

FAQ: Brexit and Environmental Law

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EU environmental law has been one of the success stories of EU integration. While the UK will be able to adopt their own environmental standards, it is not likely that these will be higher than those currently in force at EU level.

This FAQ discusses:

- General EU environmental law
- The impact of Brexit on environmental law
- The enforcement of environmental law post-Brexit
- The lack of ECJ or Commission oversight
- The future of environmental protection legislation and for independent enforcement for example through specialized environmental courts.

This FAQ is intended to provide a brief overview of some key issues, and is therefore not comprehensive.



Q: How does Brexit affect environmental law?

A: While Brexit is considered a major challenge in most legal areas, there was initially an element of optimism concerning Brexit and environmental law. Unlike in many other areas, some environmentalists have expressed the view that the United Kingdom (UK) could perhaps adopt higher and more appropriate standards of protection, particularly in the areas of agriculture and fisheries. But of course, after the current government announced unconditional withdrawal from the customs union and single market, de-regulatory pressure will be mounting significantly for the time post-Brexit. Given that much of UK environmental law is actually based on EU law, many of the detailed effects will depend on the final version of the UK Withdrawal bill. An amendment not to allow Ministers to change environmental norms without an act of Parliament failed to obtain a majority. In addition some of the most important norms are contained only in the EU Treaties such as protection of animal rights, integration of environmental concerns in economic decision making and all EU environmental law principles (Article 191 TFEU). The concern is that the EU Withdrawal Bill as it currently stands does not convert EU Treaty norms into UK law unless they are directly effective. While this is the case (arguably) for all EU environmental law principles it might not be the case for animal rights (Art. 13 TFEU) or other 'newer' Treaty norms. This led to the [accusation](#) that a failure to convert EU Treaty norms might lessen environmental and animal rights protection post-Brexit. This does not bode well for negative changes to come. In general, hope about an impending environmental paradise post-Brexit in Britain is largely tempered by the fact that thus far the UK had never adopted more stringent environmental measures.

Unlike in many other fields, Article 193 TFEU authorises Member States to establish more stringent protective measures,¹ when implementing environmental policy at the national level.² This domestic deference allowing for higher levels of ambition is rarely used and arguably the UK did not need Brexit to establish stricter environmental laws.

Q: How will the absence of ECJ jurisdiction affect environmental law?

A: Much depends on the details in the EU Withdrawal Bill but several prominent ECJ decisions have influenced and evolved EU environmental law. There are significant discussions as to how the ECJ will continue to influence the interpretation of the many norms that will become UK law. At best it will continue to carry persuasive value for years to come. At worst much of the advances of EU environmental law by the jurisprudence of the ECJ will be lost.

For example in [Inter-Huiles](#) (172/82) the ECJ reviewed the French system which in effect inhibited the export of waste oil, finding that Member States cannot organize a disposal system in a trade restrictive way. This holding was reaffirmed in multiple subsequent cases (e.g. [Rhônes-Alpes Huiles 295/82](#); [Vanacker C-37/92](#); [Chemische Afvalstoffen C-203/96](#); [FFAD C-209/98](#)). In [ADBHU](#) (240/83) the Court was asked to consider the balancing of general interests – including free movement of goods, competition, and trade – in relation to environmental protection, holding that general interests were not absolute and must be seen in the context of the essential objective of environmental protection.

The balancing of the EU interests with the autonomy of Member States has been a central theme of environment jurisprudence. In [Danish Bottles \(302/86\)](#) the Court considered a Danish beverage container preapproval process which provided an exception for imported test products, and a quantitative limitation on unapproved containers of 3,000 hectolitres (hl) per annum. Following the holding in [ADBHU](#), the Court noted that environmental protection was an essential objective which could justify a trade-distorting bottle deposit-and-return system, but held that the preapproval process was discriminatory as it disallow otherwise reusable containers,³ in effect placing a proportionality test on trade-distorting environmental measures. In [Commission v Belgium \(C-2/90\)](#) the Court considered a Belgian prohibition on the dumping or storage of foreign or domestic waste in the region of Wallonia, but for waste originating in that region. Curiously, while the Court noted the measure openly discriminated against imports, the measure was upheld as having a clear objective to protect human health and the environment,⁴ reinforcing the prominence of domestic environmental protection measures. The Court protected rights of environmental activists in [Schmidberger \(C-112/00\)](#) where it concluded that the rights of demonstrators had equal weight to the right of transport companies to move goods freely within the EU. Losing this progress would mean moving the UK away from the EU.

Q: But isn't international environmental law protecting us?

A: Insofar as the current framework for environmental law is set out at international level in international environmental law treaties, it will be largely unaffected by Brexit. The provisions of, for example, the [Paris Agreement on Climate Change](#), the [UN Convention on Biodiversity](#) or the [Stockholm Convention on Persistent Organic Pollutants](#) and the environmental chapter of the [UN Convention on the Law of the Sea](#) (esp Arts 116-120) just to name a few as well as numerous regional environmental treaties such as the [Basel Convention on Toxic Wastes](#) or the [Aarhus Convention on Environmental Information and Participation](#) will remain similarly unchanged.

¹ Consolidated Version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ C 326/47, Article 193.

² *Ibid*, TFEU, Article 258.

³ *Danish Bottles*, at para 20-22.

⁴ *Commission v Belgium*, at para 50.

In particular, the international law obligations of the United Kingdom and individual EU Member States not to harm the environment of other States and to conduct environmental impact assessment constitute principles of customary international law which bind the UK and will remain in force. It should however be noted that these provisions are, unlike EU law, not directly effective and require implementation before private parties can rely on them before UK courts. It will depend on the EU Withdrawal Bill if the implementation legislation for all of these treaties which was adopted at EU level count for the purpose of UK domestic law as 'implementation statutes'. The normal view is that delegated legislation cannot implement an international treaty into UK law but then nothing is really normal in this Brexit. However, the Bill does not assign a legal status to retained EU law except for in two unrelated circumstances (Sch 8, paras 5, 19). This means it is unclear whether international environmental law can be relied upon before UK Courts to ensure that existing standards are maintained, though there are good arguments for litigants to argue for such a 'transformation' of international law.

Q: Can we still cooperate with the EU on global issues, such as climate change?

A: Assuming that there is an Article 50 TEU Agreement and perhaps an association agreement for the future relationship between the UK and the EU, the latter could contain options to participate in climate change legislation, such the EU Emissions Trading System. A pillar of the EU climate change framework, [Directive 2003/87/EC](#), establishes a scheme for greenhouse gas emission allowance trading providing a market-based mechanism to positively incentivize decarbonization efforts.⁵ The EU ETS covers CO₂, nitrous oxide (N₂O), and perfluorocarbons (PFCs), and includes: power generation, energy intensive sectors – such as oil refineries, production of various metals, cement, glass, pulp and paper, cardboard, acids and bulk organic chemicals – and commercial aviation within the European Economic Area (EEA).⁶ Non-EU Member States such as Switzerland, Norway and Iceland are already part of the ETS, so it is assumed that the UK could also conclude a 'linking' agreement as part of the Withdrawal Treaty.

Q: Could the UK just ignore EU environmental standards?

A: Yes, the UK could ignore EU environmental standards if it decided not to trade with the EU anymore. The US Trade Representative for example listed the EU's [REACH Chemicals Regulation](#) as one of the most trade restrictive laws that US producers must follow. In other words, even US producers follow a large number of EU rules concerning product standards. If UK companies wish to sell their products in the EU, they will have to follow EU product standards unless those are challenged in the WTO, or the UK and the EU agree mutual recognition. With regards to this future regulatory cooperation, EU Chief Negotiator Michel Barnier [said recently](#) that he aims to ensure a level playing field between new UK standards post-Brexit and existing standards EU standards, which would only be problematic if the UK concluded trade agreements with other countries with much lower regulatory standards.

Q: Many EU environmental laws rely on the EU Commission to enforce them. Who will do this post-Brexit?

A: If the recent media reports can be believed, the UK aims to establish an independent environmental watchdog to replace the EU Commission's role. Many countries don't allow the government itself to evaluate its own environmental performance but rather create environmental agencies that can effectively supervise governmental failings or even establish [separate environmental courts](#) with special knowledge and experience in handling scientific advice. Perhaps the government should review if special environmental courts will be necessary.

⁵ EU ETS Directive, *Preamble*.

⁶ *Ibid*, Annex I-II.

Q: So what will happen next?

A: In the unlikely event that there is no withdrawal agreement with the EU, UK citizens and NGOs will have to become much more vigilant as to the environmental enforcement and compliance with international and national standards. Brexit means that many rules on which we have come to rely all over the EU ranging from drinking water quality and food standards to air and noise pollution are now not enforced internationally but at the whim of the government with the danger of immense downward regulatory pressure and a US-style laissez-fair attitude to environmental enforcement but without the punitive damages on offer in their tort system. Brexit could thus inadvertently mean deviating from internationally agreed standards and in the end a much lower standard of living for all.

In case there is a far reaching Withdrawal Agreement, perhaps even a new UK-EU Association Agreement, provisions will most likely include participation of the EU in the most important environmental law initiatives such as the EU ETS and in any case an obligation not to lower environmental standards to attract investment or create business opportunities, similar to the [CETA](#) provision on “Upholding levels of protection” in Article 24.5(1) which reads: “The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.” A similar provision would probably ease the most urgent Brexit related environmental law concerns.