UK environmental law on the way to Brexit

A guide for environmental professionals on key issues in UK law and compliance during the EU withdrawal negotiations

29 MARCH 2017
Joan Walley, Chair, Aldersgate Group
What, in your view, are the main environmental risks from triggering article 50?

Faced with having to address every policy area, insufficient priority given to the environment by government and its negotiators. The EU has helped drive environmental improvements in the UK so the process of withdrawal must not lead to any weakening of our current environmental protections. Although the Great Repeal Bill will be helpful in achieving regulatory stability once we have left the EU, transposing legislation will not be a simple process, particularly because of the need to replace governance and enforcement arrangements that may no longer apply. Nor should Brexit entirely distract from other government priorities, such as improving the state of our natural environment via the 25-year environment plan or supporting moves to a more resource-efficient economy.

Robbie Staniforth, Commercial Manager, Ecosurety
What do you think are the environmental opportunities?

If more power is transferred to DEFRA, the Environment Agency, BEIS etc, which we assume will happen, that is a real chance for them to show their mettle, prosecute and take decisive action against polluters. Particularly in product legislation, it is an opportunity to prioritise UK environmental concerns and act quickly. Targeted action could have more immediate and tangible impacts than the current system. Businesses and our industry need to ensure the government doesn’t pursue legislation based on grabbing headlines and generating votes. Some of the more obscure and uninteresting pieces of legislation to the voter are the ones that have delivered the greatest environmental benefit. It could be a chance to rip up clunky legislation or rules, even whole departments, and replace them with something streamlined that carries more weight with producers and forces them to consistently do the right thing by the environment. There are EU tools that have a poor reputation for delivering results, especially around climate change. This is an opportunity to replace them with something much better.

Join us on 11 April to hear from Joan Walley, Robbie Staniforth and many more speakers including:

- Dr Alan Whitehead, Labour MP, Southampton Test
- Amy Mount, Head of Greener UK Unit, Green Alliance
- Nigel Haigh, Hon. Fellow and former Director, Institute for European Environmental Policy (IEEP)
- Paul Leinster, Professor, Cranfield University and Former Chief Executive, Environment Agency
- Richard Macrory, Professor, UCL and Co-chair, UK Environmental Law Association Brexit Task Force
- Kate Swade, Executive Director, Shared Assets
- Martin Baxter, Chief Policy Advisor, IEMA
- Samuel Lowe, Campaign Lead, Friends of the Earth

Don’t miss the key opportunity for business, environmental and legal professionals to come together to hear from experts on what Brexit might mean for UK environmental law and contribute your own views on the significance of Article 50.
Foreword

Brexit has enormous implications for UK environmental legislation, for which the EU has provided a main driver and legal framework for 45 years. With the triggering of article 50 of the Lisbon Treaty on 29 March, the journey towards Brexit is now definitively under way. Barring unlikely scenarios the UK will most probably be outside the EU’s legal jurisdiction by March 2019.

No-one yet knows what changes future UK governments and devolved administrations will make after Brexit day. But for the period leading up to the UK’s formal departure many of the key issues can already be identified.

The government has clearly committed to respecting current EU rules for as long as the UK remains formally a member, and to providing legal continuity on withdrawal. This implies that it should continue going through all the motions of EU membership during the coming two years.

In particular it means faithfully writing existing EU requirements into UK law through the Great Repeal Bill and adapting existing UK laws so that they are still useable after Brexit. It also means complying with any new legal obligations that take effect or court rulings made during the negotiating period.

But how zealous will the government be - or be able to be - as the clock ticks down towards Brexit, as the practical difficulties of the negotiations mount and as stakeholders (and there are bound to be some) start to demand change to regulations even before withdrawal? This ENDS special report aims to shed light on the areas of environmental law that could be affected by issues like this during the period of negotiations.

Our goal is to provide a practical reference manual for business environment managers, environmental consultants, environmental lawyers and others.

Key themes covered are:

- **EU regulations and the Great Repeal Bill:** Hundreds of directly applicable environmental EU regulations must be converted into UK law raising questions of how far they can be carbon copied and who decides on any necessary changes. We identify the most important EU environmental regulations as a pointer for affected parties and to illustrate the scale of the challenge.

- **Existing UK legislation and the Great Repeal Bill:** Most environmental legislation passed by the UK and its devolved administrations includes extensive references to EU laws, institutions, obligations and other EU matters. We illustrate the scale and diversity of these references, which will have to be dealt with for such laws to be legally sound after withdrawal, for a typical piece of UK legislation.

- **Scheduled new EU legal obligations during Brexit negotiations:** The EU’s legislative motor has not stopped running because of the UK’s decision to leave and a slew of future compliance deadlines are already being set in stone. We list forthcoming deadlines as of early March 2017 and ask how likely it is that the UK will meet them all in practice.

- **Open legal infringement proceedings against the UK:** The EU is a community of law held together by the European Commission and the Court of Justice of the EU. Multiple environmental infringement proceedings are currently open against the UK, some of which could result in new court rulings against it before Brexit. We show what these cases are and discuss how the prospect of withdrawal could affect them.

Where possible through the report, references to specific legislation includes hyperlinks to document summaries on the ENDS Compliance Manager website, available to ENDS subscribers.

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SPECIAL REPORT

UK environmental law on the way to Brexit

An ENDS special report

Authors Alice Fillan, Max Lees, Nick Rowcliffe
Editors Isabella Kaminski, Nick Rowcliffe
Production David Young
Cover photo Pixabay (Makamuki0)

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ENDS
Haymarket Business Media
Bridge House
69 London Road
Twickenham
TW1 3SP, UK

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EU regulations and the Great Repeal Bill

The government has pledged to ensure continuity of current environmental laws as the UK leaves the EU. The mechanism it has proposed to achieve this is the Great Repeal Bill. As well as repealing the European Communities Act 1972, which will end the primacy of EU over UK law, the government says this will convert all currently applicable EU legislation into UK law.

At the heart of this task will be transferring (or converting or copying across - the language of the debate is still unclear) a large number of EU regulations.

Unlike EU directives, which set objectives that each member state has to convert into its own law (transpose in the jargon), EU regulations are “directly applicable”. This means they apply immediately and in full in every member state without any further national legislative action.

If the UK were to repeal the European Communities Act 1972 and leave the EU without converting environmental EU regulations into national law it would leave enormous holes in the British legislative framework.

There are somewhere in the region of 500 directly applicable EU regulations with environmental effects currently in force. The European Commission’s Eur-Lex database of EU legislation records 340 tagged to the subject: environment. But there are many others that are equally important as environmental laws that are not classified as such on Eur-Lex.

UK parliamentary and expert reports have underlined the scale and complexity of the challenge of converting these thousands of pages of legislation into UK law. UK environment secretary Andrea Leadsom has amplified these concerns with her comment to the House of Commons Environmental Audit Committee that only “about two-thirds of the legislation will be able to be rolled forward with just some technical changes, but roughly a third will not”.

In addition, commentators have raised process and democracy concerns over how changes will be made where legislation cannot be “rolled over” more or less intact.

The European Communities Act that took the UK into what was then the European Economic Community contained a clause enabling ministers to make changes to UK legislation for the purposes of aligning it with European requirements without going through the process of primary legislation. Such provisions are widely known as ‘Henry VIII’ clauses.

Now faced with an equally large task of writing all current EU regulations into UK law, it has been suggested that the government should make widespread use of Henry VIII clauses to get the job done efficiently and relatively quickly.

The extent to which the government uses this technique for converting EU environmental regulations will be intensely scrutinised by environmental stakeholders concerned that Brexit should not mean a roll-back of standards, and by parliamentary campaigners worried by any sideling of parliamentary sovereignty.

Another hot issue will be how EU regulations are translated in a UK context in which environment is already a devolved issue; the administrations of Scotland, Wales and Northern Ireland have primary responsibility for setting environmental rules on their turf within the common framework set by the EU.

This will be controversial in part because of the reignited debate over a second Scottish independence referendum. These are all debates that will only crystallise once DEFRA publishes specific plans for how it intends to convert environmental EU regulations into UK law.

The list below presents 172 of the main EU regulations with environmental effect that the Great Repeal Bill must convert into UK law.

Our selection includes all regulations introducing substantive new controls, including regulations that amend previous directives, but excluding regulations that amend other regulations. Also excluded are law types called implementing and delegated regulations.

Key in force environmental EU regulations

**GENERAL (including access to environmental information directive /Aarhus)**


AVIATION


■ Commission Regulation (EU) No 606/2010 of 9 July 2010 on the approval of a simplified tool developed by the European organisation for air safety navigation (Eurocontrol) to estimate the fuel consumption of certain small emitting aircraft operators

■ Commission Regulation (EC) No 748/2009 of 5 August 2009 on the list of aircraft operators which performed an aviation activity listed in Annex I to Directive 2003/87/EC on or after 1 January 2006 specifying the administering Member State for each aircraft operator

BATTERIES AND ACCUMULATORS


BIOFUEL


CHEMICALS


■ Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, and a large number of implementing regulations approving active substances


■ Commission Regulation (EC) No 771/2008 of 1 August 2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency

■ Commission Regulation (EC) No 2161/1999 of 12 October 1999 imposing further testing requirements on the importers or manufacturers of a certain priority substance as foreseen under Council Regulation (EEC) No 793/93 on the evaluation and control of the risks of existing substances


■ Council Regulation (Euratom) No 1493/97 of 8 June 1993 on shipments of radioactive substances between Member States


CLIMATE


■ Commission Implementing Regulation (EU) No 2015/2067 of
17 November 2015 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, minimum requirements and the conditions for mutual recognition for the certification of natural persons as regards stationary refrigeration, air conditioning and heat pump equipment, and refrigeration units of refrigerated trucks and trailers, containing fluorinated greenhouse gases and for the certification of companies as regards stationary refrigeration, air conditioning and heat pump equipment, containing fluorinated greenhouse gases


CONSERVATION
- Commission Implementing Regulation (EU) No 2015/736 of 7 May 2015 prohibiting the introduction into the Union of specimens of certain species of wild fauna and flora
- Commission Implementing Regulation (EU) No 2016/145 of 4 February 2016 adopting the format of the document serving as evidence for the permit issued by the competent authorities of Member States allowing establishments to carry out certain activities concerning invasive alien species of Union concern pursuant to Regulation (EU) No 1143/2014 of the European Parliament and of the Council
- Commission Regulation (EC) No 963/2001 of 17 May 2001 on detailed rules for the application of Council Regulation (EC) No 1259/1999 as regards the additional Community support and the transmission of information to the Commission
- Commission Delegated Regulation (EU) No 2015/531 of 24 November 2014 supplementing Regulation (EU) No 508/2014 of the European Parliament and of the Council by identifying the costs eligible for support from the European Maritime and Fisheries Fund in order to improve hygiene, health, safety and working conditions of fishermen, protect and restore marine biodiversity and ecosystems, mitigate climate change and increase the energy efficiency of fishing vessels
- Council Regulation (EC) No 734/2008 of 15 July 2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears

TRANSPORT AND TRANSPORT EMISSIONS
- Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second Marco Polo programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003
- Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and
EU REGULATIONS


- Commission Implementing Regulation (EU) No 2015/429 of 13 March 2015 setting out the modalities to be followed for the application of the charging for the cost of noise effects

POLLUTION AND WASTE


- Council Regulation (EC) No 1420/1999 of 29 April 1999 establishing common rules and procedures to apply to
EU REGULATIONS

shipments to certain non-OECD countries of certain types of waste

- Commission Regulation (EC) No 782/2005 of 24 May 2005 setting out the format for the transmission of results on waste statistics
- Regulation (EC) No 2099/2002 of the European Parliament and of the Council of 5 November 2002 establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and amending the Regulations on maritime safety and the prevention of pollution from ships
- Regulation (EU) No 530/2012 of the European Parliament and of the Council of 13 June 2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers

PRODUCTS (Ecodesign, Ecolabel, Energy labelling)

EU REGULATIONS

- Regulation (EU) No 2010/30 of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (recast) and numerous commission delegated regulations for energy labelling of specific products

EU EMISSION TRADING SYSTEM

- Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC

ENERGY

- Commission Regulation (Euratom) No 302/2005 of 8 February 2005 on the application of Euratom safeguards

GMos

UK legislation and the Great Repeal Bill

Converting directly applicable EU regulations into UK law in their entirety may be the biggest challenge of the Great Repeal Bill. But updating existing UK legislation passed to implement EU requirements is also a huge task.

As noted by the House of Lords European Union committee in February, UK legislation that implements EU law is deeply intertwined with its EU framework through a complex series of references to other EU laws, institutions and obligations.

It summarised the issue as being a question of “how [the government] will accommodate so-called ‘legislation by reference’, as well as references to the EU’s institutions, its executive agencies and obligations imposed on other member states”.

The risk here, according to environmental experts, is that without amendment huge parts of existing UK environmental laws will cease to make sense legally once the UK is out of the EU.

There are hundreds of pieces of UK and devolved administration legislation that have implementing EU rules as their primary objective. Even where implementing EU rules is not their primary aim, most current UK environmental legislation contains at least some EU references.

Based on a review of UK statutory instruments ENDS has found the following to be common types of EU reference:
2. Definitions of key terms by reference to EU legislation.
3. Obligations to communicate with or report to EU institutions.
4. Dependence on specific actions to be taken by the European Commission.
5. Contextualisation of requirements against wider EU objectives.
6. Principles of EU law, such as the precautionary principle.
7. Concepts developed by case law from the Court of Justice of the EU (CJEU).

How the government will deal with each of these through the Great Repeal Bill remains to be seen. As a starting point it is valuable to review in detail the extent and specific types of EU references in a single piece of UK environmental legislation.

For this we have chosen a 2010 law designed to consolidate all UK legislation implementing the EU Habitats Directive, originally passed in 1992 but since significantly amended at EU level.

Here for the record is the full list of 100+ EU references in the UK Conservation of Habitats and Species Regulations 2010:

EU references in UK law: a case study of the Conservation of Habitats and Species Regulations 2010

INTRODUCTORY TEXT
- “The Secretary of State is designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to the environment”
- “In exercise of the powers conferred on them by section 2(2) of the European Communities Act 1972, the Secretary of State and the Welsh Ministers make these Regulations”
- “These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972”

The secretary of state is given the powers to make these regulations by the European Communities Act 1972, so as to implement EU law in the area of the environment.

PART 1
Regulation 3 (1)
Interpretation:
- “Conservation” has the meaning given by Article 1(a) of the Habitats Directive
- “European offshore marine site” means a European offshore marine site within the meaning of regulation 15 of the 2007 Regulations (meaning of European offshore marine site)

EU REFERENCES IN UK LAW

- **Natura 2000** means the European network of special areas of conservation, and special protection areas under the old Wild Birds Directive or the new Wild Birds Directive, provided for by Article 3(1) of the Habitats Directive.
- **natural habitats** has the meaning given by Article 1(b) of the Habitats Directive “Priority habitat types” and “Priority species” has the meaning given by Article 1(d) of the Habitats Directive.
- **site of Community importance** has the meaning given by Article 1(k) of the Habitats Directive.
- **special area of conservation** has the meaning given by Article 1(l) of the Habitats Directive.

**Regulation 8**

(1) Subject to paragraph (2), in these Regulations a “European site” means—

a. a special area of conservation;

b. a site of Community importance which has been placed on the list referred to in the third sub-paragraph of Article 4(2) of the Habitats Directive;

c. a site hosting a priority natural habitat type or priority species protected in accordance with Article 5(4) of the Habitats Directive (a site in respect of which consultation has been initiated under Article 5(1) of that Directive, during the consultation period or pending a decision of the Council under Article 5(3));

d. an area classified pursuant to Article 4(1) or (2) of the old Wild Birds Directive or the new Wild Birds Directive; or

e. a site which has been proposed to the European Commission under regulation 10 (selection of sites eligible for identification as of Community importance), until such time as—

i. the site is placed on the list of sites of Community importance referred to in the third sub-paragraph of Article 4(2) of the Habitats Directive, or

ii. agreement is reached or a decision is taken pursuant to Article 4(2) of that Directive not to place the site on that list.

**Regulation 9 (1) and (3)**

- The appropriate authority and the nature conservation bodies must exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive.

- A competent authority must, in relation to a marine area, exercise any of their functions which are relevant to marine conservation so as to secure compliance with the requirements of the Habitats Directive.

These provisions mean that the secretary of state, Welsh ministers and bodies such as Natural England and Countryside Council for Wales must make sure all nature conservation efforts also protect the habitats and species identified by the EU as in need of protection.

**PART 2**

**Regulation 10 (1):**

- On the basis of the criteria set out in Annex III (Stage 1) to the Habitats Directive [...] the appropriate authority must propose a list of sites in England or Wales which are eligible for identification as of Community importance, indicating with respect to each site—

  a. which natural habitat types in Annex I to the Habitats Directive the site hosts; and

  b. which species in Annex II to the Habitats Directive that are native to Great Britain the site hosts.

These obligations derive from the Habitats Directive (article 4). The criteria include, among other things, consideration of the global view of the conservation value of the site. The proposed sites must be sent to the European Commission (see regulation 10(5)). This process has already been more or less followed to completion, but there is currently one outstanding candidate site in Scotland, which the commission has yet to approve.

Annex I of the Habitats Directive lists the habitat types in need of protection and annex II lists the species. Regulation 10 (4)

- The appropriate authority may propose modification of the list in the light of the results of the surveillance referred to in Article 11 of the Habitats Directive.

Under Article 11, the UK must carry out surveillance of the conservation status of the relevant habitats and species. That obligation is detailed in regulation 48.

**Regulation 10 (5)**

- The list, and any new site included in that list, must be transmitted to the European Commission together with information on each site including—

  a. a map of the site,

  b. its name, location and extent, and

  c. the data resulting from application of the criteria specified in Annex III (Stage 1) to the Habitats Directive provided in a format established by the European Commission.

This obligation derives from article 4(1).

**Regulation 11 (1)**

- Once a site of Community importance in England or Wales has been adopted in accordance with the procedure laid down in Article 4(2) of the Habitats Directive, the appropriate authority must designate that site as a special area of conservation.

The procedure mentioned involves the commission first identifying which of the sites proposed lost one or more priority natural habitat types or priority species. The commission must consult with the member state, then adopt the list within the first six years of the directive.

**Regulation 11 (2)**

- The appropriate authority must establish priorities for the designation of sites.

- This obligation derives from the Habitats Directive (article 4(4)). In addition to prioritising according to the importance of the site for conservation of the habitats and species listed, the secretary of state must also take into account how each site contributes to the overall coherence of the EU-wide Natura 2000 network.

**Regulation 12 (1)**

- If consultation is initiated by the European Commission in accordance with Article 5(1) of the Habitats Directive [...] and

  a. the appropriate authority and the European Commission agree [...] that the site should be selected, or

  b. the European Council, or acting on a proposal from the European Commission in pursuance of Article 5(2) of the Habitats Directive, decides that the site should be so selected in accordance with Article 5(3) of that Directive.
the site is to be treated as having been placed on the list
Article 5(1) stipulates that if a member state fails to include a site which appears to meet the criteria, the commission will launch a bilateral consultation, to compare the scientific data used by each. If the two parties do not agree after six months, the commission will submit a proposal to the European Council suggesting that the site should be selected, which will take a vote and can force its approval if heads of state vote unanimously in favour.

Regulation 13 (1)
● A register of European sites, in an appropriate format, must be compiled

The register includes not only those sites submitted to the commission for consideration, but those already designated as special areas of conservation, those currently under consideration, as well as special protection areas and sites containing priority species and habitats; in short, all European sites.

Regulation 19(1) and (2)
● This regulation and regulations 20 to 22 apply where a notification is in force under section 28 of the WCA 1981 (sites of special scientific interest) in relation to land which is or forms part of a European site.

● The appropriate nature conservation body may, for the purpose of securing compliance with the requirements of the Habitats Directive, at any time amend the notification.

Under the Wildlife and Countryside Act 1981, if Natural England considers that an area of land is of special interest, it must notify local planning authority, owners and occupiers of the land and the secretary of state. The requirements of the Habitats Directive are that conservation bodies ensure the protection of the habitats and species listed within it.

Regulation 20 (1)
● While a notification [...] is in force in relation to any land which is or forms part of a European site, the owner or occupier of that land must not carry out, or cause or permit to be carried out, on that land any operation specified in the notification [...]

Regulation 21 (1)
● Where it appears to the appropriate nature conservation body that an application for consent under regulation 20(2)(a) relates to an operation which is or forms part of a plan or project which—

is likely to have a significant effect on a European site (either alone or in combination with other plans or projects) they must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives.

UK nature conservation bodies should consider the impact on European sites of operations that have been consented to under UK rules, because European sites demand particular standards of protection under the Habitats Directive.

Regulation 21 (3)
● This regulation does not apply in relation to a site which is a European site by reason of regulation 8(1)(c) (site protected in accordance with Article 5(4) of the Habitats Directive)

This refers to sites which the European Commission believes should be European sites, but where the UK disagrees, and a final decision is yet to be taken by the council.

Regulation 24 (1)
● Where an application for a farm capital grant is made as respects expenditure incurred or to be incurred for the purpose of activities on land within a European site, the appropriate authority—

must, so far as may be consistent with the purposes of the grant provisions, exercise their functions so as to further the conservation of the flora, fauna, or geological or physiographical features by reason of which the land is a European site; and

where the appropriate nature conservation body have objected to the making of the grant on the ground that the activities in question have destroyed or damaged or will destroy or damage that flora or fauna or those features, must not make the grant except after considering the objection.

Farm capital grants are payments made to farms under existing UK law or as part of EU agricultural policy. The government must, wherever possible, award grants in a way which ensures the standards of conservation in the Habitats Directive, if the grant is made in relation to activities on land in a European site. If one of the consideration bodies such as Natural England have objected to the grant because the activities have destroyed or damaged habitats and species in the site, the government can only make the grant after considering that objection.

Regulation 27 (5)
● If, following a referral under paragraph (4), the appropriate authority are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest [...], the appropriate authority may direct the appropriate nature conservation body to give consent to the operation

The concept of “imperative reasons of overriding public interest” derives from the Habitats Directive. Its general meaning has been developed in the case law of the CJEU (for example, in Nomarchiaki Aftodiokisi Altolakarnanias v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon (Case C-43/10) [2013] Env LR 451). The following provision addresses the scope of these reasons in a specific situation.

Regulation 27 (6)
● Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (5) must be either—

reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or

any other reasons which the appropriate authority, having due regard to the opinion of the European Commission, consider to be imperative reasons of overriding public interest.

Priority natural habitat types and priority species are set out in the Habitats Directive. If the reasons fall outside of the scope of sub-paragraph (a), the government must consult the European Commission. This obligation comes from article 6(4) of the Habitats Directive

Regulation 27 (7)
● Where the appropriate authority direct the appropriate nature conservation body to give consent under paragraph (5), the appropriate authority must secure that such compensatory measures are taken as are necessary to ensure that the overall coherence of Natura 2000 is protected

The duty to take compensatory measures comes from article 6(4) of the Habitats Directive.

PART 3

Regulation 40 (1)
● Schedule 2 (European protected species of animals) lists
those species of animals listed in Annex IV(a) to the Habitats Directive which have a natural range which includes any area in Great Britain.

**Regulation 40 (2)**

- References in this Part to a “European protected species” of animal are to any of those species.

The species listed in Annex IV of the Habitats Directive are those ‘in need of strict protection’. It contains most of the same species which are also listed in annex II, which is for species whose conservation requires the creation of an special area of conservation, but includes some others.

**Regulation 41 (1)**

- A person who—
  - a. deliberately captures, injures or kills any wild animal of a European protected species,
  - b. deliberately disturbs wild animals of any such species,
  - c. deliberately takes or destroys the eggs of such an animal, or
  - d. damages or destroys a breeding site or resting place of such an animal,

is guilty of an offence.

**Regulation 41 (3)**

- It is an offence for any person—
  - a. to be in possession of, or to control,
  - b. to transport,
  - c. to sell or exchange, or
  - d. to offer for sale or exchange, anything to which this paragraph applies.

**Regulation 41 (4)**

- Paragraph (3) applies to—
  - a. any live or dead animal or part of an animal—
    - i. which has been taken from the wild, and
    - ii. which is of a species or subspecies listed in Annex IV(a) to the Habitats Directive; and
  - b. anything derived from such an animal or any part of such an animal.

The Habitats Directive does not require the criminalisation of any of the above activities, but it does require member states to take ‘requisite measures’ to establish a system which prohibits them (article 12(1)). ‘Taken from the wild’ means taken from the wild in any EU member state.

**Regulation 43 (1)**

- This regulation applies in relation to the capturing or killing of a wild animal—
  - a. of any of the species listed in Schedule 4 (which lists those species listed in Annex V(a) to the Habitats Directive, and to which Article 15 of that Directive applies, which have a natural range which includes any area of Great Britain); or
  - b. of a European protected species, where the capturing or killing of such animals is permitted in accordance with these Regulations.

Annex V of the Habitats Directive contains a list of species whose taking in the wild or exploitation may be subject to management measures, which include prohibitions on their capturing or killing. Article 15 requires member states to prohibit indiscriminate acts which might significantly harm a population of a species referred to above, for example causing a local disappearance of that species. Capturing or killing might be permitted as part of a derogation by member states from certain provisions of the Habitats Directive - derogations are governed by article 16 of the directive.

**Regulation 44(1) and (2)**

- Schedule 5 (European protected species of plants) lists those species of plants listed in Annex IV(b) to the Habitats Directive which have a natural range which includes any area in Great Britain.

- References in this part to a “European protected species” of plant are to any of those species.

A similar regime of prohibition exists for the plants listed in annex V(b) of the Habitats Directive, as for animals listed in annex V(a), referred to above.

**PART 4**

**Regulation 48 (1)**

- The appropriate authority must make arrangements in accordance with paragraphs (4) to (6) for the surveillance of the conservation status of natural habitat types of Community interest and species of Community interest, and in particular priority natural habitat types and priority species.

The obligation on the government to undertake surveillance comes from article 11 of the Habitats Directive. Many of the other regulations in this instrument depend on the results of this surveillance.

**Regulation 49 (1)**

- The appropriate authority must, as required in the light of information derived from surveillance arranged under regulation 48 or otherwise arranged for the purpose of Article 11 of the Habitats Directive, ensure that measures are taken for the purpose specified in paragraph (2).

**Regulation 49 (2)**

- The purpose is to ensure that—
  - a. the taking in the wild of specimens of a species listed in Annex V to the Habitats Directive, and
  - b. the exploitation of such specimens, are compatible with the maintenance of that species at a favourable conservation status.

This obligation derives from article 14 of the Habitats Directive.

**Regulation 50 (1)**

- The appropriate authority must make arrangements in accordance with paragraphs (4) to (6) to establish a system to monitor the incidental capture or killing of animals of the species listed in Annex IV(a) to the Habitats Directive.

This obligation derives from Article 12(4) of the Habitats Directive. Paragraphs (4) to (6) establish the roles of the conservation bodies and the secretary of state in this monitoring.

**Regulation 51(1) and (2)**

- The appropriate authority, as required in the light of information derived from monitoring arranged under regulation 50 or otherwise arranged for the purpose of Article 12(4) of the Habitats Directive, must make arrangements for further research for, or ensure that conservation measures are taken for, the purpose specified in paragraph (2).

- The purpose is to ensure that any incidental capture or killing of animals of a species listed in Annex IV(a) to the Habitats Directive which have a natural range which includes any area in Great Britain.
Directive does not have a significant negative impact on that species.
The obligation on the government to arrange research or ensure conservation measures are taken is found in article 12(4) of the Habitats Directive.

Regulation 53 (1)
- Subject to the provisions of this regulation, the relevant licensing body may grant a licence for the purposes specified in paragraph (2).

Most of the purposes specified are to promote conservation in line with the aims of the Habitats Directive or other legislation, but the paragraph also includes the following purpose:

Regulation 53 (2)
- [...] e. preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment;
The concept of ‘imperative reasons of overriding public interest’ originates in article 6(4) of the Habitats Directive.

Regulation 53 (4)
- Subject to the provisions of this regulation, the relevant licensing body may grant a licence to permit the taking or possession or control of certain specimens of any of the species or subspecies listed in Annex II(b) (other than any bryophyte) or Annex IV to the Habitats Directive notwithstanding that the licence is for a purpose not specified in paragraph (2).

The ability to establish a system of licences in this area is granted by article 14(2) of the Habitats Directive.

Regulation 53 (7)
- The relevant licensing body may grant a licence under paragraph (4) only if they are satisfied that the grant of the licence would be consistent with the restrictions in article 16(1) (e) of the Habitats Directive (namely “under strictly supervised conditions, on a selective basis and to a limited extent” and “in limited numbers”).

Article 16(1) sets out the purposes for which the UK can derogate from certain provisions of the Habitats Directive, namely articles 12, 13, 14 and 15(a) and (b).

PART 6

Chapter 1

Regulation 61 (1)
- A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
  a. is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
  b. is not directly connected with or necessary to the management of that site,
must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives.

Regulation 61 (5)
- In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest),
the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

These obligations derive from article 6(3) of the Habitats Directive.

Regulation 62 (1) and (2)
- If the competent authority are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest [...] they may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).

- Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (1) must be either— (a) reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or (b) any other reasons which the competent authority, having due regard to the opinion of the European Commission, consider to be imperative reasons of overriding public interest.

These obligations derive from article 6(4) of the Habitats Directive. A process of consultation with the European Commission is also required in order to determine the validity of the reasons. Priority natural habitat types and priority species are set out in the Habitats Directive.

Regulation 66 (1)
- Where in accordance with regulation 62 (considerations of overriding public interest)— (a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site or a European offshore marine site, or (b) a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment, the appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.

As in many other parts of these regulations, the coherence of the Natura 2000 network across the EU is a key objective, and one which comes from the Habitats Directive.

Chapter 2 - Planning

Regulations 68-101:
Regulations 68-101 provide detail of the UK’s implementation of article 6(3) of the Habitats Directive on appropriate assessment of projects that could impact on a protected site. Each regulation covers either a specific type of development or a type of protected site - for example:

Regulation 68 (2)
- Where the assessment provisions apply, the competent authority may, if they consider that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission or, as the case may be, take action which results in planning permission being granted or deemed to be granted subject to those conditions or limitations.

Regulations 102-107
The references in regulations 102-107 follow a similar format to regulations 68-101, and all relate to a goal in article 10 of the Habitats Directive.
The limiting or refusing of planning permission, or permission to
develop on or interfere with the land in any way (for example, by the building of roads or electricity infrastructure), when it might adversely affect a European site derives from the obligation in article 10 of the Habitats Directive. That obligation is ‘to encourage the management of features of the landscape which are of major importance for wild fauna and flora’. Such limitations or refusals are to be done whenever the relevant authorities consider it ‘necessary’, but particularly ‘with a view to improving the ecological coherence of the Natura 2000 network’.

Though not mentioned explicitly in the regulations or the directive, this is an application of the ‘precautionary principle’, a fundamental principle of EU law in many areas which is enshrined in article 191 of the Treaty on the Functioning of the European Union. It states that, ‘if there is the possibility that a given policy or action might cause harm to the public or the environment and if there is still no scientific consensus on the issue, the policy or action in question should not be pursued’.

Regulation 102 (1)
- Where a land use plan— (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of the site, the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site’s conservation objectives.

Regulation 103 (1)
- If the plan-making authority are satisfied that, there being no alternative solutions, the land use plan must be given effect for imperative reasons of overriding public interest [...], they may give effect to the land use plan notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).

The concept of ‘imperative reasons of overriding public interest’ is contained in the Habitats Directive (article 6(4)), and has been developed by case law of the CJEU.

Regulation 103 (3)
- Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (1) must be either—
  a. reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or
  b. any other reasons which the plan-making authority, having due regard to the opinion of the European Commission, consider to be imperative reasons of overriding public interest.

Priority natural habitat types and priority species are set out in the Habitats Directive. If the reasons fall outside of the scope of sub-paragraph (a), the government must consult the European Commission.

Regulation 105
- Where in accordance with regulation 103 (considerations of overriding public interest) a land use plan is given effect notwithstanding a negative assessment of the implications for a European site or a European offshore marine site, the appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.

As in many other parts of these regulations, the coherence of the Natura 2000 network across the EU is a key objective, and one which comes from the Habitats Directive. This regulation refers directly to article 10, and mirrors wording used throughout the directive.

Regulation 127 (1)
- Where the appropriate nature conservation body or any other person enter into an agreement with a drainage authority for the doing by that authority of any work on land in a European site, no limitation imposed by law on the capacity of the drainage authority by virtue of its constitution operates so as to prevent the authority carrying out the agreement.

This is to ensure that the UK’s nature conservation bodies have sufficient powers to fulfill their various obligations set out above, many of which derive from the Habitats Directive.

Regulation 130 (1)
- The appropriate authority may cause a local inquiry to be held for the purposes of the exercise of any of their functions under these Regulations.

The obligation to consider public opinion ‘if appropriate’ arises when agreeing plans or projects which assessments have concluded will not adversely affect European sites (article 6(3) of the Habitats Directive), and when deciding to re-introduce native species which investigations suggest will contribute to their favourable conservation status (article 22(a) of the Habitats Directive).
New EU law obligations during the Brexit talks

The government has stated that, while the UK remains formally part of the EU, it will continue to comply fully with all legal obligations. This should include not only laws already in force but also any new legal requirements flowing from the EU or changes to current EU rules right up to withdrawal.

Because of the nature of EU lawmaking it is already possible to identify a stream of new environmental legal obligations due in the next two years in the form of deadlines for member states to transpose or apply EU directives.

In addition, under the highly harmonised REACH regulation on chemicals, a series of legal changes are already programmed that will end exemptions from restriction for particular substances in particular applications.

These lists are important for at least two reasons. First, for regulated companies and their advisors they show how environmental requirements flowing from the EU will continue to grow and change even during the negotiations. And second, as deadlines approach the expected Brexit date (particularly with regard to transposition of EU directives) there has to be a growing warning over the likelihood of the government actually implementing them.

This is not to accuse the government of preparing to flagrantly ignore legal requirements, but rather to recognise political realities.

The first is that, notwithstanding the European Commission’s efforts, it has always been common for member states to transpose EU directives late or incompletely. Penalties for such tardiness have been strengthened under the Lisbon Treaty, but EU infringement procedures are long and in practice even if the UK government completely ignored a transposition deadline falling as much as two years before actual Brexit it is very unlikely that the Court of Justice of the EU could impose fines before the UK is out and could safely ignore such judgments.

The second issue is that the UK government is widely expected to be so busy preparing for Brexit over the next two years that it will have little resource left for anything else.

This is to say that even if the government remains absolutely committed to both the spirit and the letter of fully respecting all the UK’s legal obligations right up to withdrawal, in practice it may not have the capacity to follow through.

The following list therefore serves two purposes: a look ahead at EU-sourced environmental rules due to take effect in the next two years and a watchlist of rules that could potentially be sidelined or delayed due to the exigencies of Brexit.

Environmental compliance deadlines under EU legislation at end of February 2017

**TRANPOSITION AND APPLICATION DEADLINES**

EU directives typically allow for a set period of time, often 12 or 18 months, before member states have to transpose the provisions into domestic law. The average delay for transposition is around seven months.

**VEHICLE EMISSIONS**

*Directive implementing the Fuel Quality Directive*

Compliance date(s): Must be transposed by 21/04/2017

Description: This directive sets out rules on the methods for calculating greenhouse gas (GHG) emissions of fuels and other energy from non-biological sources and reporting requirements in accordance with the Fuel Quality Directive.

**CHEMICALS**

*Directive amending the RoHS II Directive*

Compliance date(s): Must be transposed by 30/04/2017 - see below for exemptions

Description: This directive amends the Restriction of Hazardous Substances in Electrical and Electronic Equipment (RoHS II) Directive to permit the use of lead in solders of electrical connections to certain temperature measurement sensors.

*Directive amending the RoHS II Directive*

Compliance date(s): Must be transposed by 30/04/2017 - see below for exemptions

Description: This directive amends the RoHS II Directive to permit the use of cadmium anodes in Hersch cells for certain oxygen sensors used in industrial monitoring and control.
instruments where sensitivity below 10ppm is required.

ENERGY EFFICIENCY OF VEHICLES

Directive amending the Weights and Dimensions of Road Vehicles Directive
Compliance date(s): Must be transposed by 07/05/2017
Description: This directive grants derogations regarding the maximum lengths and weights of road vehicles as per the Weights and Dimensions of Road Vehicles Directive. The derogations are intended to make heavy goods vehicles greener by improving their aerodynamic performance and to encourage the use of alternative fuels.

ENVIRONMENTAL IMPACT ASSESSMENT

Compliance date(s): Must be transposed by 16/05/2017
Description: This directive amends the Environmental Impact Assessment (EIA) Directive to strengthen the quality of the EIA procedure by, among other things, enhancing its relationship with other EU-level legislation and policies, as well as strategies and policies developed by member states in areas of national competence.

CHEMICALS

Directive amending the Toy Safety Directive
Compliance date(s): Must be transposed by 24/05/2017
Description: This directive amends the Toy Safety Directive for the purpose of adopting specific limit values for the use of the chemical benzisothiazolinone in toys.

CHEMICALS

Directive amending the Toy Safety Directive
Compliance date(s): Must be transposed by 24/05/2017
Description: This directive amends the Toy Safety Directive for the purpose of adopting specific limit values for the use of the chemical benzisothiazolinone in toys.

TRANSPORT

Compliance date(s): Must be transposed by 30/06/2017
Description: This directive amends the Inland Transport of Dangerous Goods Directive, which establishes common rules governing the transport of dangerous goods between member states. Under that directive, member states retain the right to regulate the transport of such goods within their territory, including on grounds unrelated to safety such as environmental protection.

NUCLEAR ENERGY

Directive amending the Nuclear Safety Directive
Compliance date(s): Must be transposed by 15/08/2017
Description: This directive amends the Nuclear Safety Directive by combining technical improvements with wider safety issues, such as governance, transparency and on-site emergency preparedness and response.

BIOFUELS

Directive amending the Fuel Quality and Renewable Energy Directives
Compliance date(s): Must be transposed by 10/09/2017
Description: This directive amends the Fuel Quality Directive and the Renewable Energy Directive to take into account indirect land-use change (ILUC) caused by biofuel production and promote energy efficiency in the transport sector.

WATER QUALITY

Directive amending the Drinking Water Directive
Compliance date(s): Must be transposed by 27/10/2017
Description: This directive amends the Drinking Water Directive in order to align EU water quality standards with the World Health Organization (WHO) Guidelines for drinking water quality.

CHEMICALS

Directive amending the Aerosol Dispensers Directive
Compliance date(s): Must be transposed by 12/12/2017; applies on 12/02/2018
Description: This directive amends the Aerosol Dispensers Directive to increase the maximum allowable pressure of aerosol dispensers containing non-flammable propellants, and to adapt its labelling provisions to the requirements of the Classification, Labelling and Packaging (CLP) Regulation.

AIR POLLUTION

Medium Combustion Plants Directive
Compliance date(s): Must be transposed by 19/12/2017
Description: This directive lays down emission limit values and monitoring requirements to control emissions of sulphur dioxide (SO2), nitrogen oxides (NOx) and dust into the air from medium combustion plants rated at 1MW or greater.

NUCLEAR ENERGY

Basic Safety Standards Directive (revised)
Compliance date(s): Must be transposed by 06/02/2018
Description: This directive establishes uniform basic safety standards for the protection of the health of individuals subject to occupational, medical and public exposures against the dangers arising from ionising radiation.

AIR POLLUTION

Revised National Emissions Ceiling Directive
Compliance date(s): Must be transposed by 01/07/2018
Description: This directive establishes member states’ emission reduction commitments in relation to certain atmospheric pollutants. It also obliges them to draw up, adopt and implement national air pollution control programmes as well as to monitor and report on emissions levels of the pollutants covered by the directive.

WASTE ELECTRICAL AND ELECTRONIC EQUIPMENT

WEEE II Directive
Compliance date(s): This directive switches to open scope from 15/08/2018, at which point all electrical and electronic equipment (EEE) will be caught in the WEEE regime. The minimum annual collection rate rises from 1 January 2019 to 65% of all EEE placed on the market in the three preceding years.
in the member state concerned, or 85% of WEEE generated on the territory of that member state.

**Description:** This directive lays down revised measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste from EEE and by reducing overall impacts of resource use and improving the efficiency of such use in accordance with articles 1 and 4 of the revised Waste Framework Directive.

**SHIPPING**

**Inland Waterway Vessels Directive**

**Compliance date(s):** Must be transposed by 07/10/2018

**Description:** This directive establishes technical requirements certain substances. The RoHS II Directive is implemented in the UK by the Restriction of Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012.

**31/12/2017 - Mercury and lead**

- Exemption expires for 3.5mg mercury in single capped compact fluorescent lamps for general lighting purposes less than 30W with a lifetime equal or above 20,000 hours
- Exemption expires for lead used in solders for mounting cadmium telluride and cadmium zinc telluride digital array detectors to printed circuit boards

**31/12/2018 - Mercury and lead**

- Exemption expires for lead in polyvinyl chloride sensors in in-vitro diagnostic medical devices
- Exemption expires for the use of lead in solders and termination finishes of electrical and electronic components and finishes of printed circuit boards used in ignition modules and other electrical and electronic engine control systems
- Exemption expires for the use of lead in platinised platinum electrodes for wide-range conductivity measurements or for measuring conductivity under strongly acidic or alkaline conditions
- Exemption expires for the use of limited mercury content in hand-crafted luminous discharge tubes used for signs, decorative or architectural and specialist lighting and light-artwork

**30/06/2019 - Mercury**

- Exemption expires for mercury in electric rotating connectors in intravascular ultrasound imaging systems

**30/12/2019 - Lead**

- Exemption expires for lead in X-ray image intensifiers to enable vacuum tight connections between aluminium and steel

**31/12/2019 - Lead and cadmium**

- Exemption expires for the use of lead in solder in one interface of large area stacked die elements
- Exemption expires for cadmium used in phosphor coatings in image intensifiers for X-ray images and in spare parts for X-ray systems placed on the market before 1 January 2020
- Exemption expires for lead in soldiers on printed circuit boards of detectors and data acquisition units for PET that are integrated into MRI equipment
- Exemption expires for hexavalent chromium in alkaline dispensers used to create photocathodes in X-ray image intensifiers and in spare parts for X-ray systems placed on the market before 1 January 2020

**30/06/2020 - Lead**

- Exemption expires for lead in solders, termination coatings of electrical and electronic components and printed circuit boards, and connections of electrical wires, shields and enclosed connectors that are used in (a) magnetic fields within the sphere of one metre radius around the isocentre of the magnet in medical magnetic resonance imaging equipment, including patient monitors designed to be used within this sphere; or (b) magnetic fields within one metre distance from the external surfaces of cyclotron magnets, magnets for beam transport and beam direction control applied for particle therapy

**31/12/2020 - Lead**

- Exemption expires for lead in dielectric ceramic in capacitors for a rated voltage of less than 125V AC or 250V DC for industrial monitoring and control instruments
- Exemption expires for the use of lead in other than C-press compliant pin connector systems for industrial monitoring and control instruments
- Exemption expires for lead in solders on populated printed circuit boards used in mobile medical devices other than portable emergency defibrillators falling within class Iib of the Medical Devices Directive

**30/06/2021 - Lead and cadmium**

- Exemption expires for lead and cadmium in metallic bonds creating MRI, SQUID, NMR (Nuclear Magnetic Resonance) or FTMS (Fourier Transform Mass Spectrometer) detectors
- Exemption expires for lead in the surface coatings of pin connector systems requiring nonmagnetic connectors that are used durably at a temperature below -20°C under normal operating and storage conditions
- Exemption expires for lead in solders on printed circuit boards
boards, termination coatings of electrical and electronic components and coatings of printed circuit boards, solders for connecting wires and cables, solders connecting transducers and sensors that are used durably at a temperature below -20°C under normal operating and storage conditions

- Exemption expires for lead acetate as marker within headframes used for positioning for radiotherapy and gamma-ray tumour extractions procedures
- Exemption expires for lead in alloys, as a superconductor or thermal conductor, used in cryo-cooler cold heads and/or in cryo-cooled cold probes and/or in cryo-cooled equipotential bonding systems, in medical devices (category 8) and/or in industrial monitoring and control instruments
- Exemption expires for lead used as an alloying element for bearings and wear surfaces in medical equipment exposed to ionising radiation
- Exemption expires for lead in solders of electrical connections to certain temperature measurement sensors

21/07/2021 - Lead, cadmium, hexavalent chromium and PBDE
- Exemption expires for lead, cadmium and hexavalent chromium in reused spare parts, recovered from medical devices placed on the market before 22 July 2014 and used in category 8 equipment placed on the market before 22 July 2021
- Exemption expires for lead, cadmium, hexavalent chromium, and polybrominated diphenyl ethers (PBDE) in spare parts used in medical devices other than in vitro diagnostic medical devices
- Exemption expires for lead in micro-channel plates in medical devices and monitoring and control instruments

22/07/2021 - Lead
- Exemption expires for lead as an activator in the fluorescent powder of discharge lamps when used for extracorporeal photopheresis lamps containing BSP (BaSi2O5:Pb)

15/07/2023
- Exemption for cadmium anodes in industrial monitoring and control instruments expires

21/07/2023 - Lead, cadmium, hexavalent chromium, and PBDE
- Exemption expires for use of lead, cadmium, hexavalent chromium, and PBDE in in vitro diagnostic medical devices
- Exemption expires for lead in micro-channel plates for in-vitro diagnostic medical devices

21/07/2024 - Mercury, lead, cadmium, hexavalent chromium, and PBDE
- Exemption expires for the use of mercury in cold cathode fluorescent lamps for back-lighting liquid crystal displays, not exceeding 5mg per lamp, used in industrial monitoring and control instruments placed on the market before 22 July 2017
- Exemption expires for lead in micro-channel plates for industrial monitoring and control instruments
- Exemption expires for the use of mercury in cold cathode fluorescent lamps for back-lighting liquid crystal displays, not exceeding 5mg per lamp, used in industrial monitoring and control instruments placed on the market before 22 July 2017
The fourth area of legal uncertainty during the Brexit negotiating period that we are focusing on is environmental legal infringement proceedings against the UK.

Under the EU treaties the European Commission has a specific role to oversee member state compliance with legal obligations. Infractions that the commission looks out for include non-transposition of EU directives, incomplete or incorrect transposition, and failure to fully or correctly implement or enforce EU directives or regulations in practice.

The government has stated that after Brexit it wants the UK no longer to be subject to the jurisdiction of the CJEU. The working assumption must therefore be that even if there were further court rulings after withdrawal, they would have no legal force in the UK.

On the other hand, just as with new legal obligations discussed in the previous article the UK government has expressed its commitment to fully comply with all legal obligations until withdrawal itself, which would certainly include judgments issued by the European court.

In this context it is interesting to ask two questions: on what topics could the UK feasibly face CJEU judgments for non-compliance with environmental EU rules before Brexit? And will the context of impending Brexit change how any of the parties behave?

We must start by noting that, due to the time taken by EU infringement and legal procedures, few of the currently open proceedings against the UK are likely to result in court judgments before withdrawal.

In cases brought by the European Commission, infringement procedures start with a formal notice (first warning), followed by a reasoned opinion (final warning). If the commission is still not satisfied by a member state’s counter-arguments it refers a case to the CJEU.

According to European Commission and CJEU statistics the overall average time for a case to travel from formal notice stage to an eventual court judgment is about three years.

In the context of Brexit this could obviously reduce the appetite of the UK authorities to react as compliantly to infringement proceedings as they would have done if the UK’s membership were continuing.

One reason is that, even if they resulted in judgments prior to Brexit, none of the currently open cases against the UK can result in a fine.

A second is that the UK could become less sensitive to the embarrassment of being condemned in the CJEU than it has been in the past. It must also be asked whether the European Commission and the CJEU itself will continue prioritising cases against the UK.

It is at least plausible that processes could begin to slow as the moment of Brexit draws closer, given that any judgment against the UK will increasingly start to look like a dead letter.

The following lists all 20 open environmental infringement proceedings against the UK as of the end of February 2017. Cases are in groups, starting with those that could most plausibly lead to court judgments before Brexit day.

Top of the list are cases currently before the court. These are followed by cases at reasoned opinion stage, then by those at formal notice stage.

Finally there are cases that have already resulted in CJEU judgments but that remain open on the commission’s infringements database. The EU executive could potentially decide to reopen cases - and in this case indicate its intention to request fines in the case of a second court ruling against the UK. But in this case it would first have to go through the entire infringement cycle again, making it least likely that these cases could result in new judgments before Brexit.
Ongoing environmental infringement proceedings

CASES BEFORE THE COURT OF JUSTICE
Two cases against the UK for non-compliance with environmental legislation are currently before the CJEU. Both are “first time” procedures and neither concerns simple non-transposition of directives, so any court judgment issued before Brexit could not include an order for financial penalties.

WASTE WATER
Infringement reference: 2013/2055
Status: Referral to the CJEU under article 258 TFEU - 26/03/2015
Description: The commission argued that the UK had presided over excessive spills of wastewater in Llanelli and Gowerton in Wales, had failed to provide secondary treatment for wastewater in nine agglomerations including Gibraltar and had failed to provide more stringent treatment for wastewater in 24 agglomerations classified as sensitive areas. CJEU proceedings in case C-502/15 began on 22 September 2015.

CONSERVATION
Habitats Directive 92/43/EEC
Infringement reference: 2013/4035
Status: Referral to the CJEU under article 258 TFEU - 26/03/2015
Description: The commission argued that the UK had failed to propose adequate special areas of conservation (SACs) to ensure the protection of harbour porpoises, a marine mammal found regularly in its waters. It had proposed two sites in Northern Ireland and one in Scotland; this was considered insufficient for the UK to meet its obligations under the Habitats Directive. CJEU proceedings began on 23 December 2016 in case C-669/16 and are ongoing. The UK has since proposed three more SACs in Wales.

CASES AT REASONED OPINION STAGE
In the following instances, the European Commission has issued a reasoned opinion against the UK. This is the stage before bringing the case before the court, in which the commission sets out its legal arguments as to why it believes a breach has occurred. It is a formal request to comply with EU law, and the UK has two months from the date of the opinion to inform the commission of the measures it is taking to rectify the issue.

AIR QUALITY
Ambient Air Quality Directive 2008/50/EC
Infringement reference: 2014/4000
Status: Reasoned opinion - 15/02/2017
Description: The commission argued that the UK persistently exceeded nitrogen dioxide (NO2) limits set by the Ambient Air Quality Directive in 16 areas of the country including major cities like London, Birmingham and Leeds. The deadline for achieving appropriate levels was in 2010, though this was extended to 2013 or 2014 for certain areas. The government must respond by mid-April 2017.

WATER QUALITY
Water Framework Directive 2000/60/EC
Infringement reference: 2007/2241
Status: Reasoned opinion - 22/10/2015
Description: The commission argued that the requirements in the Water Framework Directive were only partially implemented by the government’s 2009-2015 River Basin Management Plans. The 2015 targets under those plans were not met, so an extended deadline of 2021 was given, and new plans have now been introduced. The UK’s measures are still under scrutiny by the commission.

ENVIRONMENTAL IMPACT ASSESSMENT
Infringement reference: 2012/4149
Status: Reasoned opinion - 10/07/2014
Description: Development and construction consents were given for Pembroke power station before environmental impacts were assessed, which was required under the Environmental Impact Assessment (EIA) Directive as well as the Habitats Directive. The commission also raised concerns with the cooling system’s acceptance as best available technique and the breach of an environmental quality standard in the water around the site. The commission has confirmed it remains in discussions with UK authorities to find a resolution.

MARINE POLLUTION
Offshore Safety Directive 2013/30/EU
Infringement reference: 2015/0507
Status: Reasoned opinion - 17/11/2016
Description: The commission issued a reasoned opinion for incomplete transposition of the Offshore Safety Directive, which aims to reduce the occurrence of major accidents in offshore oil and gas operations and limit their consequences in order to protect the marine environment and coastal economies against pollution. The UK had failed to introduce implementing regulations in relation to Northern Ireland; on 19 December 2016 the Offshore Installations (Offshore Safety Directive) (Safety Case etc.) Regulations (Northern Ireland) 2016 (SR 2016/406) were brought into force.

CASES AT FORMAL NOTICE STAGE
In the following instances, the European Commission has sent a letter of formal notice to the UK. This is the first stage in infringement proceedings, whereby the commission alerts the country in question that it may be in breach of EU law. It has two months in which to respond with further information regarding the potential breach.

A significant number of formal notices are issued for late transposition, which typically take less time to be resolved. The average delay in transposing EU directives into UK law is 11.3 months.
INFRINGEMENT PROCEEDINGS

VEHICLE EMISSIONS
Infringement reference: 2016/2183
Status: Formal notice - 08/12/2016
Description: The commission issued a formal notice as a result of the UK’s failure to prosecute Volkswagen over its alleged deception regarding vehicle emissions tests. Under the Framework Directive for Type Approval and Regulations 715/2007/EC and 692/2008/EC which established the Euro 5 and 6 emission standards for light vehicles, the UK should have an ‘effective, proportionate and dissuasive’ system of penalties in place for breaches of the requirements laid down.

AVIATION EMISSIONS
Provision of Air Navigation Services Regulation 550/2004/EC
Infringement reference: 2014/2169
Status: Additional Formal Notice - 24/09/2015
Description: Though the UK’s Functional Airspace Block has been formally established, the commission was not satisfied with the rate of progress of practical implementation of the requirements of the Provision of Air Navigation Services Regulation 550/2004/EC. It argues the delays have meant consumption of more fuel and greater greenhouse gas emissions. A dialogue with the UK and other relevant member states is ongoing.

CONSERVATION
Habitats Directive 92/43/EEC
Infringement reference: 2016/4018
Status: Formal notice - 28/04/2016
Description: A dispute arose between Natural England and Walshaw Moor Estate regarding the management of a site of special scientific interest (SSSI) and SAC, used by the estate for grouse hunting. A settlement was reached in March 2012, which included a ten-year stewardship contract. The commission alerted UK authorities that the agreement might be in breach of the Habitats Directive because the stewardship contract left open too much risk of damage to habitats from the burning of blanket bogs. The UK is working with the commission to address the situation.

AIR QUALITY
Infringement reference: 2017/0214
Status: Formal notice (late transposition) - 24/01/2017
Description: The UK missed the deadline (31 December 2016) for transposing Directive 2015/1480/EU, which amends annexes IV and V to the Fourth Daughter Directive and annexes I, III, VI and IX to the Ambient Air Quality Directive, in order to lay down rules concerning reference methods, data validation and location of sampling points for the assessment of ambient air quality. The UK has until 24 March 2017 to respond.

MARINE POLLUTION
Marine Equipment Directive 2014/90/EU
Infringement reference: 2016/0835
Status: Formal notice (late transposition) - 24/11/2016
Description: The UK missed the deadline (18 September 2016) for transposing the Marine Equipment Directive, which requires suppliers to withdraw any equipment covered by the legislation if national authorities believe it presents a risk to safety, people’s health or the environment. The UK brought into force the Merchant Shipping (Marine Equipment) Regulations 2016 (SI 2016/1025) on 5 December 2016.

TRANSPORT
EU accession to the Convention concerning International Carriage by Rail 1999 (COTIF)
Infringement reference: 2015/2169
Status: Formal notice - 10/12/2015
Description: The UK refused to apply appendices E, F and G of COTIF, an international agreement to which the EU acceded in 2011. Appendix F lays down the procedure for the validation of technical standards (article 1), an aim of which is the protection of the environment (article 3(I)(c)). The UK is talking to the commission about how to resolve this issue.

ALTERNATIVE FUELS
Alternative Fuels Infrastructure Directive 2014/94/EU
Infringement reference: 2017/0212
Status: Formal notice (late transposition) - 24/01/2017
Description: The UK missed the deadline (18 November 2016) for transposing the Alternative Fuels Infrastructure Directive, which requires member states to adopt policies that aim to develop the market for alternative transport fuels and the infrastructure to support them. The government ran a consultation on transposition which ended on 23 November 2016, and is currently analysing the feedback it received.

BIODIVERSITY
Infringement reference(s): 2017/0213, 2017/0207 and 2017/0210
Status: Formal notice (late transposition) - 24/01/2017
Description: The UK missed the deadline (31 December 2016) for transposing directives 2014/96/EU, 2014/97/EU and 2014/98/EU which implement the Marketing of Fruit Plant Propagating Material Directive. The aims of the directive include protecting genetic diversity and reducing environmental risk from genetically-modified organisms (GMOs).

AIR QUALITY
Stage II Petrol Vapour Recovery Directive 2009/126/EC
Infringement reference: 2016/0577
Status: Formal notice (late transposition) - 27/07/2016
Description: The UK missed the deadline (12 May 2016) for transposing Directive 2014/99/EU, which updates the Stage II Petrol Vapour Recovery (‘PVR’) Directive with new standards. The Stage II PVR Directive lays down measures aimed at reducing the amount of petrol vapour emitted to the atmosphere during the refuelling of passenger cars at service stations. The UK brought into force the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016/1154) on 19 December 2016, which transpose the requirements in the 2009 directive as amended (among others).

VEHICLE EMISSIONS
Recreational Craft Directive 2013/53/EU
Infringement reference: 2016/0242
Status: Formal notice (late transposition) - 23/03/2016
Description: The UK missed the deadline (18 January 2016) for transposing the Recreational Craft Directive, which consolidates design and manufacture requirements for boats used for recreational purposes, including limits on engine exhaust emissions (CO, HC, NOx and particulates) and noise levels.
OPEN CASES FOLLOWING CJEU JUDGMENTS

These cases have already resulted in a ruling against the UK from the CJEU, but remained open infringement cases as of the end of February 2017. This could be due to administrative delays or potentially the commission could reopen the cases.

ACCESS TO JUSTICE

Public Participation Directive 2003/35/EC
Infringement reference: 2006/4033
Status: Referral to the CJEU under article 258 TFEU - 06/04/2011
Description: The CJEU found on 13 February 2014 (C-530/11) that the UK was in breach of EU law by failing to adequately transpose articles 3(7) and 4(4) of the Public Participation Directive. The provisions stipulate that challenging decisions concerning the environment must not be prohibitively expensive. The UK has introduced amendments to the Civil Procedure Rules (SI 2017/95) to address the issue for England and Wales, which came into force on 28 February 2017 and the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 (SR 2017/27) for Northern Ireland, which came into force on 14 February 2017.

AIR POLLUTION

Large Combustion Plants Directive 2001/80/EC
Infringement reference: 2012/2236
Status: Referral to the CJEU under article 258 TFEU - 26/03/2015
Description: The CJEU found on 21 September 2016 (C-304/15) that nitrogen oxides (NOx) emissions from Aberthaw power station in Wales exceeded the 500 mg/Nm3 limit set in the Large Combustion Plants Directive. The commission is in discussions with UK authorities to assess how they will comply with this recent judgment.

WASTE WATER

Infringement reference: 2000/4225
Status: Referral to the CJEU under article 258 TFEU - 08/10/2009
Description: The CJEU found on 18 October 2012 (C-301/10) that the UK had failed to ensure the appropriate collection and treatment of urban waste water at Whitburn Steel pumping station in Sunderland, contrary to articles 3(1) and 2(1) of, and annex 1(A) to, the Urban Waste Water Treatment Directive. Upgrades are currently being undertaken to address this and the commission is so far satisfied with the rate of progress.

ENERGY EFFICIENT PRODUCTS

VAT Directive 2006/112/EC
Infringement reference: 2007/2449
Status: Referral to the CJEU under article 258 TFEU - 21/02/2013
Description: The UK government introduced a reduced VAT rate for energy-saving building materials as part of its Green Deal. However, under EU rules on VAT, it can only apply a reduced rate to energy-saving materials if specific conditions are met, such as where their use is for social policy purposes. The CJEU found on 4 June 2015 (C-161/14) that a reduced VAT rate for all energy-saving materials contravened Article 98 of the VAT Directive. The government introduced proposals to comply with the judgment but these were abandoned as a result of opposition.
Joan Walley, Chair, Aldersgate Group
What, in your view, are the main environmental risks from triggering article 50?

Faced with having to address every policy area, insufficient priority given to the environment by government and its negotiators. The EU has helped drive environmental improvements in the UK so the process of withdrawal must not lead to any weakening of our current environmental protections. Although the Great Repeal Bill will be helpful in achieving regulatory stability once we have left the EU, transposing legislation will not be a simple process, particularly because of the need to replace governance and enforcement arrangements that may no longer apply. Nor should Brexit entirely distract from other government priorities, such as improving the state of our natural environment via the 25-year environment plan or supporting moves to a more resource-efficient economy.

Robbie Staniforth, Commercial Manager, Ecosurety
What do you think are the environmental opportunities?

If more power is transferred to DEFRA, the Environment Agency, BEIS etc, which we assume will happen, that is a real chance for them to show their mettle, prosecute and take decisive action against polluters. Particularly in product legislation, it is an opportunity to prioritise UK environmental concerns and act quickly. Targeted action could have more immediate and tangible impacts than the current system.

Businesses and our industry need to ensure the government doesn’t pursue legislation based on grabbing headlines and generating votes. Some of the more obscure and uninteresting pieces of legislation to the voter are the ones that have delivered the greatest environmental benefit.

It could be a chance to rip up clunky legislation or rules, even whole departments, and replace them with something streamlined that carries more weight with producers and forces them to consistently do the right thing by the environment. There are EU tools that have a poor reputation for delivering results, especially around climate change. This is an opportunity to replace them with something much better.

Don’t miss the key opportunity for business, environmental and legal professionals to come together to hear from experts on what Brexit might mean for UK environmental law and contribute your own views on the significance of Article 50.