

The Civil Society Brexit Project: *Information*

BREXIT AND THE ENVIRONMENT

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

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Who is this Civil Society Brexit Project: *Information* for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

BREXIT AND RIGHTS IN AREA OF ENVIRONMENT, ENERGY AND SUSTAINABILITY

What areas of rights does this briefing cover?

This briefing covers rights in the area of environment, energy and sustainability. To best understand the impact of Brexit on these rights, it is helpful to consider them in two categories: procedural environmental rights; and substantive environmental rights.

Procedural environmental rights are:

- access to environmental information;
- public participation in environmental decision-making;
- access to justice in environmental matters.

Substantive environmental rights are:

- rights to life, family life, health, food and water that depend on a clean environment.

Which environmental rights currently come from EU law, policy or regulations?

EU law on environmental rights is heavily interlinked with two international treaties which the UK has signed up to: the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters and the European Convention on Human Rights (ECHR). Both of these are independent of the EU.

EU law on procedural environmental rights largely aims to implement the Aarhus Convention with regard to:

- access to environmental information, including provisions on access to justice (Directive 2003/4/EC; Regulation (EC) No 1049/2001; EU Charter of Fundamental Rights);
- public participation in environmental impact assessments of public and private projects (e.g.,

- construction of airports, motorways, certain types of waste disposal installations) and in permitting processes relating to industrial installations, including provisions on access to justice (Directive 2011/92/EU; Directive 2010/75/EU); and
- public participation in strategic environmental assessment of plans and programmes (Directive 2001/42/EC).

Provisions on public participation and access to information are also included in other pieces of EU environmental law affecting specific issues e.g., in the area of water policy.

Although there is no specific EU legislation on access to justice in environmental matters, the EU Courts have clarified what is expected of domestic courts in this connection. Notably, the right to have access to justice in environmental matters should not be made impossible or excessively difficult in practice, for instance because of high costs or insufficient legal aid. In 2017, the European Commission issued guidance based on EU courts case law.

Furthermore, procedural environmental rights have been protected under the ECHR:

- a right to effective and accessible procedures to enable individuals to seek all relevant and appropriate environmental information, and to participate in environmental decision-making, when one's right to life, or/and right to respect for private and family life, are threatened (ECHR Art. 10, 2 and 8); and
- a right to access to justice and an effective remedy in environmental matters (ECHR Arts. 6(1) and 13).

EU law also protects, to some degree, substantive environmental rights. The EU Charter of Fundamental Rights incorporates the protection of substantive environmental rights under the ECHR, such as:

- the right to have one's life protected from dangerous activities, such as nuclear tests, the operation of chemical factories with toxic

emissions or waste-collection sites, whether carried out by public authorities or by private companies (ECHR Art. 2);

- the right to have one's private and family life (including one's home) protected from direct and serious detrimental environmental factors, such as excessive noise levels from an airport, air and water pollution from industrial activities, and environmental harm caused by waste collection, management, treatment and disposal (ECHR Art. 8); and
- the right to have one's peaceful enjoyment of property protected as a result of environmental standards (such as a flash flood occurring after public authorities released water into a poorly maintained river channel without warning) (Protocol No. 1 to the ECHR, Art. 1).

Which policy areas that particularly affect environmental rights are currently reserved to the UK Parliament and which are devolved to the Scottish Parliament?

Environmental rights are both devolved and reserved. Matters devolved to the Scottish Parliament include agriculture and fisheries, forestry, certain aspects of energy and transport policy, and the environment. Other more general devolved powers that can have a big impact on procedural environmental rights include local government (including legislative/administrative framework, policy and elections) and law and order (including civil justice, civil law and procedure, courts, freedom of information and legal aid).

However, a number of policy areas with a UK-wide or international impact that hold significant implications for environmental protection (e.g., energy, transport, trade and industry) remain reserved to the UK Parliament. In addition, many aspects of environmental policy are addressed at the international level (climate change, for instance) so there may be issues that are at the same time devolved from an environmental perspective and reserved in terms of foreign policy.

What do we know will happen to environmental rights when the UK leaves the EU?

With regard to procedural environmental rights, after Brexit the UK will continue to be bound by its international obligations under the Aarhus Convention, which is independent of EU law. In addition, the ECHR will continue to apply as this is also independent of EU law and has nothing to do with the EU.

With regard to substantive environmental rights also, the ECHR rights will continue to apply after Brexit. In addition, other international UN human rights treaties (that are independent of EU law), are increasingly understood as also protecting substantive environmental rights. For example, the right to food is part of the International Covenant of Economic, Social and Cultural Rights.

The European Union (Withdrawal) Bill states that the Charter of Fundamental Rights will not form part of domestic law after Brexit. There are two implications from an environmental perspective:

First, the Charter includes a principle for policy-makers to integrate environmental considerations in all policies (Article 37), but this does not amount to a legal right. However, as this principle exists elsewhere in EU law (Articles 11 and 191 TFEU) that has been implemented in domestic law, Brexit law changes will not affect this principle.

Second, the EU Charter gave additional legal strength to the procedural and substantive environmental rights protected under the Aarhus Convention and the ECHR. As the Charter has the same legal strength as the highest instruments of EU law, it takes precedence over all other sources of domestic law. As a result, the Charter provides a stronger remedy against acts of UK public authorities that violated procedural and substantive environmental rights than the remedy available under UK law (the Human Rights Act): the offending law can (effectively) be struck down, rather than merely declared incompatible. After exit, domestic laws infringing environmental rights may remain as part of the UK system, even if they are declared incompatible with the ECHR.

What do we not know yet?

- We do not yet know what exactly will happen during a transition period between the official date of Brexit and the entry into force of the new relationship between the UK and the EU. But it is likely that the UK will need to continue to conform with all EU rights – including the Charter – during that period.
- We do not yet know whether the EU (Withdrawal) Bill as it stands at the moment will pass the House of Lords unamended.
- We also do not yet know whether the devolved legislatures – in particular the Scottish Parliament – will give the Bill their legislative consent; and if they do, we do not know whether this consent will be given under the condition that the Scottish Parliament's powers are increased, possibly even with regard to environmental rights.
- We do not yet know what developments in rights terms will happen at the Scottish level. The First Minister recently appointed an advisory group on human rights leadership, which is due to report back to her by the end of 2018. It is possible that that group's work will lead to policy changes and/or legislation in Scotland.
- We do not yet know whether the Scottish Continuity Bill – a Scottish version of the EU (Withdrawal) Bill will enter into force. If it does, it will retain the Charter as far as some Scots law connected with EU law is concerned.
- We do not yet know how far the UK Government is intent on using its “Henry VIII powers” under the EU (Withdrawal) Bill to amend or repeal ‘retained EU law’ protecting human rights.
- We also do not yet know how the courts will interpret the constraints regarding the justiciability of EU fundamental rights contained in the EU (Withdrawal) Bill.
- We do not know how the rights in the Charter of Fundamental Rights will be developed by the EU Court of Justice in the future, i.e. the rights protections there might have been if the UK had remained in the EU.

What are the main concerns around environmental rights after Brexit?

Post-Brexit, the UK's compliance with its international obligations to protect procedural environmental rights under the Aarhus Convention will continue to be overseen by the Aarhus Convention Compliance Committee (ACCC), which is an international, quasi-judicial body. The ACCC's decisions are only recommendatory (not legally binding). Nevertheless, these recommendations must be taken into account by domestic authorities and courts in the interpretation and implementation of the Convention. The UK has been involved in the highest number of non-compliance cases considered by the ACCC, which has identified persistent problems with regard to the prohibitive expense of access to justice in environmental matters.

The main concern, however, around the UK's continuing compliance with the Aarhus Convention post-Brexit is the loss of the EU's oversight and "hard enforcement" infrastructure, which provides an additional avenue that is legally binding and can be accompanied by fines for ensuring compliance with relevant EU law (explained in more detail here). In the past, the EU courts have played a crucial role in connection with the implementation of the Aarhus Convention and the protection of procedural environmental rights:

- first, they provided guidance to clarify the obligations of the State in protecting procedural environmental rights, for instance on the prohibitive effect of litigation costs; and
- second, the European Commission brought infringement proceedings against the UK, which, together with the recommendations issued by the ACCC and two seminal reports prepared by members of the UK's senior judiciary, led to a broad-ranging reform of the England and Wales costs regime in 2013. While the ruling of the Court of Justice of the EU did not concern Scotland, some of its criticism was also relevant for the Scottish system, which shared some features with that of England and Wales. The Courts Reform Scotland Act 2014 and 2013 rules on Protective

Expense Orders in environmental matters addressed some issues that were similar to those in the rest of the UK. These reforms, however, continue to be criticised for failing to fully address the issue of costs in cases relating to the Aarhus Convention (see below).

In addition, as noted above, the loss of the EU Charter may mean that after exit, domestic laws infringing environmental rights may remain as part of the UK system, even if they are declared incompatible with the ECHR.

What about in Scotland – are there particular concerns or opportunities affecting environmental rights because of devolution?

A key concern around procedural environmental rights for Scotland relates to the potential lowering of standards in the domestic implementation of the Aarhus Convention. Changes could be made to existing legislation implementing EU law on procedural environmental rights that reduce environmental rights, particularly in connection to access to environmental information and (to a certain extent) public participation in environmental decision-making and access to justice. Recent reforms have addressed some issues around access to justice, for example reforms have made it easier for court actions on environmental rights to be raised in the public interest. However, NGOs are concerned that changes in Scotland have not gone far enough, for example Scottish courts have not been quick to apply a new test that allows NGOs to take these cases to court, and further reforms are needed to the general rule that the losing party in court proceedings must bear the costs of the successful party even when it acted in the public interest. Furthermore, legal aid remains largely unavailable for most environmental cases.

With regard to both procedural and environmental standards, the Scottish Parliament and the Scottish Government are absolutely prohibited from acting in breach of the ECHR and so any of their acts violating environmental rights protected under the ECHR need to be declared invalid without the need to bring a case under the EU Charter. However the lack of the EU Charter applying at UK level means that there

will no longer be the possibility of acts in reserved issues being declared invalid where they are incompatible with environmental rights protected under the ECHR, for example several powers related to energy.

Professor Elisa Morgera and Mara Ntona
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An opportunity in Scotland to protect environmental rights has arisen with the creation by the First Minister of an Advisory Group on Human Rights Leadership that will specifically look into ways for Scotland to 1) prevent going below the current level of protection of environmental rights in the EU; 2) avoid remaining behind for future enhanced protection of environmental rights in the EU; and 3) become a leader in the protection of environmental rights. The Group will make recommendations to the First Minister in November 2018.

What happens now in the Brexit process?

On 15 December 2017, the European Council agreed that the Brexit negotiations should move to phase 2. This means that key issues have been settled in principle: in particular, most issues on citizens' rights and the financial settlement.

Phase 2 will first be dedicated to agreeing a transitional period where the UK will leave the EU, but remain bound by EU law and entitled to (most) rights under EU law. Second, phase 2 will probably result in a basic agreement on what the future relations between the EU and the UK will be.

In terms of rights it will remain to be seen whether the EU will ask the UK to remain committed to protecting current standards and to remain signed up to the ECHR.

Internally, the EU (Withdrawal) Bill has received its third reading in the House of Commons and is currently being debated in the House of Lords. If there are no amendments voted through in the House of Lords, it can probably receive its Royal Assent before the summer. If there are, this may be delayed.

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If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit