THE LANDSCAPE OF UK ENVIRONMENTAL POLICY AND GOVERNANCE FOLLOWING BREXIT

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Nothing is agreed until everything is agreed and so with a small number of weeks to go, a no deal Brexit is looking more and more likely. But what will happen to the UK Government's environmental policies, from 11pm on 29th of March this year, when the UK is scheduled to leave the EU?

Since 1973 when the UK joined the European Communities (EC), the now European Union (EU) has agreed more than 200 pieces of legislation aimed at contributing to "preserving, protecting and improving the quality of the Environment" as set out in the Treaty on the Functioning of the European Union. The two key concepts that have shaped environmental legislation to date have been the polluter-pays principle and the precautionary principle.

So how are changes to the long established regime shaping up and who will regulate the UK government's performance? The UK Government's post Brexit plan, through the EU (Withdrawal) Act, is for all European environmental legislation to be fully transferred to the UK statute books. Otherwise, little is clear on how leaving the EU will change UK environmental policy, though plans are underway to create a post-Brexit Environment Watchdog.

However, the Government's current proposals for a post-Brexit Environment Watchdog, do not grant it the same powers or scope as the European Commission. The proposed enforcement powers of the Environment Watchdog, will comprise for instance the issuing of advisory notes, though will have the power to take the Government to court. These powers will not be extended to taking public bodies or bodies carrying out public functions, e.g. water companies, to court. These fall short of matching the EU's enforcement powers of holding member states to account. It also proposes that devolved administrations will be able to opt in.

There are vast amounts of policy areas where the government has said very little about its post-Brexit agenda for the environment. The current uncertainty is compounded by the threat that a no deal Brexit may result in a damaging gap in the enforcement of environmental laws and pose risks to the environment. Though The Department for Environment, Farming and Rural Affairs (DEFRA) has outlined that businesses may benefit by rendering environmental compliance easier by the expected red-tape reduction exercise.

Therefore, much hinges on the Government's Environmental Principles and Governance Bill (Draft published in December 2018), which will define how England's environment is managed and protected, by December 2020, not the EU exit day. The bill focuses on environmental principles, accountability and overall governance. This will essentially set the back drop for how the UK's environment is managed and protected after Brexit. This most significant piece of legislation will also set into primary legislation the following nine key environmental concepts:

(a) the precautionary principle, so far as relating to the environment,

(b) the principle of preventative action to avert environmental damage,

(c) the principle that environmental damage should as a priority be rectified at source,

(d) the polluter pays principle,

(e) the principle of sustainable development,

(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,

(g) the principle of public access to environmental information,

(h) the principle of public participation in environmental decision-making, and

(i) the principle of access to justice in relation to environmental matters.

Clearly, the act is looking to extend original principles and at a time of climate change pressures, growing focus on corporate responsibility and the drive toward a circular economy, these principles will hopefully serve as a step in the right direction for environmental governance. Additionally, following the release of the Intergovernmental Panel on Climate Change Report in October last year, it is hoped by some that the UK Government addresses policy and regulation toward potentially higher targets than those committed to by the EU.

In the meantime, as the exit deadline looms, The Department for Exiting the European Union (DExEU) has published technical notices covering the impact of a no-deal Brexit on

the energy and environment sectors. These have been focused on key matters such as industrial emissions standards, upholding environmental standards, meeting climate change requirements and the UK's exclusion from participating in the EU Emissions Trading System in a 'no deal' scenario. In the long term it is likely that the UK would stay in the EU Trading System (EU ETS), which ensures that a price is placed on carbon emissions from the industrial, power and aviation sectors, as the UK Government appears committed to carbon pricing as a tool. The common message in all notices from The DExEU has been the stated commitment maintaining environmental standards after the UK leaves the EU and that clean growth will remain at the centre of our modern Industrial Strategy.

Yet, there is still much to be agreed and concerns remain that negotiating free trade deals after Brexit could lead to a drop in the UKs environmental standards. The view by some is that to maintain uncompromised access to the EU market, the UK will have to comply with all EU regulations. Therefore, if the UK government were to negotiate free trade agreements with other countries that allows products into the UK that are not compliant with the EU regulations, then the UK will have to have border controls to ensure they don't just pass through to Europe. It is therefore believed that free trade agreement with countries that are not in regulatory alignment with the EU is untenable, thus potentially limiting the UK's access to environmental goods and services.

Though some senior members of the government are pushing for the UK to go it alone in the determination of the regulatory environment, many "green" groups are encouraging the maintenance of close ties with Europe, which would limit the scope of trade deals with third countries. Campaign groups are keen on either non-regression with EU regulations being met or, as a world leader, see this as an opportunity to protect current standards and go on to set higher ones. Therefore, if the UK government is to turn its back on EU regulatory alignment, in favour of trade deals with other countries, the public, campaign groups, and businesses will need convincing.

Opposing this view is the European Research Group (ERG), Chaired by Jacob Rees-Mogg, who has commented on environmental issues, in that the UK could roll back standards "a very long way" once it leaves the EU. The ERG is also strongly against the UK staying within the jurisdiction of the European Court of Justice (ECJ), which currently oversees compliance with environmental law. If this is the case, the UK will need to create a new legal process to secure access to justice for citizens and campaign groups once (and if) recourse to the ECJ has gone. What does seem certain is that without the ECJ the UK is likely to face an interval in environmental governance and confusion over enforcement.

Since the referendum, there has been a great deal of environmental policies and development of strategies. The Clean Growth Strategy, the Industrial Strategy, the 25-Year Environment Plan and the Clean Air Strategy have been opened for public discussion and will without doubt have implications for business and industry across the UK. Though the exact content cannot be determined while the Brexit negotiations continue, the priority areas are becoming clear. The regulation of the key areas of air and water quality, biodiversity and waste will all need to be determined, especially when the UK is currently not meeting EU targets

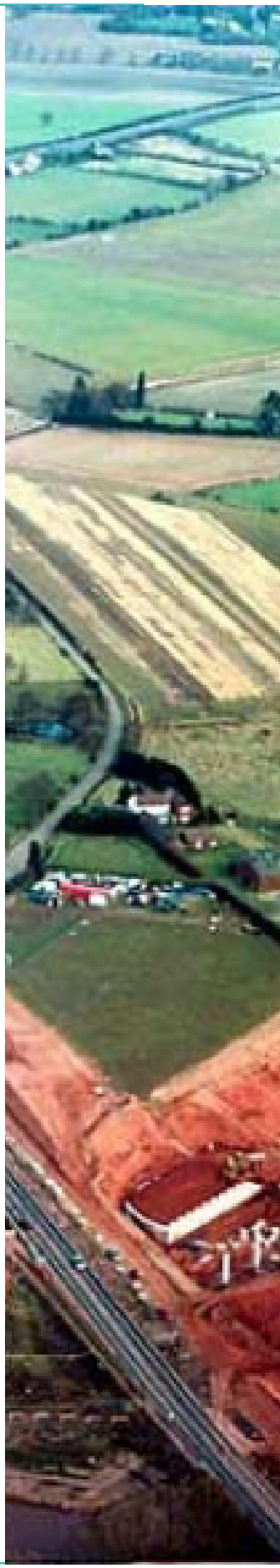
on a number of these issues. It is not clear how much the EU will consider such failings to meet targets in future trade agreements. Additionally, until the point of leaving, the UK remains a member and subject to European legislation which continues to develop.

With an eye on some key sectors, the power sector faces new barriers and disruption not only in day to day energy trading, but potentially damage to investment in continental interconnectors and smart energy systems. The physical link of the UK and EU power grids via interconnectors has been seen as increasingly important in meeting climate and energy goals, as they enhance energy security and flexibility amid increasing renewable energy capacity on the grid. A no-deal will lead to the reliance on the World Trade Organisation rules, which are considered more cumbersome and costlier. In turn, this is expected to increase investor exposure to political risks which will drive up the cost of capital, delay emission control investment and therefore reduce the UK's ability to absorb higher levels of renewable generation, thus slowing progress toward a low-carbon smart grid. If you add the loss of access to EU funding sources and innovative joint research, this will further delay positive strides toward the UK's decarbonisation and be counter to an ambition to be a world leader. However, the UK remains active in the internal energy market (IEM), a collection of rules aiming to harmonise energy generation across member states and continued participation in the IEM would ensure that trade over the continental interconnectors would continue.

For sectors outside of the EU ETS, EU Member states have binding annual greenhouse gas emission targets for 2021-2030, this includes transport, buildings, agriculture, non-ETS industry and waste. This accounts for almost 60% of total domestic emissions, controlled under the Effort-Sharing Regulation. It is key to the agenda of energy and climate change and it is expected that the UK will maintain its commitment to decarbonisation.

For the waste sector, new policy has been expected for some time, which will also comprise a new resources and waste strategy, with Government ambitions to make the country "a world leader in terms of competitiveness, resource productivity and resource efficiency". The Government is aiming for zero avoidable waste by 2050, zero avoidable plastic waste by 2042 and no food waste to landfill by 2030. The prevention and management of plastic waste would represent a huge opportunity to lead the world, with a holistic approach combining the reform of the packaging industry, material formatting, innovation and taxation to encourage greater recycling over incineration.

In the realm of air quality, Brexit might have particularly significant implications for industrial regulation, with the government trying to develop best available techniques reference documents that regulate heavy industry. This



sector is heavily regulated and governed by EU law. The European Commission is currently taking the UK government to court over years of continued failings to meet Nitrogen Dioxide (NO2) limits. However, given the timescales (years) for a hearing, and potentially years to hand down a fine, this case remains uncertain. Additionally, there is uncertainty as what would happen if the case was brought to domestic courts.

In the area of land development, the key EU legislation directives concern Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA), Habitats and the protection of wild birds. It is believed by some in the UK Government that land use and habitat directives are a barrier to future development, causing many to fear that these will be targeted once the UK has Brexited. European Economic Area (EEA) members such as Iceland and Norway are not required to comply with these nature laws, leading others to believe they are at high risk during negotiations. There have also been suggestions that the UK might amend the list of protected species and omit those that are endangered across the EU, though not so rare in the UK, such as the great crested newt.

For the water environment, the UK has struggled to meet many of the standards set out under the Water Framework Directive (WFD), which seeks action from member states to bring freshwater up to "good status" (ecologically and chemically), originally by 2015. The UK missed the 2015 deadline and the Environment Agency admitted the UK will largely miss the extended 2021 and 2027 deadlines, for both expense and technical difficulties. The Government's post Brexit

position is unclear and it is considered that the continued progress to improve natural water quality will be heavily influenced by whatever mechanisms are set out in the Agricultural Bill to replace the Common Agricultural Policy subsidy regime. However, it is accepted that EU regulatory alignment on this issue will require considerable expense, which continues to fuel the deregulation campaigners.

MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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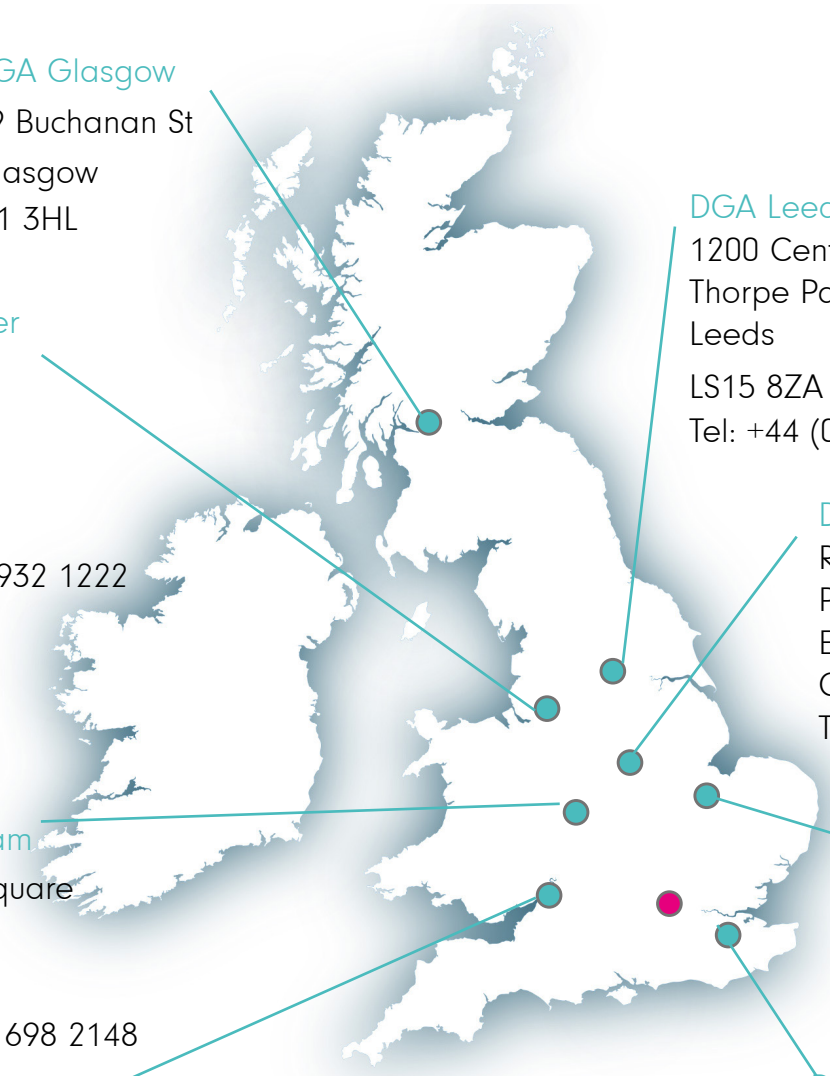

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