RTPI
Royal Town Planning Institute

RTPI Briefing Paper

JUNE 2018

The impacts of Brexit on UK implementation of key EU legislation affecting land use

A briefing by the Institute for European Environmental Policy

Institute for European Environmental Policy

rtpi.org.uk

Registered charity number: 262865
Scottish registered charity number: SC 037841

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Report scope

Research for this briefing paper was carried out between January and March 2018. Subsequent developments related to Brexit are not reflected in this document.

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List of abbreviations and formulae

EFTA	European Free Trade Association
EIA	Environmental Impact Assessment
EU	European Union
MFN	Most favoured nation
MSFD	Marine Strategy Framework Directive
MSP	Maritime spatial planning
MSPD	Maritime Spatial Planning Directive
NO2	Nitrogen dioxide
OSPAR	Mechanism of cooperation between 15 Governments & the EU to protect the marine environment of the North-East Atlantic
RDF	Refuse-derived fuel
RMBP	River Basin Management Plan
SEA	Strategic Environmental Assessment
UK	United Kingdom
UWWTD	Urban Waste Water Treatment Directive
WSR	Waste Shipment Regulation
WTO	World Trade Organization

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1. Introduction

Environmental legislation in the UK has been closely bound up with UK membership of the European Union over the last 40 years, with the steady growth in the coverage and ambition of European legislation having a significant impact on UK practice. This impact includes a number of areas which are either directly, or indirectly, relevant for policy and practice in land use, and land use planning. This paper aims to identify a range of feasible outcomes from the current negotiations on the UK's departure from the EU, and its future relationship with the EU, and, on that basis, to identify the potential impacts on planning.

We start by an assessment of the respective positions of the EU and the UK on environmental legislation, in the current negotiations. It should be noted that the negotiations cover three interlinked issues: the terms of the UK's departure; the nature of any transitional arrangement to be applied while the terms of the UK's future relationship are discussed; and the nature of that future relationship itself. It should be noted that there are differing views on the extent to which the detail of the future relationship will already be agreed before the UK's departure, with the UK keen to have substantive commitments on it from the EU side, and the EU sceptical about the extent to which it is feasible to negotiate such details in the limited time available.

1.1. The EU position

The environment, and particularly the extent to which the UK continues to abide by either EU legislation or agreed EU policy objectives on the environment, has been signalled by the EU 27 (both in Council and in Parliament) as an important aspect of the negotiations. The negotiating guidelines adopted in April 2017 included the clear statement that any future free trade agreement:

> *"must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices."*

However, the detailed elements of an agreement which would be necessary to deliver such a level playing field need to be developed further. In particular, the EU will need to offer further specific positions on the nature of the environmental commitments the UK will need to make, and how they will be enforced.

Some initial thinking on these issues was revealed in the Commission's Article 50 taskforce presentation to Member States, subsequently posted on its web page (European Commission, 2018a). It identifies that the depth and breadth of EU/UK economic integration, and the geographic proximity of the UK to the EU, requires a tailored approach. This approach could be based on a non-regression commitment, accompanied by specific commitments on general principles and substantive provisions; backed by an enforcement mechanism and a dispute settlement mechanism. While it notes the impact on transboundary pollution of potential UK weakening of its delivery of air pollution targets, it suggests a focus on competitiveness impacts. Key governance elements noted are the need to be able to rely on "domestic authorities upholding environmental standards", and the need for transparency and reporting.

Contact with Commission officials responsible for developing the EU position, in the Environment DG and in the Article 50 taskforce, suggests that this relatively flexible position on the way in which the UK implements environmental commitments is in large part driven by current Commission assumptions about the nature of UK access to the internal market, in the "future relationship".

1.2. The UK position

For the UK, meanwhile, the exact nature of the trade-off between regulatory flexibility and market access that the UK is willing to accept remains unclear – as does the extent to which the UK will accept that such a trade-off needs to exist.

Theresa May's September 2017 speech in Florence, for example, stated that:

> "*The government I lead is committed not only to protecting high standards, but strengthening them. So I am optimistic about what we can achieve by finding a creative solution to a new economic relationship that can support prosperity for all our peoples. Now in any trading relationship, both sides have to agree on a set of rules which govern how each side behaves. So we will need to discuss with our European partners new ways of managing our interdependence and our differences, in the context of our shared values. There will be areas of policy and regulation which are outside the scope of our trade and economic relations where this should be straightforward. There will be areas which do affect our economic relations where we and our European friends may have different goals; or where we share the same goals but want to achieve them through different means. And there will be areas where we want to achieve the same goals in the same ways, because it makes sense for our economies.*" (UK Government, 2017)

Foreign Secretary Boris Johnson's more recent speech (UK Government, 2018c), however, although largely devoid of the policy detail promised, suggested that there were many areas in which the UK would adopt different standards, including for example on impact assessments and by implication on the designation and protection of nature protection sites.

> *"We can simplify planning, and speed up public procurement, and perhaps we would then be faster in building the homes young people need; and we might decide that it was indeed absolutely necessary for every environmental impact assessment to monitor 2 life cycles of the snail….*
>
> *We will decide on laws not according to whether they help to build a united states of Europe, noble goal that that may be, but because we want to create the best platform for the economy to grow and to help people to live their lives."*

However, the speech recently in Vienna by David Davis, the Secretary of State for Exiting the European Union (UK Government, 2018a), has argued that fears of a deregulatory approach in future from the UK are unfounded, and called for the agreement to include:

> *"The ability for both sides to trust each other's regulations and the institutions that enforce them, with a robust and independent arbitration mechanism."*

By implication, the UK would maintain high standards, but might choose to find new ways of

delivering them. On governance issues, however, UK Environment Minister Michael Gove has acknowledged that departure from the EU would leave a significant gap in terms of enforcement, and has promised to consult on measures to tackle that gap.[1]

Finally, Prime Minister Theresa May's most recent, and most detailed, speech on Brexit, at Mansion House in London on 2 March 2018, accepts that:

> *"The UK will need to make a strong commitment that its regulatory standards will remain as high as the EU's. That commitment, in practice, will mean that UK and EU regulatory standards will remain substantially similar in the future.*
>
> *Our default is that UK law may not necessarily be identical to EU law, but it should achieve the same outcomes. ….And there will need to be an independent mechanism to oversee these arrangements." (UK Government, 2018b)*

While this commitment is made in relation to products, it seems to be intended as a response to EU indications (see above) about the need to avoid an unfair competitive advantage being gained by implementing weaker standards.

Set against this is the UK's focus on developing new free trade agreements with economies outside Europe. Trade negotiators from key potential trade partners such as the US, China and India are likely to emphasise (as they have done in negotiations with the EU) the removal of what they regard as regulatory barriers, including on environmental and associated standards. The UK could therefore see regulatory flexibility as essential in delivering the free trade bonanza that Brexit advocates have said is feasible; although Ministers, particularly Michael Gove, have also suggested that there is no risk of a weakening of standards in future trade details. An alternative view is therefore that clear commitments on regulatory alignment with the UK's main trading partner, the EU, would strengthen the UK's hand in arguing against a weakening of standards that would be politically unacceptable for a domestic audience.

As the UK position on this develops, it will need to accommodate a number of apparently conflicting pressures, including: its stated broad policy objective of improved levels of environmental delivery following Brexit; its negotiating red lines on the role of the European Court of Justice; the stated interest of UK politicians in greater regulatory flexibility on departure from the EU; clear statements of the need for the UK not to be bound by legislation which it has no role in framing; and ambitions to develop parallel free trade agreements with other economies. From discussion with UK officials, however, it seems clear that the UK will be willing to commit to broad regulatory objectives; but will be keen to gain greater flexibility over the means to deliver those objectives. In many ways, this reprises UK positions in negotiations in Council on many individual pieces of environmental legislation over recent decades, with a frequent call for legislation to focus on specifying outcomes, leaving Member States greater flexibility on the means to deliver those outcomes.

[1] See, for example, his oral evidence to the House of Lords Select Committee on the EU, 1 November 2017, in which he says: "It has been put to me by a variety of organisations that we need to reflect on our own institutional architecture. …Will it be enough to have judicial review? … I am minded, although this will have to be a matter for consultation, to say that the arguments are strong and powerful, and there is a responsibility on my department and others to come forward with propositions to answer those concerns… There is what has been called the governance gap, and we have a responsibility to address those arguments." (House of Lords, 2017b)

2. The scenarios for analysis

2.1. Option A: UK remains part of the EU market

While the UK administration has effectively ruled out participation in the Single Market and the Customs Union – what became known as the "Norway option", because of Norway's adoption of this model through membership of the European Economic Area – it is possible that it may in practice be applied as a result of any transitional agreement with the EU 27.

The nature of the UK's participation in a transitional agreement is likely to be politically controversial in the UK, particularly given the likely requirement to abide by EU legislation, and the decisions of the EU legal system, without having a voice in either. However, it seems highly unlikely that EU negotiators will be willing to invest effort in devising bespoke arrangements allowing either flexibility or significant influence to the UK over decisions, given the short-term nature of the arrangement, and the strong pressure on UK negotiators to achieve it.

The impacts for analysis in this project are therefore relatively limited. Our assumption is that the UK will be required to continue to abide by the terms of the relevant legislation. One area of uncertainty is whether the UK will also be required to comply with any subsequent developments in the European legal acquis; in a transitional arrangement this is unlikely to be a significant issue, given the limited programme of legislative change in the pipeline, but in a longer-lasting arrangement, along the lines of the EEA, consultation mechanisms similar to those in the EEA would be needed, and the UK would presumably retain the right to refuse to accept new legislation (with consequent curtailment of its market access).

It should be noted that, for comparative purposes, Option A is functionally equivalent to the UK remaining within the EU (with the exception of UK influence over future development of the EU legislative *acquis*). And, as noted above, it could be a staging point on a path to greater flexibility, for example under Option B, or Option C below.

2.2. Option B: A bespoke free trade deal

The development of a free trade agreement between the UK and the EU is now the assumed direction of talks on the future relationship, although with different assumptions on the UK and the EU side on the depth and level of ambition of such an agreement. In particular, the UK's preference for virtually frictionless trade is not seen as a plausible option by the EU negotiators, in particular given the UK's red lines in terms of Customs Union and Single Market participation, and given the EU's wider obligations to other trading partners under the "most favoured nation" rule.

The likely impacts on trade and on supply chains are highly relevant to economic activity and to development pressures in the UK; but are not the focus of this paper. We will consider instead the likely impact on environmental regulation affecting land use planning. Here, a key element in assessing likely outcomes is the clear emphasis of the EU side on avoiding competitive distortions as a result of divergent regulatory standards. The EU's initial negotiating position (Council of the European Union, 2017), which will guide the development of more detailed guidelines for phase 2 of the negotiations, makes it clear that any free trade agreement:

> *"must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices."*

This issue has also been particularly emphasised by the European Parliament, which will need to agree to any deal before it comes into effect. The UK, on the other hand, has indicated ambition to avoid being a rule-taker, and to benefit from flexibility over future legislation – although both the Prime Minister and the Secretary of State for the Environment have emphasised an interest in enhancing environmental protection following the UK's departure.

The Commission's understanding of how to deliver the "level playing field" was clarified by a recent slide presentation to EU 27 officials (European Commission, 2018a). This notes that the nature of a free trade agreement with the UK would need to reflect both its geographical proximity, and the high level of integration of the UK and EU 27 economies, with a consequently greater risk of impacts from competitive deregulation. While the risk seems to be considered greater in respect of labour and social protection legislation, the Commission notes that backstop mechanisms – such as the UK's membership of relevant Multilateral Environmental Agreements – are unlikely to be effective because of the relatively weak enforcement mechanisms involved. The likely approach is that the EU will insist on a non-regression clause, covering at least a list of key areas of environmental legislation identified in the Commission presentation:

- Industrial emissions
- Air quality
- Water quality (including nitrates and marine protection)
- Waste management
- Nature conservation
- Impact assessments
- Transparency, permitting, controls and enforcement

However, it seems likely that – given the lower degree of market participation resulting from a free trade agreement (in particular, UK exports would face technical barriers including more detailed requirement to demonstrate the origin of products) – the EU 27 side will not insist on UK commitment to the terms of legislation in these areas, but rather to meeting the objectives of that legislation. An issue likely to arise is how to judge whether the UK is genuinely meeting the objectives of legislation; it would, in principle, be possible for the UK to adopt legislation which formally enshrines the objectives, but then fails to take detailed regulatory action to deliver them. The Commission slides refer in particular to the need for "domestic authorities upholding environmental standards".

Based on the combination of EU and UK statements on negotiating objectives, our judgement is that the likely outcome of negotiations in this scenario would be a combination of the following:

- A non-regression clause covering a broad – but not comprehensive – list of areas of environmental policy;
- A recognition that the UK would have flexibility over how it delivered the objectives of legislation in those areas;

- A bilateral dispute resolution mechanism which is likely to be relatively slow-moving and ineffective;
- A requirement for the UK to adopt enhanced domestic monitoring and enforcement mechanisms;
- An obligation for the areas of environmental policy covered by the agreement to be implemented in domestic legislation in ways which (i) require practical and effective steps to be taken towards achieving the objectives; (ii) enable a broad range of individuals and public interest groups to bring legal action to enforce such legislation; and potentially (iii) require an independent monitoring mechanism to be established with a role in assessing delivery and, where necessary, initiating legal or other action to ensure delivery.
- An obligation on both sides to avoid the adoption of new environmental standards which unfairly discriminate against products from the other party.

This outcome would thus give the UK some flexibility to redesign some areas of EU legislation, while retaining – and taking real steps to deliver – its objectives. The extent to which the UK takes advantage of that flexibility may be constrained by limits on policymaking time. Our assessment of key areas of legislation will therefore focus on the potential for changes to legislation, while also noting that a continuing roll-forward of the current EU legislation would have less impact (although not a nil impact – the relative flexibility for legislative change created by the UK being outside the EU will, whether or not it is in fact exercised, have an impact on those taking long-term decisions of the kind usually associated with land use planning).

Less attention has focused on the potential for divergence between UK and EU legislation as a result of changes to the EU legislation itself, following the UK's departure. This is partly because EU legislative activity on environmental issues has slowed down over recent years; although there are some areas (circular economy, climate change) where future Commission activity is likely. We will not address this aspect in detail, but it should be noted that it creates some additional uncertainty, particular in scenarios where the UK is closely aligned with EU legislation.

Finally, it should be noted that the free trade deal considered here is unlikely to be feasible in the short term after the UK's planned departure from the EU in March 2019. It would therefore be preceded by a period of either participation in a tighter regulatory alignment – under Option A above – or, less plausibly, a period in which there is no agreement covering the UK's trading relationship with the EU, and trade takes place on default WTO terms (Option C below).

2.3. Option C: no agreement; or no UK commitment on the relevant environmental legislation

The final option to consider would be a situation where the UK has no obligation to the EU with respect to the relevant environmental legislation. In practice, given the clarity of the EU negotiating position on this point, this is only likely to happen across the environmental acquis if the UK and the EU fail to reach an agreement at all (and may, in this case, come to pass either following a transition period, or on the UK's departure in March 2019 following a failure to reach agreement in the negotiations). However, it is also possible for it to apply to individual elements of the environmental acquis if those elements are not included in a list of legislation which the UK is asked to continue to implement, or whose objectives the UK commits to continue to meet.

3. Legislation to be analysed

The following sections examine a number of areas of European regulation, which appear to have particular relevance for land use and land use planning in the UK. We will consider for each of them the implications of options A (where generally the implication will be that there is no change), Option B (allowing some margin for new UK approaches), and option C (where a UK outside the EU has maximum flexibility). In all cases, it should be noted, the outcome will depend on political choices which are unpredictable; although the degree of policy risk planners and developers face (in other words, the scope of that political choice and the potential for significant or rapid change) is relatively predictable.

The legislation we have looked at is as follows:

- The Waste Framework Directive
- The Water Framework Directive
- The Marine Strategy Framework Directive
- The Maritime Spatial Planning Directive
- The Ambient Air Quality Directive
- The Urban Waste Water Treatment Directive
- The Habitats and Birds Directives
- The Strategic Environmental Assessment Directive
- The Environmental Impact Assessment Directive

3.1. Waste Framework Directive (2008/98/EC)

3.1.1. Main impact on land use decisions, and on land use planning

The Waste Framework Directive requires Member States to adopt waste management plans and waste prevention programmes, which should be evaluated and revised if appropriate every six years. These plans must cover the entire geographical territory of a Member State. The waste management plans must take into account several aspects related to spatial planning, including: the waste management and waste generation situation; existing waste collection and major disposal/recovery installations; the need for new collection schemes, closure of installations, additional infrastructure and investments; location criteria for site identification and capacity of future disposal/recovery installations; and they may also contain information on historical contaminated waste disposal sites. The plans must also conform with waste planning requirements in Article 14 of the Packaging and Packaging Waste Directive (94/62/EC) and the strategy for reducing biodegradable waste going to landfill in Article 5 of the Landfill Directive (1999/31/EC). Relevant stakeholders, authorities and the public must be given an opportunity to participate in the plans' elaboration and have access to them once developed. Member States are to cooperate with other Member States when drawing up their waste management plans and waste prevention programmes.

Although not within the remit of the Waste Framework Directive, the export and import of waste between the EU and third countries is also important, in particular as it has the potential to impact on planning waste management capacity. The Waste Shipment Regulation (WSR, 1013/2006) prohibits the exports from the EU to a third country of waste for disposal, or of mixed municipal waste for recovery operations, unless the third country is a member of EFTA and party to the Basel Convention; the WSR allows imports to the EU of waste from a third country party to the Basel Convention (European Commission, 2018b). After Brexit the UK would not be part of EFTA (unless separately agreed), so any imports of waste from MS would be prohibited.

3.1.2. Core arguments for incorporation in an agreement:

The European Commission's Article 50 Task Force[2] has recognised waste management as a key area of environmental policy to consider during preparatory discussions on the scope of the future EU-UK relationship, in particular in terms of ensuring a level playing field between the EU and UK (European Commission, 2018a).

One potential area for impact will be the Ireland/Northern Ireland border, since Ireland will still be subject to the Directive. This could have various different impacts, for example regarding waste facilities near the border accepting waste (as waste imported from the Republic would be prohibited), and the potential for increased inspections when shipments of waste transit the border. The latter could be either beneficial (e.g. in terms of catching illegal shipments) or not (e.g. in terms of increased burden and cost of inspections).

More generally, it is worth noting that the UK exports over 4 million tonnes of waste to the EU as refuse-derived fuel (RDF), for use in waste-to-energy plants in the Netherlands, Germany and Scandinavia, because it lacks the energy recovery plants/capacity to deal with the material itself (House of Lords, 2017a). From the UK withdrawal date, all exports of waste for disposal or of mixed municipal waste for recovery from the EU 27 to the UK will be prohibited, but imports from the UK to the EU 27 will be allowed since the UK is party to the Basel Convention. It is unclear, however, whether any tariffs, or indeed non-tariff barriers to trade (e.g. product standards and waste definitions) may be imposed. If so, this could have an impact on future waste exports, with knock-on impacts for infrastructure and related planning.

3.1.3. Implications of a continued obligation to meet the terms of the legislation (Option A)

Essentially, under Option A, the Directive would continue to apply in the UK, meaning that the UK would need to abide by its provisions and targets, for example on waste recycling and recovery (including, by 2020, achieving 50% preparation for re-use and recycling of certain types of household waste, and 70% preparing for re-use, recycling and other recovery of construction and demolition waste). This would require the UK to continue to work to achieve those targets, with the associated implications for planning of waste management infrastructure.

[2] Formally titled the 'European Commission's Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU'.

3.1.4. Implications of greater UK flexibility over how objectives are met (Option B)

Option B would most likely involve the UK continuing to meet the objectives of the Directive, but having the freedom to redesign legislation/policy to achieve them.

This could mean, for example, that the same targets (e.g. for recycling and recovery) would remain in place, but the policy instruments to achieve them could change. Also, given that many waste management decisions are essentially local, this is an area where divergence between the UK devolved administrations is more likely without the constraint of EU law. This could lead to some uncertainty over planning for waste management infrastructure, although this would not necessarily be the case in the short-term (to 2020, the deadline for achievement of the existing EU targets). However, with no targets set for after 2020, and based on indications from negotiations in the Council of Ministers that the UK Government is not keen on some of the higher targets in the EU Circular Economy Package (see below), the level of ambition for waste management in the UK could potentially drop post-Brexit compared to the EU (House of Lords, 2016). On this point it is also worth noting that the UK is not currently on track to meet the 2020 target to recycle 50% of household waste (House of Lords, 2016), which could provide motivation not to increase the target. The lack of planned targets could lead to further uncertainties regarding the planning of waste management infrastructure, since targets help to provide signals for investments of this type.

3.1.5. Potential implications of no UK commitments (Option C)

Under Option C, the provisions of the Directive would no longer apply in the UK post-Brexit.

Looking to the future, it is worth mentioning that the EU Circular Economy Package includes more ambitious waste legislation (which includes higher recycling and recovery targets to be achieved by 2030). The Package is currently going through the EU decision-making process and the new legislation is unlikely to enter into force before Brexit in 2019, with the implication that it would not apply in the UK. As mentioned above, the uncertainty over targets could result in uncertainty regarding the planning of waste management infrastructure.

If the UK adopted different (more likely lower) waste management targets to those in place in the EU 27, this could create financial incentives to either import or export waste, legally or illegally. This could be the case between the UK and the EU 27 generally, but could potentially be brought into particular focus across the Ireland/Northern Ireland border (House of Lords, 2017a).

If waste exports from the UK to the EU 27 were affected post-Brexit, this may have an adverse impact on the UK's waste management. For example, tariffs on UK exports of waste (which counts as 'goods') to the EU would make exports more expensive. If they became prohibitively so, this could leave the UK with significant additional amounts of waste to deal with via alternative means, which could have both cost and planning implications if additional infrastructure needed to be put in place. The EU generally applies its WTO most favoured nation (MFN) tariff of 6.5% on municipal waste imports. However some countries (e.g. Switzerland, South Africa and India) have negotiated free trade deals with the EU that include a 0% rate on municipal waste imports (Eunomia, 2017), giving some precedent for this approach.

3.2. Water Framework Directive (2000/60/EC)

3.2.1. Main impact on land use decisions, and on land use planning

The purpose of the Water Framework Directive is to protect the EU's inland surface waters, transitional waters, coastal waters and groundwater, preventing further deterioration, and protecting and enhancing the status of aquatic ecosystems and water-related aspects of terrestrial ecosystems and wetlands. It also aims to promote sustainable water use, reduce discharges and emissions to water, and contribute to mitigating the effects of floods and droughts. 'Good status' of waters should be achieved by 2017 (three consecutive planning periods).

The Water Framework Directive requires Member States to establish River Basin Management Plans (RBMPs) for each river basin district, and to update them every six years. River basin districts can be either national or international (covering a district within the territory of one or more EU Member States, or third countries in cases where a district extends beyond the EU). The RBMPs must take into account several aspects related to spatial planning, including: analysis of the river basin district's characteristics; review of the impact of human activity on the status of surface waters and groundwater; and an economic analysis of water use.

Measures to be included in the RBMPs with relevance to spatial planning include: promotion of efficient and sustainable water use; measures to meet drinking water requirements; control measures over water abstraction, groundwater recharge/augmentation, point source discharges and diffuse pollution; prohibition of direct discharges; and prevention of surface water pollution. Each of these could have an impact on land-use planning in river basin districts, with a view to ensuring good water quality. The Directive suggests that all interested parties should be actively involved in the production, review and updating of the RBMPs.

3.2.2. Core arguments for incorporation in an agreement:

The European Commission's Article 50 Task Force has recognised water quality as a key area of environmental policy to consider during preparatory discussions on the scope of the future EU-UK relationship, in particular in terms of ensuring a level playing field between the EU and UK (European Commission, 2018a).

There are two main international river basin districts the cross the Ireland/Northern Ireland border: the Western and Neagh Bann International River Basin Districts (Environmental Protection Agency, 2018). There is currently sound cooperation across the border on implementation of the Directive, with joint analysis and planning.

3.2.3. Implications of a continued obligation to meet the terms of the legislation (option A)

Under Option A, the UK would still need to comply with the requirements of the Water Framework Directive, meaning that the UK would need to abide by its provisions and objectives. This would require the UK to continue to work to achieve those targets, with the associated implications for the planning-related aspects of water management. Under this scenario, the UK would presumably (at least until the end of any transition period) continue to use RBMPs as a core planning tool for river basin management.

The Directive is due to be reviewed starting in 2019. However, the Commission has stated that if any new legislation is to be proposed following the review, this would not happen until 2020-21 and would not be adopted and enter into force until later – well beyond any transition period.

3.2.4. Implications of greater UK flexibility over how objectives are met (Option B)

Option B would most likely involve the UK continuing to meet the objectives of the Directive, but having the freedom to redesign legislation/policy to achieve them.

This could mean, for example, that the UK could adopt a different approach than that laid down for the RBMPs, change the content of existing plans, appoint different competent authorities etc., although this would presumably only be done if the UK saw some advantage in a particular change in approach. This could potentially lead to some uncertainty over planning within river basins, although this would not necessarily be the case.

3.2.5. Potential implications of no UK commitments (Option C)

Under Option C, the Water Framework Directive will no longer apply in the UK.

The Directive is seen as one of the key drivers for investments by water companies, with a significant amount of investment by EU-based water company operations; if the Directive no longer applied in the UK, there may be a question mark over what would happen to this investment (see e.g. evidence from Water UK in (House of Lords, 2016)). In a worst case scenario, if the investment were withdrawn, this could lead to a shortfall in investment in UK water management infrastructure. Of course, levels of investment and their timing would depend on any UK objectives relating to water (including those of the devolved administrations), which may or may not differ from those in the Water Framework Directive.

Regarding cooperation across the Ireland/Northern Ireland border, since the Directive (Article 13) encourages EU Member States to cooperate with third countries on international river basin districts, there does not appear to be any particular reason for the current level of cooperation to change in any of the three scenarios considered in this report.

3.3. Marine Strategy Framework Directive (2008/56/EC)

3.3.1. Main impact on land use decisions, and on land use planning

The objectives of the Marine Strategy Framework Directive (MSFD) are to achieve good environmental status (GES) of the EU's marine waters by 2020, including a specific regulatory goal to 'maintain biodiversity by 2020', and to protect the resource base that underpins marine economic and social activities.

The MSFD requires each Member State to develop a strategy for its marine waters (or Marine Strategy), reflecting the overall perspective of the marine region or subregion concerned[3]. The strategy must be kept up to date and reviewed every six years. The strategy must take into account several aspects related to spatial planning, including: current environmental status of waters; environmental impact of human activities; and economic and social analysis of use of

[3] The marine region of relevance to the UK is the North-east Atlantic Ocean; the sub-regions of relevance are the Celtic Seas and Greater North Sea (ETC/ICM, 2015).

waters. Measures to be included in the strategy with relevance to spatial planning include: input and output controls; spatial and temporal distribution controls; management coordination measures; measures to improve traceability of marine pollution; mitigation and remediation management tools; and spatial protection measures. Each of these could have an impact on spatial planning, with a view to ensuring good environmental status and protecting, preserving and preventing the deterioration of marine environments. The Directive also calls for all interested parties to have opportunities to participate in its implementation.

3.3.2. Core arguments for incorporation in an agreement:

The European Commission's Article 50 Task Force has recognised water (including marine) quality as a key area of environmental policy to consider during preparatory discussions on the scope of the future EU-UK relationship, in particular in terms of ensuring a level playing field between the EU and UK (European Commission, 2018a).

The Directive (Article 6) encourages close coordination with both other EU Member States and with third countries, e.g. through Regional Sea Conventions, regarding the marine regions. For this reason, there does not appear to be any particular case for this type of cooperation to change when the UK becomes a third country. It is likely that international cooperation between the UK and relevant EU Member States would continue through the requirements of the Espoo Convention and the UK's participation in OSPAR (ABPmer, 2016).

Post-Brexit, the UK will still presumably aim for similar objectives to those contained in EU legislation for the marine environment, so it could reasonably be argued that without EU marine legislation it would still require similar measures, and would be inefficient and/or unwise to reverse the efforts made so far to fulfil the relevant EU directives (Boyes and Elliott, 2016).

3.3.3. Implications of a continued obligation to meet the terms of the legislation (option A)

Under Option A, the UK would still need to comply with the requirements of the MSFD, meaning that the UK would need to abide by its provisions and objectives, including the achievement of GES of marine waters by 2020 (which falls within the likely timescale for a transition period). This would require the UK to continue to work to achieve that objective, with the associated implications for the planning-related aspects of marine management. Under this scenario, the UK would presumably (at least until the end of any transition period) continue to use its marine strategy, as developed in response to the MSFD, as a core planning tool for the management of its marine waters.

3.3.4. Implications of greater UK flexibility over how objectives are met (Option B)

Option B would most likely involve the UK continuing to meet the objectives of the MSFD, but having the freedom to redesign legislation/policy to achieve them. This could mean, for example, that the UK could adopt a different approach than that laid down for the strategy developed in response to the MSFD, change the content of its existing plan, appoint different competent authorities etc., although this would presumably only be done if the UK saw some advantage in a particular change in approach. This could potentially lead to some uncertainty over spatial planning related to the marine environment, although this would not necessarily be the case.

3.3.5. Potential implications of no UK commitments (Option C)

Under Option C, the MSFD will no longer apply in the UK. Some commentators have argued that the MSFD is not only very useful in terms of setting objectives and a framework to achieve them, but it is the best framework currently available for providing a link between the UK and EU on marine issues in the future (Williams, 2017). As such it may be preferable for the UK to continue to follow its general provisions, objectives and means of developing strategy, even if this is not legally required.

The EU has expressed the opinion that the MSFD is relevant to the EEA, but EEA countries have argued that it is not, pointing out that the EEA Agreement only applies to the territories of the EEA countries (i.e. the area extending to the 12 nautical mile limit of territorial waters), but that the MSFD mainly applies outside that limit (to 200 nautical miles or mid-lines) (Boyes and Elliott, 2016). However Norway, whilst arguing that the MSFD should not be included in the EEA Agreement, nevertheless follows many of the aspects involved in implementing the MSFD including plans for the North Sea (Boyes and Elliott, 2016). This could therefore be seen as a model for the UK to consider.

There is also a question mark over whether the MSFD no longer applying in the UK would lead to diverging approaches between the UK devolved administrations. If this were to materialise, it could lead to fragmentation and loss of coherence in how ecological networks are treated; arguably the marine environment is different in nature land-based environments (i.e. it is of a more shared nature), and requires greater collaboration in its management (Williams, 2017).

3.4. Maritime Spatial Planning Directive (2014/89/EU)

3.4.1. Main impact on land use decisions, and on land use planning

The Maritime Spatial Planning Directive (MSPD) was adopted in response to the fact that maritime spatial planning (MSP) takes place across national borders and sectors, and in recognition of the consequent benefits of a common framework for MSP in Europe. Although the Directive was adopted in 2014 and had to be transposed and competent authorities designated by 2016, the maritime spatial plans required by the Directive only need to be established by the end of March 2021. The plans should be reviewed at least every 10 years.

Member States' maritime spatial plans should contribute to the sustainable development of energy sectors at sea, maritime transport, fisheries and aquaculture, and to the preservation, protection and improvement of the environment. Member States may also pursue other objectives, e.g. the promotion of sustainable tourism or sustainable extraction of raw materials. Member States can decide the relative 'weighting' of these various objectives. The plans must take into account several aspects related to spatial planning, including: land-sea interactions; environmental, economic, social and safety aspects; and interactions between various activities and uses of the marine space (e.g. aquaculture, fisheries, energy extraction/production, including renewables, transport routes, protected areas, submarine cables/pipelines, tourism and military training areas). Stakeholders should also be involved in the development of the plans.

3.4.2. Core arguments for incorporation in an agreement:

The European Commission's Article 50 Task Force has recognised water (including marine) quality as a key area of environmental policy to consider during preparatory discussions on the scope of the future EU-UK relationship, in particular in terms of ensuring a level playing field between the EU and UK (European Commission, 2018a).

The Directive (Articles 11 and 12) encourages cooperation between Member States, and third countries, within each marine region, to ensure coherence between their maritime spatial plans, e.g. through Regional Sea Conventions and/or networks of competent authorities.

Post-Brexit, the UK will still presumably aim for similar objectives to those contained in EU legislation for the marine environment, so it could reasonably be argued that without EU marine legislation it would still require similar measures, and would be inefficient and/or unwise to reverse the efforts made so far to fulfil the relevant EU directives (Boyes and Elliott, 2016).

3.4.3. Implications of a continued obligation to meet the terms of the legislation (option A)

Under Option A, the UK would at least in theory still need to comply with the requirements of the MSPD. However, since the deadline for the development of maritime spatial plans is March 2021, i.e. post-Brexit and likely post any transitional period, it seems unlikely that the UK would need to develop such a plan even under this Option A, if it did not want to. However, until late 2020 it would still be legally obliged to prepare the plan and consult on it, so that a decision to not produce a plan a few months later seems unlikely.

3.4.4. Implications of greater UK flexibility over how objectives are met (Option B)

Option B would most likely involve the UK continuing to meet the objectives of the MSPD, but having the freedom to redesign legislation/policy to achieve them.

This could mean, for example, that the UK could adopt a different approach than that laid down in the Directive, although as mentioned above, if the preparation of the plan has begun before Brexit, the Government may not deem it sensible or appropriate to divert from the process simply because it is no longer bound by the processes in the Directive. Nevertheless, if the process were changed, this could potentially lead to some uncertainty over spatial planning related to the marine environment.

3.4.5. Potential implications of no UK commitments (Option C)

Under Option C, the MSPD would not apply in the UK. In practice, the UK already has an established statutory system for planning in its marine waters, and it could therefore be argued that if the MSPD was not implemented in the UK, there would be little impact (if any) (ABPmer, 2016). The MSPD also encourages cooperation with third countries, so the door would be open for the UK to cooperate with EU Member States (and other countries) in the North-east Atlantic Ocean marine region.

3.5. Ambient Air Quality Directive (2008/50/EC)

3.5.1. Main impact on land use decisions, and on land use planning

Under the Ambient Air Quality Directive, Member States must divide their territory into zones and agglomerations, assess the air pollution levels in each and report air quality data to the European Commission. For each zone or agglomeration where levels are above air quality or target values, where deadlines for achieving limit values for NO_2 or benzene are postponed, or where ozone target values are exceeded, an air quality plan or programme must be prepared. The aim of the plan/programme is to address the sources responsible and ensure compliance with the limit value before the target date. The plans must take into account several aspects related to spatial planning, including: localisation of excess pollution; nature and assessment of pollution; origin of pollution; and analysis of the situation. For plans relating to postponed deadlines for achieving limit values for nitrogen dioxide or benzene, additional information to be provided includes air pollution abatement measures considered. Plans may additionally include specific measures aimed at the protection of sensitive population groups (including children), which may be relevant to planning aspects such as the location of schools. Information on air quality should also be disseminated to the public.

In addition, for zones or agglomerations with a risk of pollutant levels exceeding one or more of the alert thresholds, Member States should draw up short-term action plans to tackle the situation. Where appropriate, joint short-term action plans may be drafted to cover neighbouring zones in other Member States. Measures to be included in the short-term action plans with relevance to spatial planning include: measures to reduce the risk and limit the duration of such exceedances; potentially measures related to motor-vehicle traffic, construction works, ships at berth, industrial plants or products and domestic heating; and specific actions aiming at the protection of sensitive population groups.

In the UK, one of the main factors of the planning-related requirements of the Directive to consider is road planning, since transport is one of the key sources of emissions that impact on air quality in the UK.

3.5.2. Core arguments for incorporation in an agreement:

The European Commission's Article 50 Task Force has recognised air quality as a key area of environmental policy to consider during preparatory discussions on the scope of the future EU-UK relationship, in particular in terms of ensuring a level playing field between the EU and UK (European Commission, 2018a).

Where alert, limit or target values are exceeded due to transboundary pollution, Member States are to cooperate and, where appropriate, draw up joint activities such as joint air quality plans and short-term action plans where relevant.

Some stakeholders are suspicious that the Government may seek to weaken some aspects of air quality law in the UK following Brexit, in particular since the Government has previously attempted to weaken the Ambient Air Quality Directive, particularly in relation to nitrogen dioxide (see e.g. evidence from ClientEarth in (House of Lords, 2016)) and because meeting the targets in the Directive is proving particularly problematic. The loss of the existing EU enforcement mechanisms post-Brexit could lead to lack of effective enforcement.

3.5.3. Implications of a continued obligation to meet the terms of the legislation (option A)

Under Option A, the Directive would continue to apply in the UK, meaning that the UK would need to abide by its provisions and targets. This would require the UK to continue to work to achieve those targets, with the associated implications for planning as outlined above.

3.5.4. Implications of greater UK flexibility over how objectives are met (Option B)

Option B would most likely involve the UK continuing to meet the objectives of the Directive, but having the freedom to redesign legislation/policy to achieve them.

This could mean, for example, that the UK could adopt a different approach than that laid down in the Directive for the development of air quality plans/programmes and short-term action plans, or change the content of existing plans. This would presumably only be done if the UK saw some advantage in a particular change in approach. This could potentially lead to some uncertainty over planning aspects related to meeting the Directive's objectives, although this would not necessarily be the case.

3.5.5. Potential implications of no UK commitments (Option C)

As air quality has become a high profile issue politically and with the public, a clear policy to weaken protection, such as a change in standards, would be difficult for the Government to deliver. However, a weakening of the pressure on local government to deliver actions where air quality improvements are needed may be done with less publicity, so that the standard is not weakened, but the path to achieving it is. The removal of obligations related to the Directive would provide the potential for this to occur.

3.6. Urban Waste Water Treatment Directive (91/271/EEC)

3.6.1. Main impact on land use decisions, and on land use planning

The UWWTD sets requirements on the collection and treatment of waste water in agglomerations with a population greater than 2,000. For most larger towns, secondary treatment is required, with more demanding tertiary treatment in areas defined as "sensitive", in accordance with requirements set out in an Annex to the Directive. Meeting its standards has proved challenging for many member states and for some significant agglomerations. It is therefore linked to some major infrastructure projects and their financing. While most of the UK is now compliant with the legislation, the UK is still under pressure from Commission infringement action in a number of areas, and the Directive's requirements are behind a major infrastructure investment in London, the Thames Tideway Tunnel. The requirement for tertiary treatment in sensitive areas has an impact on planning decisions for residential housing. Planning approval, and delays in achieving it, is a factor in UK slow implementation of the Directive's requirements.[4]

[4] See, for example, the UK's 2012 report under Article 16 of the Directive, "Waste water treatment in the United Kingdom – 2012: Implementation of the European Union Urban Waste Water Treatment Directive 91/271/EEC", which notes that delay in bringing the Brighton and Hove agglomeration into compliance "has arisen largely from planning approval delays" (p.9) (Defra, 2012).

3.6.2. Core arguments for incorporation in an agreement:

The European Commission's Article 50 Task Force has recognised water quality as a key area of environmental policy to consider during preparatory discussions on the scope of the future EU-UK relationship, in particular in terms of ensuring a level playing field between the EU and UK (European Commission, 2018a). It has relatively weak implications for single market relevance in terms of indirect costs; exporting industries are generally unlikely to be responsible themselves for a major proportion of the waste water requiring treatment, since process emissions to water from industry would be dealt with under the Industrial Emissions Directive. However, they would face a proportion of the local tax and water charge costs of investments such as the Thames Tideway Tunnel (and would arguably have an unfair advantage if the infrastructure requirements of the Directive did not apply. It also has significant cross-border impacts, particularly in countries sharing inland waters, but also for countries with coasts sharing the same sea – UK emissions from the South East of England could thus have an impact on bathing water quality and other water quality objectives on the coasts of Belgium and the Netherlands, for example.

3.6.3. Implications of a continued obligation to meet the terms of the legislation (option A)

Under Option A, the UK would still need to comply with the requirements of the UWWTD. The stringency with which its requirements are implemented has, however, been heavily influenced by Commission infringement action against the UK; so it could be expected that the impact of the Directive's requirements would itself be effected by whatever governance arrangements apply. While it is unlikely that, for example, the Thames Tideway Tunnel could be considered by the UK as no longer necessary (and the water charges and local taxation implications would therefore remain), there could be some (limited) potential for a more relaxed approach to the designation of sensitive areas requiring tertiary treatment, and thus for a more flexible attitude to related requirements in major new housing developments.

3.6.4. Implications of greater UK flexibility over how objectives are met (Option B)

The Directive's objectives are closely tied to the process requirements it imposes, particularly around the size of agglomerations requiring treatment at different levels. If the UK's obligations under a future relationship with the EU were framed in terms of meeting the requirements of the Water Framework Directive, the Bathing Water Directive, and other legislation setting outcome obligations, there would be some scope for a significant relaxation in the requirements for water treatment around agglomerations.

Politically, it is unlikely that simply removing legal requirements on urban waste water treatment would be attractive; and in any case, effective implementation of the requirements of outcome-based legislation such as the Water Framework Directive would require similar regulatory standards. There would, however, be much greater scope for avoiding investment requirements where meeting the Directive's standards is regarded as disproportionately expensive; or for taking a more relaxed approach if the Directive's full implementation were seen as getting in the way of other political priorities, notably housing construction.

3.6.5. Potential implications of no UK commitments (Option C)

In the event of the UK not having any water quality obligations, the choices available would be

similar to Option B above (a flexible approach to meeting objectives), but with greater flexibility for a relaxed approach, and for disapplying the formal standards in hard cases or where the expenditure requirements of meeting the standards appeared to create handicaps for politically desirable development. This could in turn create some uncertainty over the standards to be applied to new development, with potential for a case-by-case approach.

3.7. Habitats and Birds Directives (92/43/EEC, and 2009/147/EC)

3.7.1. Main impact on land use decisions, and on land use planning

The Habitats Directive (92/43/EEC) has two main elements: the protection of species of community interest listed in Annexes IV and V of the Directive wherever they occur; and, of more direct relevance for land use policy, the designation and conservation of sites (Special Areas of Conservation) for habitats and species listed in Annex I and II of the Directive. The "Natura 2000" network of sites designated under the Habitats Directive also includes Special Protection Areas (SPAs) for birds as classified by Member States under the Birds Directive.

Special Areas of Conservation (SACs) and SPAs are required to have site management and protection measures, and Member States must comply with a requirement to take appropriate steps to avoid deterioration of the sites. In particular, Member States must take a precautionary approach to any new plan or projects affecting a site, and permit it only if it has been established that it will not significantly affect the integrity of the site. It is possible to allow development to go ahead if there "imperative reasons of overriding public interest"; and even in these limited cases, must take adequate compensatory measures.

There is significant literature on the extent to which the Habitats and Birds Directives impact on land use planning decisions. A review of the constraints the directives impose was commissioned by Defra in 2011, following a commitment by the then Chancellor George Osborne. The results of the review were published in 2012 (HM Government, 2012); while finding that the terms of the Directives themselves did not create significant unnecessary costs, there were a range of recommendations for simplifying the UK's choices on implementation of the legislation, and streamlining processes.

3.7.2. Core arguments for incorporation in an agreement:

The nature directives are, as noted above, included in the Commission's list of environmental areas relevant to the "level playing field"; however, they are not among the extensive environmental requirements that EFTA members of the European Economic Area are required to comply with. They are, however, included in the Ukraine Partnership Agreement. The reason for the exclusion in the EEA agreement, as noted by Nesbit et al (Nesbit et al, 2017), was largely pragmatic, based on the concerns of the Norwegian government regarding the relevance of the legislation to its own biodiversity. It is likely that some sectors in the EU27, particularly in relation to energy, mining, transport and housing, would see compliance with the nature directives as resulting in significant costs or income forgone (although the recent study supporting the Fitness Check of the nature directives(Milieu, IEEP and ICF, 2016) found little evidence of this at a Europe-wide scale). Flexibility on the issue could therefore be viewed as a potential competitive advantage.

There are also significant transboundary arguments for delivery of the environmental objectives of nature legislation collectively, particularly (but not exclusively) in relation to migratory species.

3.7.3. Implications of a continued obligation to meet the terms of the legislation (option A)

Continuing to meet the terms of the Habitats and Birds Directives would provide a degree of legal continuity and predictability on the ways in which the broad objectives of species and habitants protection would be delivered. As with other areas of legislation, the enforcement mechanisms put in place post-Brexit are likely to have an impact on the stringency of the application of the legislation; however, the contentious nature of site designation, protection and management decisions, and the high level of attention from environmental NGOs, is likely to mean that any relaxation is subject to legal challenge. Government efforts to simplify and streamline the processes associated with EU nature legislation could be expected to continue.

3.7.4. Implications of greater UK flexibility over how objectives are met (Option B)

UK (Defra) Ministers have argued that the Habitats and Birds Directives impose unnecessary constraints. George Eustice, the Minister of State responsible for Farming and Fisheries, described the legislation as "spirit-crushing", saying during the Referendum campaign:

> *"A lot of the national directives they instructed us to put in place would stay. But the directives' framework is so rigid that it is spirit-crushing…. If we had more flexibility, we could focus our scientists' energies on coming up with new, interesting ways to protect the environment, rather than just producing voluminous documents from Brussels." (Neslen, 2016)*

Michael Gove, the current Secretary of State, has argued (before taking on his current role) has argued that:

> *"The Habitats Directive holds that if you build a home within five kilometres of a particular type of terrain, heathland, then you have to allocate, at the same time, something called suitable alternative natural green space to offset the environmental impact." [The Directive] "massively increases the cost and the regulatory burden for housing development…. As a result my constituents, and perhaps your children find homes more expensive and mobility in this country impeded."* (Stone, 2017)[5]

While there is little evidence to support the claim that the Directives themselves impose significant costs on housebuilding, these comments suggest a high level of political commitment to change.

As the overall objectives of the nature directives in general terms is to maintain and restore selected habitats and species to a favourable conservation status there is considerable scope for achieving this in a variety of ways. It therefore seems likely that there would be pressure to take advantage of any flexibility; however, no commitments or proposals along these lines were made in the 25 year environment plan launched in 2018 (HM Government, 2018). [6]. On the basis of recent statements by Ministers, conflicts between Defra and nature conservation NGOs,

[5] Independent newspaper, 25/3/2017
[6] "A Green Future: Our 25 Year Plan to Improve the Environment", Defra 2018

Commission interventions over UK infringements of the nature directives, and other documented evidence (e.g. to the Fitness Check), it seems that flexibility would most likely be sought with respect to the following legislative components of the directives:

- **The designation of Natura 2000 sites**[7]. The terrestrial network of Natura 2000 sites is virtually complete and it would seem unlikely that declassification would occur to a significant degree on land – due to government statements in the 25 year plan on implementing the recommendations of the Lawton review of protected areas in England. However, the designation of sites for some widely dispersed species was contentious, and these might conceivably be reversed. The UK has not completed its Natura 2000 site network in the marine environment, so there is more scope for reducing for site designations. This would seem particularly likely as George Eustice has argued that Natura 2000 site designation requirements are too onerous, citing the Harbour Porpoise as an example where the objectives of improved protection for such a widespread and mobile species could be met more effectively by other means[8].
- **The protection of Natura 2000 sites**. Currently Natura 2000 sites are given a much higher level of protection than sites receiving the highest level of protection under domestic legislation (i.e. Areas/Sites of Special Scientific Interest). In particular, Articles 6.3 and 6.4 of the Habitats Directive, requires that plans or projects affecting a Natura 2000 site can only be approved if it can be determined that they will not adversely affect the habitats and species for which the site was designated. In exceptional circumstances, authorisations can be granted for damaging activities where there are no other alternatives and there imperative reasons of overriding public interest. In such cases, the Member State is required to take the necessary compensatory measures (i.e. biodiversity offsetting). There is considerable scope for flexibility on this, such as raising the threshold of what are considered to be adverse impacts, widening the scope of exceptional circumstances, or weakening the mitigation hierarchy such that developments may go ahead if compensation can result in no net loss of the habitats and species concerned. It might also be possible for Article 6.3/6.4 obligations to be dropped so that all Natura 2000 sites effectively become A/SSSIs – but such a change would be fiercely fought against by the nature NGOs.
- **The strict protection of selected species**. In recent years there have been many widely publicised cases where the need to protect certain species that receive strict protection under the Habitats Directive has resulted in significant costs and delays to some projects (e.g. housing developments, new roads and building renovations) which have been disproportionate to their conservation developments. These have mainly concerned the Great Crested Newt and bats. However, there is evidence that indicates that such problems in the UK have been mainly due to some gold-plating and also a risk averse interpretation of the legal requirements of the directives, which unnecessarily focusses on protecting each individual of the species concerned rather than the conservation status of the local population(Beebee, 2015; McConville and Tucker, 2015; Simpson, 2015). However, Defra and the nature NGOs have realised that the approach can be costly and ineffective in conservation terms, and have agreed a new more strategic approach to conserving newt populations that is currently being

[7] as Special Protection Areas (under the Birds Directive) and Special Areas of Conservation (under the Habitats Directive)
[8] Comments at a Royal Geographical Society/Sibthorp Trust panel discussion, “People, Politics and the Planet – Any Questions?”, 21 July 2016

trialled. It might therefore be expected that this trend towards more objective focussed and flexible approaches to species protection would accelerate (although it is not dependent on the UK leaving the EU).

It seems less likely that there would be significant changes in the management measures that are applied to Natura 2000 sites, as the directives already provide Member States with significant flexibility on this. Moreover, the UK already has a fairly streamlined approach to the setting of conservation objectives for Natura 2000 sites and the implementation of necessary management measures.

It should be borne in mind that a disincentive for changes would be the resulting significant uncertainty over the precise implications of any revised legislative approach, and the detailed nature of the obligations imposed on planning authorities and developers in specific cases. It would take time for case law to flesh out the broad terms of domestic legislation, with the potential for resulting uncertainty to create both delays to decisions, and challenges in determining the economic value of land currently designated.

3.7.5. Potential implications of no UK commitments (Option C)

In the event of there being no obligation on the UK to protect wildlife under an agreement on the future relationship with the EU, there would in principle be greater flexibility to change legislation on the protection of wildlife and habitats. However, future governments would be constrained both by a relatively high level of current and likely future public support for wildlife protection, and by commitments entered into under international treaties, in particular the Bern Convention. There would, however, be some scope for the UK choosing to vary its list of protected species (within the constraints of the Bern Convention), particularly in cases where species were relatively abundant in the UK, even if scarce at a European scale.

3.8. Strategic Environmental Assessment Directive (2001/42/EC)

3.8.1. Main impact on land use decisions, and on land use planning

The Strategic Environmental Assessment (SEA) Directive requires Member States to undertaken an environmental assessment, according to prescribed rules, for certain plans or programmes which could give rise to significant environmental impacts. An SEA is always required for plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and which set the framework for future development consent of projects covered by the requirements of the Environmental Impact Assessment (EIA) Directive. An SEA may be required for other plans and programmes which (i) set the framework for future development consent and (ii) are likely to have significant environmental effects.

The approach to implementation of the SEA in the UK is set out in guidance published in 2005 (Office of the Deputy Prime Minister, 2005), and still regarded as current by the Department for Housing, Communities, and Local Government. The requirements of the Directive are integrated into land use planning legislation; and indeed it has a wider impact, covering other areas of policy. Many of the Directive's requirements, which in turn are underpinned by the Aarhus Convention and

the Espoo Convention[9], are essentially good governance (consultation with environmental authorities; public consultation requirements; requirements to consult other countries on transboundary impacts). However, there are detailed requirements on the content of the environmental reports to be prepared; and on issues such as the scope and timing of public consultation.

3.8.2. Core arguments for incorporation in an agreement:

The SEA Directive is included in the list of legislation with which EFTA members of the European Economic Area are required to comply, suggesting an initial view that it has transboundary impacts, including on competition. While its administrative impacts are lower in practice than the EIA Directive, it still imposes some costs on public authorities. The key argument for inclusion in a future agreement with the UK is, however, likely to be that it provides a framework for ensuring that transboundary environmental impacts of plans and programmes are identified at an early stage, with consultation then required.

3.8.3. Implications of a continued obligation to meet the terms of the legislation (option A)

There would be little significant impact of a continued requirement for the UK to meet the terms of the Directive; the key impact would be on future plans and programmes covered by the legislation. Difficulties for Member States in their implementation of the Directive usually arise in cases where plans or programmes are developed without an understanding by the relevant authority that an SEA was, or could be, required (indeed, there has been a suggestion that an SEA was required for the Withdrawal Bill currently before Parliament). It is likely that public authorities in the UK would have greater licence in practice to press ahead with plans or programmes, given that the enforcement mechanism of the European Court would no longer be a constraint.

3.8.4. Implications of greater UK flexibility over how objectives are met (Option B)

The likely nature of any less detailed commitment by the UK on Strategic Environmental Assessment would almost certainly be a continued commitment to meet the terms of the Aarhus and Espoo Conventions. The UK is likely (although not certain) to continue to wish to comply with the requirements of the Conventions, although these are less stringent and detailed than the European legislation which implements them. The general good governance principles underpinning the SEA Directive are not controversial, and it seems likely that future administrations would be unwilling to reduce the scope for public consultation, or the scope of environmental information provided under public consultation. However, in cases of urgency, there would be greater flexibility for public administration to reduce the time limits for public consultation, or the sequencing of consultation and decisions.

3.8.5. Potential implications of no UK commitments (Option C)

The impact of no UK commitments under a future relationship agreement with the EU would be similar to the impact of greater flexibility under Option B; albeit with some additional theoretical scope for future UK Governments to withdraw from the Aarhus and Espoo Conventions.

[9] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus 1998; and the UNECE Convention on Environmental Impact Assessment in a Transboundary Context, Espoo 1991.

3.9. Environmental Impact Assessment Directive (2011/92/EU)

3.9.1. Main impact on land use decisions, and on land use planning

The Environmental Impact Assessment (EIA) Directive was originally adopted in 1985, and has been amended several times subsequently, and codified in the form of the 2011 Directive (which has itself been modified by Directive 2014/52/EU. It sets out a procedure for environmental assessment of the impacts of specified projects – either the types of projects listed in Annex 1 to the directive, or categories of projects listed in Annex II to the Directive where the Member State determines (in accordance with criteria set out in Annex III) that there is potential for significant environmental impact. The EIA Directive requirements are embedded in UK secondary legislation and practice, most recently in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017[10].

3.9.2. Core arguments for incorporation in an agreement:

The EIA Directive is included in the list of legislation with which EFTA members of the European Economic Area are required to comply. It imposes costs more directly on particular types of industry than does the SEA Directive (which imposes costs primarily on public authorities), and its detailed requirements have some competitiveness impacts, for example by affecting the speed with which particular types of development can take place, the rigour with which environmental impacts are taken into account, and the procedural hurdles that a project developer needs to overcome. Some EU 27 sectoral interests, particularly those covered by the annexes to the Directive, may consider it important for UK competitors to continue to face the same regulatory constraints. In addition, the directive provides for consultation on transboundary impacts, although in the UK context (with the exception of Northern Ireland) transboundary impacts are likely to be relevant only in projects of exceptional size.

3.9.3. Implications of a continued obligation to meet the terms of the legislation (option A)

There would be limited impact from a commitment to meet the terms of the legislation; in practice, the UK would gain some marginal flexibility on the designation of projects requiring EIA by the removal of the Commission and European Court enforcement mechanism, although any exercise of that flexibility would itself be subject to review by domestic courts.

3.9.4. Implications of greater UK flexibility over how objectives are met (Option B)

As with the SEA Directive, it is difficult to see how the broad outcomes of the Directive could be specified in an agreement, other by reference to the Aarhus Convention, and to general principles of public consultation and addressing environmental impacts; which would provide significant flexibility for the UK (and for devolved administrations in the UK) to adopt different procedures, and apply them to a different defined set of projects. One option for limiting the scope of that flexibility would be to retain a requirement for the types of project covered by Annex I of the Directive to continue to be subject to environmental impact assessment; but for the UK to have both greater

[10] SI 2017/571 The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

flexibility on the selection criteria for other projects requiring EIA, and to have flexibility on the detailed procedural and content requirements.

UK authorities might take advantage or such flexibility, invoking the principle of administrative simplification. A simplification of the screening procedures which implemented the Directive's requirements could be significant in scope, and in the impact on industries covered by Annex II to the Directive. It could, however, create significant legal uncertainty in the early years of application, until administrative practice and case law had clarified how the new arrangements would apply and how marginal cases would be interpreted.

3.9.5. Potential implications of no UK commitments (Option C)

In the event of there being no UK commitments under a future relationship agreement, there could be significant additional scope for the UK administrations to adopt new approaches to environmental impact assessment, both in terms of scope and procedure. It seems likely that such a simplification would be brought forward at an early stage, as part of a regulatory simplification dividend from leaving the EU, although it would be a highly complex and politically controversial project. A major impact in the early years of that process would be significant regulatory uncertainty for those in the early stages of considering projects; and in particular the risk that some potential project developers might choose to wait for a theoretically simpler and/or more favourable regime to emerge.

4. Summary and conclusions

EU environmental legislation impacts on land use and land use planning in the UK are wide-ranging, and have over time become embedded in domestic legislation and practice. The scope for a radical overhaul of the affected areas will depend on the extent of any obligations the UK enters into under a future relationship agreement (and under any transitional agreement); but also, significantly, on the central government resources devoted to taking advantage of any additional flexibility, and the political and market appetite for regulatory change.

Given Ministerial statements on the UK's commitment to high environmental standards, it can be expected that any regulatory change would be focused on process requirements (notwithstanding the importance of those process requirements in underpinning the delivery of high environmental standards). The appetite for regulatory change will be affected by the politics around Brexit, and (under the current administration) by internal party dynamics, and in particular the enthusiasm for part of the Parliamentary Conservative Party to present Brexit as a rejection of excessive government intervention. If predictions of economic damage from the UK's departure are borne out by events, then there would be strong pressure to simplify regulation, aiming for what would be presented as a red tape reduction boost to growth. Moreover, if (as seems likely) the economic downsides to Brexit are greater in the event of less UK access to the EU27 market, that limited access is likely to be accompanied by greater flexibility to diverge in regulatory terms.

The negotiations between the EU and the UK appear at present to be coalescing around an approach based on the UK committing to meet similar outcomes and objectives as those enshrined in EU legislation, but with flexibility over the design or legislation and the administrative approaches it adopts. In the case of some legislation, the outcomes are relatively easy to identify (for example, the air quality legislation, and to a lesser extent the habitats and water legislation), although the process requirements in the Directives are themselves important elements in ensuring that Member States are in practice taking measure to meet the outcomes, and in ensuring that the outcomes are likely to be met. There is therefore significant uncertainty over the way in which any UK commitments on outcomes and objectives would be drafted.

Moreover, it is important to note that the EU's current willingness to consider an outcome-based approach is based on an assumption that UK access to EU markets will be significantly less than, for example, would be available under EEA membership. To the extent that the UK secures greater access in some areas, the detail of the legislative requirements it is asked to meet can be expected to increase. (For example, if the UK succeeds in ensuring access to the Internal Energy Market, as the Prime Minister suggested in her 2 May speech, it can be expected that the list of legislative requirements on air quality they were expected to meet would become more detailed, and that the UK would be required to comply with the Industrial Emissions Directive and related legislation). Similarly, in the event of a change in UK administration and a new Government which aimed to achieve a customs union with the EU, we would expect the EU to demand a significantly greater level of compliance with the formal requirements of the acquis.

An additional element in the future stringency of implementation of environmental standards in the UK is the governance regimes applied, in the form of, on the one hand, dispute resolution mechanisms in any agreement on the future relationship between the UK and the EU, and, on the other hand, the UK's own domestic governance, where, as noted above, Michael Gove has

suggested that a strengthening may be required to reflect the removal of the role of the European Commission and the European Court of Justice.

In general, bilateral dispute resolution mechanisms in international trade agreements tend to have limited impact. The parties to an agreement generally have a mutual interest in ensuring that it continues to operate; and in the absence of mutual agreement through dispute resolution procedures, parties tend to be reluctant to use the ultimate sanction of suspending the agreement, or relevant elements of it. The extent of the issues where the UK argues that robust dispute resolution procedures will be needed suggest there may be some appetite for supranational mechanisms to be considered, but two powerful factors make this unlikely. The first is the UK's lack of enthusiasm for replacing the European Court with another mechanism over which the UK has little political control; and the second is the unwillingness of the EU27 Member States to, in effect, give the UK greater power over EU decision-making and implementation as a third party, than it has as a Member State.

Reinforced domestic mechanisms are therefore likely to be a more relevant factor in the stringency of implementation; and here, the nature of those arrangements remains unclear. However, an environmental watchdog with oversight of governmental implementation of environmental legislation would add a new element of uncertainty for project developers to consider. On balance, it seems likely that any governance mechanism would mean a less stringent oversight of UK compliance with long-term targets. Development decisions based on an assumed need to meet such long-term targets (on climate emissions, air quality, water, recycling, etc) are therefore likely to be subject to higher levels of policy risk.

Finally, although the scope of this project has not covered the potential for different approaches being adopted in the different UK administrations, and the risk of greater divergence of legislation within the UK, as well as between the UK and the EU, this will also be an important factor in practice.

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