

## **Landmark Brexit Seminars**

### ***How Much Difference will Leaving the EU make to Planning and Environmental Law?***

**Alex Goodman**

---

#### **Reading the Runes**



PM at Conservative Party Conference and David Davis in Parliament:

- Process will be article 50 of the Treaty on European Union;
  - Royal Prerogative powers will be used;
  - Process will commence in March 2017;
  - “Great Repeal Bill” will repeal the European Communities Act 1972 and re-enact European Legislation as UK Legislation wherever practical;
  - Authority of EU law, and the European Court of Justice’s jurisdiction will end;
  - UK no longer be part of a political union with supranational institutions that can override national parliaments and the courts;
  - The UK will have the right to make its own decisions over a whole host of matters from how we label our food to the way in which we control immigration;
  - Existing worker’s rights deriving from EU law will be continued as UK law;
  - There will not be a Norway Model or Swiss Model;
-

## Overview



- This paper is in three parts:
  - Part 1: Withdrawing from the EU requires at least two treaties;
  - Part 2: Detailed consideration of potential of Brexit climate change policy, environmental impact assessment (EIA), strategic environmental assessment (SEA), habitats conservation and Aarhus
  - Part 3: How to Leave the EU – my thoughts on reclaiming sovereignty.

---

## Article 50 (1) and (2) TEU



Article 50 provides (in part)

- “1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
- 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.”

## Article 50 (1) and (2) TEU- Four Stages



Four stages:

- UK decides to leave the EU in accordance with its own constitutional arrangements.
- UK gives notice to the European Council of its intentions to leave
- EU negotiates and conclude a withdrawal agreement by qualified majority of the European Council (Heads of State); The withdrawal treaty will not of itself seek to establish that framework, but it will take it into account.
- The future framework – will require unanimous agreement of EU 27.

---

## Great Repeal Bill



- EU regulations transposed?
  - Directives?
  - Treaty Provisions?
  - Freedom of Movement of Workers?
-

## Negotiation of Withdrawal Treaty



- An entirely open question as to what legal order will be negotiated to replace the TEU and TFEU once they cease to apply.
  - If UK remains in the single market, must accept much of the *acquis* of European law, just as Norway does.
  - If not in single market, essentially a matter of political choice for the UK whether to cohere with EU environmental law or not.
- 

## Hard Brexit Implications for Climate Change, SEA, EIA



- See written paper for summary of these areas of law
  - No immediate drastic change: UK implements their regimes through domestic law.
  - International trends of eg. the RAMSAR convention, the Espoo Convention, the Aarhus Convention lean towards continuation of harmonisation
  - UK already chooses to exceed EU minimum standards: Eg. EIA thresholds.
  - More obscure regulation perhaps more prone to attack
  - Over time UK could (if politically desirable) amend its procedures to diminish protection for environment. Long term risk of failing to keep pace?
-

## Aarhus Convention



- UK's ratification of this Convention will be unaffected by departure from the EU.
- Access to information is facilitated by the Environmental Information Regulations;
- Public participation measures inherent in our planning system are concordant with the demands of the Aarhus Convention.
- Access to justice has been facilitated by the emergence of protective costs orders and to a limited extent by "costs capping orders" under sections 88 to 90 of the Criminal Justice and Courts Act 2015. Perhaps UK might rein back here?

## Habitats Directive- Hard Brexit (1)



- EU-wide coherent European ecological network called Natura 2000.
- UK has designated around 9% of its terrestrial area as SACs, this being one of the smallest of any EU nation (Slovenia, the greatest, has designated 38%).
- No immediate impact on the existence of the protected network of sites.
- Sites which had been designated as SACs or SPAs would continue to be protected by the Habitats Regulations and correlative policies as a matter of domestic law to effectively the same degree as if the Habitats Directive applied.
- Furthermore, every site designated pursuant to the Habitats Regulations is also a SSSI.

## Habitats Directive – Hard Brexit (2)



- Extension of the existing network of protected sites will halt?
- Designation of new marine sites?
- Designation of Terrestrial sites near complete?
- Impact of loss of compulsion provided by the Commission to further designate SACs?
- Designation as SSSIs in any event?
- Beneficial impacts eg. of withdrawal from Common Agricultural Policy?

## Hard Brexit- more implications



- Domestic Regulations continue
- Domestic regulations which refer back to the Directive would need to be amended or addressed.
- Loss of underpinning of the Directive
- Interpretation consequences for courts
- Certain legal challenges would no longer arise if the *Marleasing* principle (that domestic regulations must, as far as possible, be construed consistently with the purpose of the Directive they implement) no longer applied.
- But courts will continue to have regard to EU law?
- Enforcement powers and mechanisms such as those of the EU Commission would be withdrawn and require replacement;
- Possibility of references to the ECJ or infraction proceedings by the Commission would also evaporate.
- New EU Directives/ Amendments to EU Directives: UK continue to keep pace?

## Resource Implications



- Could be very onerous especially on devolved administrations in Scotland, Wales and Northern Ireland.
- Eg. regulation 3 of the Conservation (Natural Habitats etc.) Regulations 1994 (which still applies in Scotland) provides for Scottish ministers to carry out their functions under a whole host of statutory provisions in a manner which secures compliance with the Directive. Amending even this provision could be complex.
- Some complexity: Since the Scotland Act 1998, the Scottish Parliament has assumed legislative power over local government, planning and the environment and the Scottish Executive holds most of the functions of the former Secretary of State for Scotland. Yet at the same time, international and EU relations are reserved to Westminster.

## Political Will to Change Environmental Law?



- House of Commons Environmental Audit Committee stated in its Third Report of Session on 23 March 2016:

“The UK Government’s view, as expressed to us by Rory Stewart MP, Parliamentary Under-Secretary at DEFRA, was that, in general, the correct balance between common EU frameworks and distinct national approaches had been broadly achieved in the environmental sphere. He said, “We have not concluded that we need to return competencies from the European Union in relation to the environment.”

-

### Part 3: Thoughts on How to Leave: The Withdrawal Treaty



- Could provide that until the end of a transitional period EU law:
  - Which was in force at the date of departure (e.g. 2019); and
  - Which comes into force during a subsequent transitional period

Will continue to apply

- UK will, in respect of environmental law (and any other areas in which certainty and consistency is desirable), remain subject to the jurisdiction of the ECJ;
- Principles of EU law continue to apply throughout the transitional period



### The Future Framework Treaty and Sovereignty



- EFTA/EEA countries currently enjoy powers to influence the incorporation of EU law, either through (a) suggesting amendments to the EU law; (b) contesting its applicability to the EEA states; or (c) through a right of veto (though this has never been exercised).
- Sophisticated measures regulating sovereignty/ harmonisation
- EFTA court not bound by, but often follows the case law of the ECJ.
- Something like negative resolution procedure for UK for future EU legislation?

