.uk/uktpo/publications/brexit-food-safety-legislation-and-potential-implications-for-uk-trade-the-devil-in-the-details/#_ftn15

⁹⁷ HC Deb, 8 September 2020, cols 497, 509

⁹⁸ ‘The Internal Market Bill – A Perfect Constitutional Storm’ (9 September 2020), available [here](#)

⁹⁹ European Commission “*Joint statement by the co-chairs of the EU-UK Joint Committee*” 8 December 2020 available [here](#)

¹⁰⁰ International Bar Association “*Internal Market Bill prompts questions on UK’s commitment to rule of law*” 1 October 2020 available [here](#)

¹⁰¹ National Audit Office, ‘Achieving government’s long-term environmental goals’ 11 November 2020 chapter 2, ‘Skills, impact and regulation’, available [here](#) Government Press Release on the appointment of Dame Stacey as Chair of the OEP available [here](#)

¹⁰² The Guardian, ‘Fury as long-awaited UK environment bill is delayed for third time’ (26 January 2021), available [here](#)

85. The establishment of the OEP and its sister organisations in the other jurisdictions of the United Kingdom (such as Environmental Standards Scotland), will clearly be crucial to addressing the many gaps in environmental law and governance highlighted above going forward. However, new bodies are unlikely to be a panacea.
86. Environmental NGOs, including ClientEarth, continue to press for amendments to strengthen the Environment Bill, such as Parliamentary oversight of appointments to the OEP and a strongly-worded 'non-regression' clause. The National Audit Office has also made a range of important recommendations in its recent report: including more joint working between Government departments on the environment, and addressing the skills and resources gaps that could inhibit the Government's environmental ambitions.¹⁰³

¹⁰³ *Supra*, note 96.