Friends of the Earth

Communicant's Response to ACCC Question – Communication ACCC/C/2017/150

Question: Please give specific examples (other than the status of Article 191 TFEU, already referred to in your communication at footnote 9) of the way(s) in which you maintain that the text of the draft Withdrawal Bill showed that it would necessarily have a significant effect on the environment.

In our response, we will make some submissions regarding the threshold required to engage Article 8 (pp1-4), and then draw the Committee's attention to several key clauses in the Withdrawal Bill (the "Bill") which clearly demonstrate the possibility of significant effects on the environment: clauses 1,6,7, 8,9 and 17 (see below pp4-9).

The Threshold

We would first note that the Committee's question refers to the Bill "necessarily" having a significant effect on the environment. However, we would submit that Article 8 mandates public participation on the preparation of legally binding normative instruments which "***may** have a significant effect on the environment*" (emphasis added) rather than that *would* have a significant effect on the environment. In our view the potential significant effect on the environment may be apparent without being expressly included in the provisions and can just result from the effect of a provision or indeed the Bill as a whole.

Findings from the Committee on communications concerning Article 8 have emphasised the broad way in which it has been conceptualised. This Committee has "*stressed that the scope of obligations under article 8 relate to **any** normative acts that **may** have a significant effect on the environment*"[1](emphasis added). We would note that this lower threshold, of the *possibility* of a significant effect rather than the certainty of this happening, is analogous to the Committee's decisions concerning the remit of Article 6. Albeit in relation to public participation in a different context[2], the Committee have similarly stated that "***it is not decisive whether** the operating conditions of the activity will indeed ultimately be updated or **will in fact have significant environmental effects** […] **The crucial point is whether** the reconsideration or update is "capable of" changing the activity's basic parameters or **will "address" significant environmental aspects of the activity***"[3] (emphasis added). The identical way in which the provisions under Article 6 and 8 have been worded[4] further supports the

[1] See the Committee's decision in ACCC/C/2009/44 at para. 61 and in ACCC/C/2014/120 at para. 87.
[2] Relating as Article 6 does to "*public participation in decisions on specific activities",* rather than "*public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments*" as per Article 8.
[3] See the Committee's decisions in ACCC/C/2014/121 at para.103 and ACCC/C/2014/122 at para.83.
[4] In relation to effects on the environment: they both refer to activities or decisions "*which **may** have a significant effect on the environment*" (emphasis added).

Communicant's position that Article 8 is engaged where a significant effect on the environment *could* occur. In any case, this is clear from the plain wording of Article 8 itself.

Potential Significant Effects

To engage Article 8, the impacts must not just be possible, but also significant. In our view, it is clear that the Bill had the potential to lead to significant adverse effects on the environment, but also to significant positive effects on the environment. Both of which engage A8.

For example, on leaving the EU, the UK came out of the EU Emissions Trading Scheme ("ETS"), which provided it with the opportunity to introduce a more ambitious (and hence environmentally beneficial) carbon trading scheme (it could of course also lead to a worse or less effective scheme too). The UK put in place a replacement scheme which will, in turn, be further modified to bring it into line with the most up to date UK Carbon Budgets.

Another example where the Bill could have led to a potential positive impact on the environment and so engage A8 in that way was through the UK's departure from the Common Agricultural Policy ("CAP") Framework. The CAP has been severely criticised on environmental grounds, including the negative repercussions of providing basic payments for land which is in "agricultural condition", resulting in the clearance of wildlife habitats, destruction of hedgerows, depletion of soil and reduction in water quality, even on land which was not actually suitable for farming.[5] Following Brexit, there has been a proposal for shift towards a scheme (known as Environmental Land Management – "ELM") which (notwithstanding its shortcomings) could better promote environmental land management (public land for public goods).[6] Policies are being developed within this and are being rolled out, such as the sustainable farming incentive.

Another example of an opportunity for significant positive change, was departing from the EU's Common Fisheries Policy, which incentivised overfishing.

The key point with all of these examples, is that the Bill created the potential for significant change and uncertainty for the environment, and should have been subject to effective public participation pursuant to the requirements of Article 8.

Statutory Instruments Laid

There was also the potential for significant **adverse** effects on the environment. As noted in Friends of the Earth's Communication (p3), the significant number of statutory instruments (SIs) that were predicted to arise in the period immediately following 'Exit Day' (and that did indeed then arise[7]) represented a major concern that the text of the draft Withdrawal Bill ("the Bill") would (or at the very least could) adversely and significantly affect environmental standards in the UK. For example, clause 7 afforded ministers the powers to make regulations for "*dealing with deficiencies arising from withdrawal*"; clause 8 afforded ministers the powers to make regulations for complying with international obligations; clause 9 afforded ministers the powers to make regulations for implementing the withdrawal agreement (see pp4-7 of our

---

[5] https://www.instituteforgovernment.org.uk/explainers/common-agricultural-policy and https://www.theguardian.com/commentisfree/2018/oct/10/brexit-leaving-eu-farming-agriculture

[6] The changes following the departure from CAP were partly set out in a Brexit SI, and partly through the Agriculture Act 2020.

[7] By 'Exit Day' on 31 January 2021, there had been 622 Brexit-related statutory instruments. See Public Law Project's analysis here.

Communication; and see further below.). These powers were broadly cast and had the potential to be used in significant ways for the environment.

In fact, 622 Brexit SIs were laid over the 2017-2019 session. [8] Of these, hundreds were laid by the Department for the Environment, Food and Rural Affairs (DEFRA), and concerns were raised over negative impacts on the environment in relation to some of these.

For example, Greener UK ("GUK"; a coalition of 12 major environmental organisations with a combined public membership of over 8 million) wrote a report published in April 2021[9] which identified serious issues relating to Brexit SIs affecting the environment, which were enabled and then issued under the EU (Withdrawal) Act 2018 (which the Bill ultimately became). These concerns included:

i) Greater discretionary powers being afforded to government ministers through SIs. For example, GUK criticises the Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019, for allowing the Secretary of State to assess existing maximum residue limits without the need to consider scientific advice from a specialist advisory body. In relation to the Specific Food Hygiene (Amendment etc.) (EU Exit) Regulations 2019, the report also highlights concerns over the transfer of powers to the Secretary of State, which had previously been held by experts in the European Medicines Agency. [10] Both of these amount to a concentration of power in the executive, and a lesser role for scientific opinion, which ultimately risks poorer environmental decision-taking and less scrutiny or accountability that would otherwise rely on this scientific opinion. This in turn risks a significant effect on the environment, which is all that is needed to engage Article 8.

ii) Inadequate replacement of EU Commission oversight and enforcement e.g. Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2019. Notwithstanding our view that there was a *potential* for a positive overall impact from departing from the Common Fisheries Policy, the GUK report states that the obligation to provide assessments of fish stock quantities to the Commission is removed, but a domestic alternative to replace this is not provided. The lack of guaranteed fish stock assessments creates the potential for a lack of critical information being provided to decision takers, such that incorrect measures or no protective measures at all for the use and/or protection of fisheries based on fish stock quantity might result, despite being needed. [11]

iii) Weaker reporting obligations e.g. Air Quality (Miscellaneous Amendment and Revocation of Retained Direct EU Legislation) (EU Exit) Regulations 2018 and the Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2018). The GUK report identifies that the requirements to notify the Commission about ambient air quality and pollutant emissions were removed, but not replaced. [12] As

[8] According to the Public Law Project, 13th October 2020 https://publiclawproject.org.uk/uncategorized/tsunami-of-eu-withdrawal-laws-rubber-stamped-latest-plp-research/

[9] Greener UK Report was entitled "Issues identified in Defra EU exit statutory instruments" https://greeneruk.org/sites/default/files/download/2021-04/Issues_identified_in_Defra_EU_exit_statutory_instruments.pdf

[10] Ibid, p1-2

[11] Ibid, p2

[12] Ibid p3

stated in the GUK report, removing a reporting requirement like this reduces accountability and transparency, which are vital to ensuring that air quality legislation is effectively implemented and that the public concerned are adequately informed (p3). A lack of a reporting requirement in relation to air quality is all the more concerning, given the UK's record on air pollution is so poor; it is described by the Government as "*the largest environmental risk to public health in the UK.*" [13]

iv) Weaker penalty regime e.g. Timber and Timber Products and FLEGT (EU Exit) Regulations 2018. The GUK report states that this SI removes the requirement for "*proportionate and dissuasive penalties and fines*".[14]

v) Removal of targets and actions falling after the end of the transition period e.g. Waste (Circular Economy) (Amendment) Regulations 2020. These Regulations transposed Directives 2018/851 and 2018/8052 into domestic law. They retained the 2035 target for waste and reuse and recycling, but not the interim targets of 2025 and 2030[15].

We note also that an article published by the UK Constitutional Law Association in January 2020 identified Brexit SIs which have attempted to weaken environmental standards. Several examples are given, including the Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (i.e. after the EU Withdrawal Bill was made law). This "*removed a provision which contained a blanket ban on hormone disrupting chemicals in pesticides*", and this ban was only reinstated after the NGO ChemTrust wrote to DEFRA about it.[16]

We will now consider specific clauses in the Bill which demonstrate – in addition to the above examples - that Article 8 was engaged.

Clause 1 – Repeal of the European Communities Act 1972

Under this provision, the legal status of the TFEU is removed in the UK, including Article 11 and Article 191 TFEU: "*The European Communities Act 1972 is repealed on exit day*".

Article 11 TFEU codifies the principle of sustainable development and provides that "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*". Codifying this principle through Article 11 enhances the position of sustainable development as an overarching objective. In removing the UK from the remit of Article 11 TFEU, the Bill therefore facilitates departures from this general, overarching principle, weakening adherence to environmental standards in the process.

In addition, the EU governance and reporting mechanisms ceased to apply to the UK upon its departure from the EU in accordance with Clause 1 of the Bill. The Commission's unique role as a guardian of EU environmental law cannot be replicated. Within the EU, the Commission plays an important role in monitoring compliance with EU environmental law and enforcing specific action in the event that Member States are considered to be in breach of their

[13] https://www.gov.uk/government/publications/health-matters-air-pollution/health-matters-air-pollution
[14] Ibid p3
[15] Ibid, p3
[16] A. Sinclair and J. Tomlinson, 'Brexit Delegated Legislation: Problematic Results', U.K. Const. L. Blog (9th Jan. 2020) (available at https://ukconstitutionallaw.org/2020/01/09/alexandra-sinclair-and-joe-tomlinson-brexit-delegated-legislation-problematic-results/)

obligations (e.g. through Article 258 TFEU). Removing the UK from the remit of the Commission leaves a lacuna in domestic environmental protection.[17].

Nor has this been remedied by the later introduction of the Office for Environmental Protection ("OEP") through the Environment Act 2021. It is important to note that when the Bill was introduced there was nothing about the replacement OEP in it and this only came into existence under this later piece of legislation (and due to considerable and sustained civil society pressure due to concern for environmental protection). The OEP has, though, been criticised for its lack of independence, with the Environment, Food and Rural Affairs Committee ("EFRAC") noting that the OEP should not be viewed as "*just another arm's length public body attached to Defra, given its elevated watchdog status*" which has led EFRAC to doubt whether the OEP "*will have anything close to the same level of independence as currently exercised by the European Commission*"[18].

The importance of this independence has been emphasised by environmental groups, with the UK Environmental Law Association stating that "*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"*[19]. The OEP cannot therefore be said to adequately fulfil the role the Commission played in ensuring compliance with environmental standards, whose role and power over the UK was removed by the Bill.

Clause 6 – Interpretation of Retained EU law

Clause 6 of the Bill specifically provided that, when interpreting retained EU environmental law, UK courts would no longer be legally bound by new CJEU case law (or indeed, need to have "any regard" to it), and the UK Supreme Court[20] would be empowered to depart from retained EU caselaw as well[21]. This clearly had the potential to result in significant effects on the environment, given the strong purposive doctrine of the CJEU (to interpret provisions in line with the objectives of the legislation) as compared to the (generally and traditionally) more black-letter law approach of the UK's domestic courts[22] (and see also below p7 on the Fish

[17] As explained in our Communication, judicial review is no substitute for the Commission as it is expensive, has more restrictive procedural requirements, and applies different standards of review. Nor do the national courts have powers equivalent to the CJEU, e.g. through imposing financial penalties (see Articles 258-260 TFEU).
[18] HC 1042, House of Commons, EFRAC and Environmental Audit Committee ('EAC') joint report of 18 December 2020, Pre-legislative scrutiny of the Draft Environment (Principles and Governance).
[19] UKELA, 'Brexit and Environmental Law – Enforcement and Political Accountability Issues', July 2017, at [5-7].
[20] Ultimately, it has transpired that both the Court of Appeal and the Supreme Court can depart from CJEU case law
[21] Clause 6 of the Bill.

[22] Contrast, for example, the approach of the CJEU to the Environmental Impact Assessment Directive in the *Dutch Dykes* case (Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-05403), where it held that the "*wording of the [EIA] Directive indicates that it has a wide scope and broad purpose*" (such that dyke works were included in "canalization and floo-relief works" for the purpose of the EIA), to the narrow approach to the Directive clear from the High Court's decision in *R v Poole Borough Council ex parte Beebee* (1991). There, the High Court found that whilst the authority had not considered whether to do an EIA when it granted planning permission, it had environmental information in mind, so the outcome of the decision was not affected. The national courts' high-water mark to the interpretation

Legal case). The potential impact on the environment can also be seen in the now legislated potential for courts to depart from CJEU jurisprudence and impose rulings that provide for less environmental protection.

Under the Bill, the CJEU would no longer be able (and now, is not able) to declare that the UK has failed to comply with EU environmental law, to make rulings on the meaning and effect of EU environmental law which the UK is bound to follow, nor to impose a penalty if its judgment is not complied with by the UK[23]. Yet the CJEU has played an important role in holding the UK government to account on matters of environmental protection.

For example, in 2014, following a case brought in the domestic courts by the environmental law organisation ClientEarth, the CJEU held that where a Member State had failed to comply with the relevant limit values, it is the duty of the national court to take measures to ensure that the Member State establishes an air quality plan that is consistent with the requirements of Directive 2008/50/EC[24]. The UK Supreme Court then ordered the Secretary of State to prepare an updated air quality plan. This ruling later provided the basis for two further successful challenges brought by ClientEarth on the UK government's failure to comply with the duties arising from the Directive. Further, the European Commission referred the UK to the CJEU in 2018 due to its continued breach of EU air quality legislation, and the CJEU ruled in March 2021 that the UK has "*systematically and persistently*" exceeded legal limits for nitrogen dioxide and has failed to put adequate plans in place to address the problem[25].

The importance of the CJEU in both enforcing direct action and setting a precedent to ensure ongoing compliance is therefore paramount. The Bill necessarily leads to, at the least, a potential for significant effects on the environment (which is all Article 8 of the Convention requires to be engaged) by removing adequate or consistent governance and reporting mechanisms under the primacy of EU law.

Enforcement of Aarhus Convention Rights

It is very clear, that were it not for the UK being a member of the EU, which is itself a party to the Aarhus Convention, then the UK approach to the Aarhus Convention would have been very different. We would draw two key examples demonstrating this to the attention of the Committee, and which are in turn evidence of the potential for significant effects on the environment that are presented by the Bill and its effect:

i. Securing compliance with the Aarhus Convention: Aarhus Protective Cost Orders

Given the UK's dualist constitutional system, in the absence of the implementation of Aarhus principles through EU law (or domestic law), the national courts held that the Aarhus Convention was something which they could, at best, have regard to, but did not mandate an outcome in terms of cost protection for environmental claimants. For example, in *Morgan*[26],

---

of the EIA Directive was the House of Lord's decision in *Berkeley v Secretary of State for the Environment and Others* [2001] 2 AC 603, but in more recent case law, the Supreme Court has rowed back, at least to some extent, from this position e.g. *Walton v Scottish Ministers* [2012] UKSC 44 [2013] 1 CMLR 28

[23] This is what the CJEU was able to do whilst the UK was a member of the EU, under Articles 258-260 and Article 267 TFEU.

[24] Case C-404/13 ClientEarth v Secretary of State for the Environment and Home Affairs

[25] ClientEarth, 'Top court confirms UK has broken air pollution law', 4 March 2021. See here. European Commission v UK Case C-664/18

[26] Morgan v Hinton Organics (Wessex) Ltd [2009] 2 P & CR 30 at [47]

the Court of Appeal recognised that certain EU Directives, which were not applicable in that case, had incorporated Aarhus principles and "*thus given them direct effect in domestic law*", but that absent that, "*the rules of the CPR relating to the award of costs remain effective, including the ordinary 'loser pays' rule and the principles governing the court's discretion to depart from it.* ***The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion****. (iv) This court has not encouraged the development of separate principles for 'environmental' cases (whether defined by reference to the Convention or otherwise).*" (emphasis added).

In *Garner* (a case in which the Communicant was a legal intervener), the Court of Appeal endorsed the approach taken in *Morgan* and its application of the general rules on cost liability in court proceedings, including the finding that the principles of the Aarhus Convention did not take effect in the absence of implementation into domestic law, and could at most be considered[27]. A PCO was granted by the Court of Appeal, but this was on the basis of the requirements of article 10a of Directive 2003/35 (on environmental impact assessment), which had direct effect in national law, and which itself incorporated Aarhus Convention principles against prohibitive expense[28].

This position should be contrasted with what happened when the case of *Edwards*[29] went before the CJEU. In the CJEU's judgment, European Union law had to be "*properly aligned*" with the Aarhus Convention [25] and, that even if neither the Aarhus Convention nor EU law specified how exactly the cost of judicial proceedings should be determined in order to determine the question of prohibitive expense, "*that assessment cannot be a matter for national law alone*" [30]. The CJEU therefore set down a list of criteria for assessing what constituted "prohibitive expense", which included objective and subjective analysis of the financial situation of the claimant, and also the public interest in the protection of the environment.

However, post Brexit we can have no recourse to the CJEU for a future decision along the lines of *Edwards*, and the Bill allowed the Supreme Court to depart from CJEU case law in significant ways, including *Edwards*.[30]

ii) Access to environmental information

A legal challenge brought by the NGO Fish Legal ultimately secured a broad understanding of what constituted a public authority under the Environmental Information Regulations 2004 ("EIRs"; which implemented Directive 2003/4, which in turn implemented Article 4 of the Aarhus Convention). This was achieved by seeking a reference to the CJEU, not through the decision of the domestic tribunal of first instance. The First-tier Tribunal (General Regulatory Chambers, Information Rights[31]) had found that the privatised water industry *could not* be classified as a "public authority" under the EIRs. However, the CJEU later concluded the opposite: private water companies *were* public authorities for the purpose of Regulation 2(2c) owing to the special powers they had been granted under the Water Industry Act 1991, which

[27] *R(Garner) v Elmbridge Borough Council & Others* [2010] EWCA Civ 1006, 2010 WL 3257402 at [32]
[28] Ibid at [53]
[29] *Edwards and Pallikaraopoulos v Environment Agency and Others – C-260/11*

[31] The first instance national tribunal. Appeals can be filed at the First-Tier Tribunal against decisions of the Information Commissioner, which in this instance had likewise concluded that the privatised water industry was not a public authority for the purpose of the EIRs.

went beyond those resulting from the normal rules governing parties under private law, and meant they carried out functions of public administration. For example, they had powers of compulsory purchase, powers to make byelaws relating to waterways and to impose hosepipe bans.[32] Through this judgment, the CJEU increased the effectiveness of the Aarhus Convention in national law, and furthered the objective of enabling citizens to access environmental information that was previously (wrongly) withheld from them.

Accordingly, enforcing (as EU law) the EU's implementation of the Aarhus Convention was the only way to secure Convention requirements which went beyond existing UK law according to the domestic UK Tribunal. Following Brexit, that possibility of indirect enforcement of the Convention has been removed. Requirements of the Convention that go beyond what is prescribed in national law, cannot now be enforced indirectly, let alone directly in the UK.

Clauses 7-9 and 17 - Powers to Amend and Delete

As set out in our Communication [p2], at the time of the Withdrawal Bill, most of the UK's environmental laws were derived from EU legislation. However, the Bill provided government ministers with powers to transfer intact, amend, or delete major aspects of environmental law derived from EU law via secondary legislation. These powers are included in clauses 7-9 and 17 of the Bill [see Communication pp4-7]. The potential for significant effects on the environment is therefore clear from these provisions.

We would draw your attention also to the House of Lords report on 28 September 2017 (footnote 6 to our Communication; p3), which stated in the summary that:

"*The European Union (Withdrawal) Bill gives excessively wide law-making powers to Ministers, allowing them to make major changes beyond what is necessary to ensure UK law works properly when the UK leaves the EU.*

The Bill contains unacceptably wide Henry VIII powers, including allowing Ministers to amend or repeal the European Union (Withdrawal) Bill by statutory instrument."

Absence of a Non-Regression Clause

Equally important to what the Bill does say is what it doesn't. Particularly notable in this regard is the omission of a binding non-regression clause (i.e. a clause that prohibits any recession of environmental law or existing levels of environmental protection and a standard in trade deals). The absence of any such clause in the Bill risked allowing the UK government to set weaker environmental regulations and standards than those currently imposed by EU law. Though this gap has to some extent been filled by Article 387(2) of the UK-EU Trade and Cooperation Agreement ("TCA")[33], this was not included in the Bill and was not known about or proposed at the time.

Moreover, as it transpires, the article was widely criticised by environmental groups for its limited remit, applying as it does only to the weakening of standards where it might directly impact on EU trade. As a result, its impact on other areas of protection, such as importing goods that do not meet certain standards or more general environmental protections, are not covered.

---

[32] *Fish Legal v Information Commissioner and Others* C-279/12 at [54]

[33] Article 7.2(1).

This led Greener UK to doubt whether it would prevent the lowering of environmental standards[34], with the Institute for Public Policy Research (IPPR) agreeing that "*the commitments on labour and environmental standards are considerably weaker than expected*"[35]. Had a binding non-regression clause been included in the Bill, action to (insufficiently) remedy this gap by the TCA would not have been necessary, and the weaker language inherent in the TCA might not have thus opened the door to a possible weakening of environmental standards.

31 August 2022

Friends of the Earth Limited

[34] Greener UK, 'Initial environmental analysis of the EU-UK Trade and Cooperation Agreement' (29 December 2020). Available here: https://greeneruk.org/sites/default/files/download/2020-12/GreenerUK_initial_analysis_of_the_EU-UK_deal.pdf

[35] IPPR, 'The agreement on the future relationship: a first analysis' December 2020. Available here: https://www.ippr.org/files/2020-12/agreement-on-future-relationship-ippr-assessment-1-.pdf