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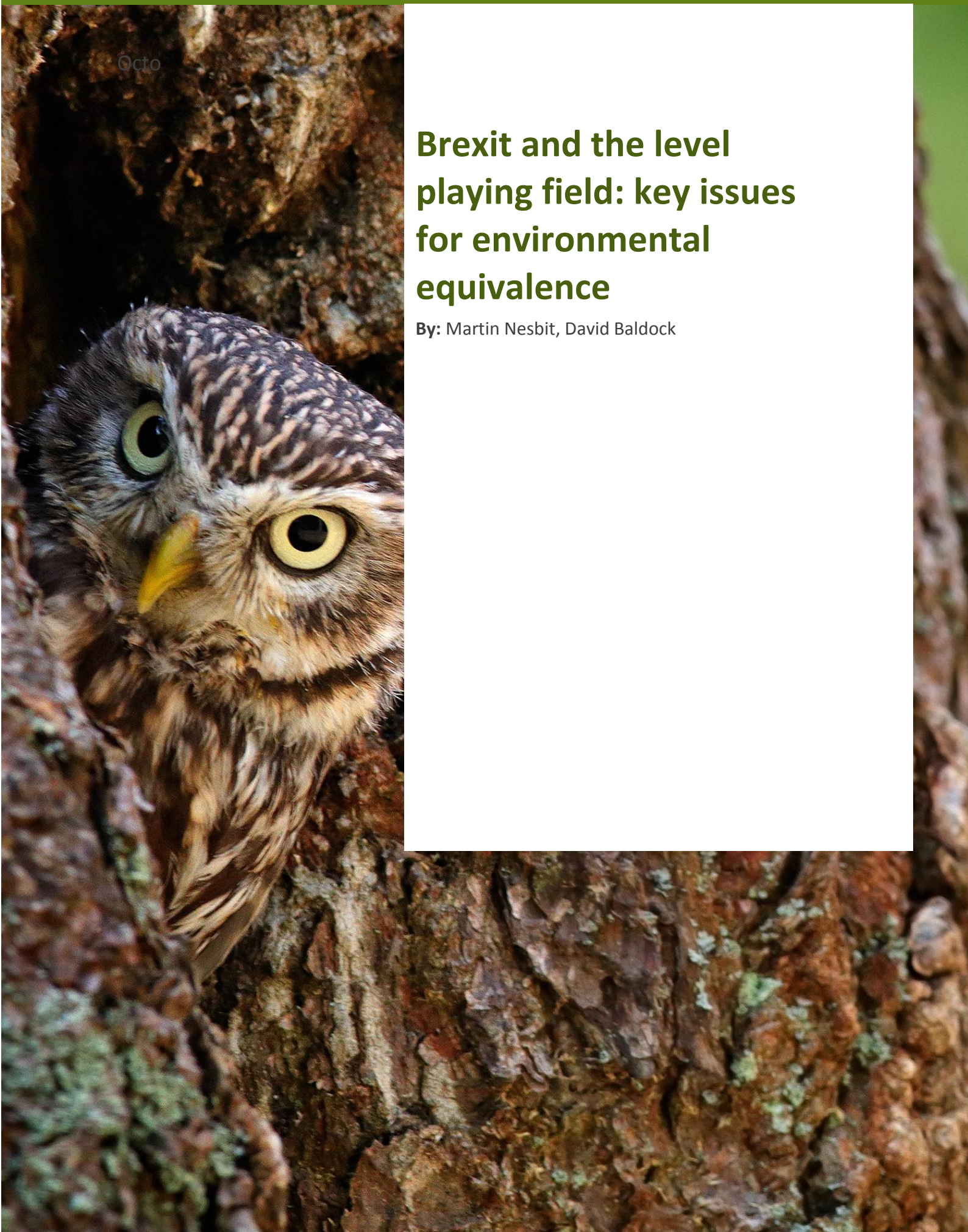

Brexit and the level playing field: key issues for environmental equivalence

By: Martin Nesbit, David Baldock

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INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY (IEEP)

London Office
11 Belgrave Road
IEEP Offices, Floor 3
London, SW1V 1RB
Tel: +44 (0) 20 7799 2244
Fax: +44 (0) 20 7799 2600

Brussels Office
Rue de la Science, 4
1000 Bruxelles, Belgium
Tel: +32 (0) 2738 7482
Fax: +32 (0) 2732 4004

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EXECUTIVE SUMMARY

The EU has placed welcome emphasis, in its negotiating directives for the future relationship with the UK, on the importance of avoiding unfair competition through weaker environmental regulation. While current UK Ministers have stressed their commitment to high environmental standards, the regulatory simplification promised to voters by some politicians as a result of Brexit, and the UK's ambitions to sign free trade agreements with other economies, will create pressures for reduced standards. This briefing sets out some ideas for the approach the EU should adopt in negotiations; suggests how those ideas could be applied to a selection of areas of environmental policy; and offers some potential solutions in terms of governance arrangements.

The potential risks for the EU arising from a weaker regime for environmental standards in the UK once it leaves include: the negative impact on delivery of environmental outcomes, particularly for transboundary challenges; real or perceived competitiveness impacts on certain economic sectors in the EU (particularly short-term pressures); and, linked to those competitiveness pressures, the risk of reducing the political space available in the EU for ambitious environmental policy in future.

A key element in both the effectiveness and the regulatory costs associated with environmental legislation are process requirements. The EU should be vigilant regarding the risk that the UK may make commitments *in principle* to deliver environmental outcomes without accompanying these with real obligations to take action to deliver those outcomes *in practice*.

This paper suggests principles that the EU should therefore follow in the negotiations. These are:

- Avoiding negative impacts on EU environmental outcomes;
- Avoiding competitiveness impacts on EU businesses;
- Ensuring that the UK delivers on environmental commitments it makes in the negotiations;
- Allowing for future increases in environmental ambition throughout Europe, and;
- Avoiding erosion of EU27 political commitment to environmental protection over time.

The relevance of environmental equivalence varies between the different areas of environmental policy, depending on the nature of either the single market issues involved, or the transboundary nature of the environmental impacts. The question of how to ensure equivalence between EU and UK measures with similar objectives, but different processes, needs to be addressed in the negotiations.

A key, transversal issue is the governance arrangements which will apply. The bilateral dispute resolution mechanisms that seem to be available, based on the precedents of previous trade agreements, and on the UK's opposition to structures such as those used for the European Economic Area, are unlikely to be invoked readily. This is because of the mutually penalising nature of any resulting disruption of trade. However, there is scope for the EU to insist on an improvement in UK governance arrangements, in order to ensure not only that legislation in the UK is enforced effectively, but that it is structured in a way that encourages scrutiny, invites challenge in the absence of progress, and ensures corrective action where necessary. This adds an important dimension to the current

debate on environmental governance in the UK once outside the UK and the appropriate response to the “governance gap” that arises.

1 Context

The European Council decided in December to launch the second phase of negotiations with the UK on its departure from the EU, including discussions on transitional arrangements to be included in the Withdrawal Agreement, and on "the framework for the future relationship". While the general guidelines set out by the European Council in April 2017 remain valid, further and more detailed guidelines were adopted in March. Meanwhile, the UK cabinet has progressively provided greater clarity on the detail of its negotiating position, through a series of speeches in the Spring?.

This briefing note addresses some of the issues at stake for the EU 27 in respect of both competitiveness and environmental policy outcomes. It does not address environmental impacts in the UK, except to the extent that UK environmental performance contributes to transboundary environmental outcomes.

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[1]. 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.

This approach finds expression in the negotiating guidelines endorsed by the European Council on 23 March 2018[2], which explains that:

> *"The aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aid, tax, social, environment and regulatory measures and practices. This will require a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement*

[1] TF50 (2018) 27, Commission slides for Internal EU27 preparatory discussions on the framework for the future relationship: "Level Playing Field", downloaded from the Commission's Article 50 webpage

[2] Guidelines, 23 March 2018 (EUCO 20001/18)

> *mechanisms in the agreement as well as Union autonomous remedies, that are all commensurate with the depth and breadth of the EU-UK economic connectedness."*

The key elements to note here are the emphases on "substantive rules" (not, importantly, equivalent outcomes); on the need for adequate domestic enforcement mechanisms (with the implication that there are currently gaps in adequacy); and on the need for both bilateral dispute resolution mechanisms and for the EU to retain the flexibility to take action unilaterally."

1.2 The UK position

For the UK, meanwhile, the exact nature of the trade-off between regulatory flexibility and market access that the Government is willing to accept remains unclear – as does the extent to which the UK will accept that such a trade-off needs to be addressed. Clarity and realism has emerged progressively in recent months, although detailed choices will need to be addressed as the negotiations continue.

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*."[3]

Foreign Secretary Boris Johnson's February speech[4], 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 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*."

[3] "PM's Florence speech: a new era of cooperation and partnership between the UK and the EU", 22/9/2017, downloaded from Gov.uk website.

[4] "Uniting for a Great Brexit", 14/2/2018, downloaded from Gov.uk website.

Similarly, the February 2018 speech in Vienna by David Davis, the Secretary of State for Exiting the European Union[5], 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*."

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.[6]

Prime Minister Theresa May's subsequent speech at the Mansion House[7], on 2 March 2018, set out more detail on the issue of regulatory equivalence. Having repeated the argument that there is little to fear from deregulatory pressures in the UK (and in doing so suggested that those on the Government benches calling for lighter regulation are not a "serious political constituency"):

> "*in … areas like workers' rights or the environment, the EU should be confident that we will not engage in a race to the bottom in the standards and protections we set. There is no serious political constituency in the UK which would support this – quite the opposite*."

she then provided more detail on regulatory equivalence:

> "*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. In some cases Parliament might choose to pass an identical law – businesses who export to the EU tell us that it is strongly in their interest to have a single set of regulatory standards that mean they can sell into the UK and EU markets.*
>
> *If the Parliament of the day decided not to achieve the same outcomes as EU law, it would be in the knowledge that there may be consequences for our market access. And there will need to be an independent mechanism to oversee these arrangements*."

Although framed in the context of trade in products, it seems clear that the approach she set out will also be relevant to broader issues of environmental equivalence. This makes it explicit that the UK is aiming for a relationship where it has a broad commitment to deliver similar levels of environmental outcome, but has flexibility over the design of processes and standards to achieve that. Whether this

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[5] "Foundations of the Future Economic Partnership", 20/2/2018, downloaded from Gov.uk website

[6] 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."

[7] Theresa May's speech on our future economic partnership with the European Union, available at: https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union

is compatible with the European Council's emphasis in its 23 March guidelines on "substantive rules" is likely to be a key element of discussion in negotiations.

Set against this endorsement of equivalence, however, 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 significant benefits from free trade that Brexit advocates have said are feasible; although Ministers, particularly Michael Gove, have also suggested that there is no risk of a weakening of standards in future trade deals. 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;
- its commitments both to avoiding a hard border in Ireland (potentially through full alignment with relevant internal market rules) and to ensuring unfettered access for Northern Irish businesses to the UK's own internal market; 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 framed in terms of outcomes; 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.

2 Rationales for environmental equivalence

Debate on the broader economic and competitiveness impacts of environmental legislation is too extensive to be reprised in detail here. However, for the purposes of deciding on the negotiating position that advocates of environmental ambition should support, there are two main rationales for equivalence; competition impacts, and transboundary impacts. Both of these need to be considered in the light of two important aspects of EU environmental policymaking: on the one hand, the introduction in legislation of process requirements[8] which ensure that practical steps towards implementation are made in all Member States; and on the other hand, the role of Treaty principles such as the precautionary principle in shaping policy and guiding its implementation.

2.1 Competition impacts:

While the overall impact of higher environmental standards on the competitiveness of the European economy is limited[9], particularly when compared to other factors such as market conditions and the availability of a skilled workforce, divergent regulatory standards can lead to significant short-term impacts on the relative competitiveness of individual producers. This in turn can lead to major political economy barriers to the introduction of the sort of higher regulatory standards which are nevertheless both in line with public opinion, and justified in terms of costs and benefits (including external costs on the environment). Introduction of lower environmental standards in a neighbouring economy with access to the same markets could therefore create distortions, at least in the short term, leading to a potentially long-term loss of market share for EU businesses.

The EU's approach to the development of a relatively ambitious environmental legislative acquis has been based on the removal of short-term competiveness concerns as between Member State economies by ensuring that all Member States either meet the same standards, or at least move in the same direction; while successive analyses have suggested that at the level of the EU as a whole, ambitious environmental standards have not been accompanied by significant costs or weakened competitiveness. We believe that the contribution of this approach to ensuring both the relative openness and integrity of the internal market, and the comparatively high standards that a majority of EU voters continue to endorse, has been significantly under-estimated and undervalued in recent years.

2.2 Transboundary impacts:

There are also a number of areas of environmental regulation where the geographical scale of the environmental issue addressed, or the spatial coherence of the regulatory response required, means that the contribution from neighbouring economies is an important element in the delivery of environmental outcomes. The example given in the Commission's Level Playing Field presentation to Member States is the National Emissions Ceilings Directive, where national targets for transboundary pollutants are set so as to deliver EU-wide improvements, and where failure of the UK to deliver its

[8] For example, detailed rules on reporting; administrative stages required to maximise the likelihood of good delivery; rules setting out what action needs to be taken in the event of standards not being achieved; rules on how stakeholders should be engaged; requirements to develop plans for how to meet legislative objectives; and so on.

[9] See, for a helpful summary of literature, Dechezleprêtre A and Sato M, "The impacts of environmental regulations on competitiveness", Grantham Research Institute 2014

commitments would lead to air quality standards not being met in EU 27 Member States (or to a requirement for deeper emissions reductions in neighbouring Member States).

Competition and transboundary impacts can combine and overlap. Thus, in the National Emissions Ceilings example above, a UK failure to make the necessary emissions reductions could lead to both a short-term competitiveness advantage in some sectors, and to a failure to meet air quality standards in some EU countries as a result of excess emissions in the UK of precursor pollutants. Moreover, as noted above, the collective nature of environmental policymaking in the EU has been an important contributor to the EU's ability to adopt higher environmental standards.

2.3 The relevance of process requirements:

An important point in relation to both competition impacts and transboundary impacts is that they can depend not just on the headline political commitments embodied in legislation, but also on the detailed rules which ensure the implementation of those commitments. For example, in the context of the nature directives, the broad obligation to protect specific species and their habitats would be of little value without the detailed nature of obligations to designate sites, and develop and implement appropriate management plans for them.

Similarly, in the National Emissions Ceilings Directive, it is not just the relevant targets which are binding on Member States, but also the requirements to adopt and implement a national air pollution programme aimed at meeting the targets (which can then be subject to a negotiation on any necessary technical corrections with the Commission), and to report annually on their emissions inventory. These process requirements help to ensure that delivery really happens, and that problems in delivery are identified at an early stage. They also enable legal intervention (for example, on site designation) before damage occurs; and not having these process requirements would lead to a divergence in the level of practical obligations placed on economic operators. While the record of EU Member States in implementing environmental legislation is imperfect, they are subject to important disciplines in terms of transposition and the meeting of interim requirements or process requirements, which enable the Commission, backed by the CJEU where necessary, to take action early enough to influence outcomes.

2.4 The underlying impact of key principles of environmental legislation

Finally, it should be noted that a number of key principles of environmental policymaking, essentially constitutional in nature, appear unlikely to be written into the legal settlement in the UK following its departure from the EU. These include the precautionary principle, the polluter pays principle, and the principles of preventive action and rectification at source, as well as the broader requirement for sustainable development and environmental protection objectives to be reflected in wider areas of policy. While most of these principles are nevertheless likely to be applied in practice by the UK after its departure from the EU, the precautionary principle (or an exaggerated understanding of what the precautionary principle means and how it has been implemented in practice) remains controversial in sections of UK politics, and with interlocutors in the US. As an illustration of the latter, for example, the US Chamber of Commerce has this statement of its approach to the precautionary principle on its website:

- "*Support a science-based approach to risk management, where risk is assessed based on scientifically sound and technically rigorous standards.*
- *Oppose the domestic and international adoption of the precautionary principle as a basis for regulatory decision making.*"[11]

There is thus a risk that the US administration will seek a commitment from the UK to principles of what it describes as "sound science" in policymaking, evidenced by high-profile commitments on key regulatory issues. While the level of British public support for such an approach is likely to be low, it cannot be ruled out; with a consequent divergence between EU and UK practice on individual regulatory decisions (for example, on pesticide use and on GMOs).

[11] See https://www.uschamber.com/precautionary-principle

3 Possible principles for environmental equivalence in the Brexit negotiations

From an environmental point of view, the best outcome from the negotiations would be a continuing obligation on the UK to meet at least the standards set out in EU environmental legislation.

Recent political commitments from the UK government, to ensure that environmental standards are at least maintained, and if possible enhanced, on departure from the EU, suggest that it should in principle be possible to reach agreement on a requirement to continue to meet high standards as an outcome of the negotiations. However, past UK resistance to what successive administrations have described as "gold plating" suggests that in practice governments have been unwilling to go beyond the achievement of compliance with EU legislation. And the UK's likely insistence on flexibility of delivery creates risks that high standards would not in practice be achieved.

The Commission's approach, on the evidence of the Level Playing Field slides, seems to be based around a principle of (presumably mutual) "non-lowering of standards"; allied to effective domestic enforcement structures, transparency and monitoring; and dispute settlement mechanisms. While this approach has some logic, in particular since the UK's access to the EU market is likely (because of the UK's insistence on being outside the Customs Union and the Single Market) to be less frictionless than, for example, that enjoyed by EFTA members of the European Economic Area, there are nevertheless significant risks to environmental outcomes. The nature of bilateral dispute resolution mechanisms under free trade agreements means that they are generally little used, and of limited effectiveness in ensuring implementation of collateral commitments, such as on environmental standards. We set out below some suggested principles for negotiations on environmental equivalence.

3.1 Avoiding negative impacts on EU environmental outcomes:

For each area of environmental legislation addressed, the potential impact of a different level of ambition in the UK, or a different level of delivery in the UK, on environmental outcomes in the EU27 should be assessed. Thus, failure to meet air pollutant limits under the National Emissions Ceilings Directives could (as noted above) have a significant impact on outcomes in the EU 27; urban waste water treatment obligations have some potential for transboundary impacts in Member States with coasts bordering the North Sea, Channel, and Irish Sea; and nature legislation is relevant to migratory/wide-ranging species, there are a number of habitat types of European importance which are predominantly found in the UK, and there are priority species with a high percentage of their population in the UK, or the potential for UK habitats to play an increasingly important role in response to a changing climate.

3.2 Avoiding competitiveness impacts on EU businesses:

Environmental stakeholders are consistently vigilant against the misuse of competitiveness arguments against improved environmental standards, pointing out that the economic impacts are often exaggerated, and need in any case to be weighed against the wider societal benefits deriving from higher standards. It will therefore be important not to endorse a narrative that environmental standards are economically damaging (a narrative frequently deployed by those in the UK arguing for Brexit and for flexibility over legislation). However, the perceived (and in some cases real) short-term competition impacts noted above are important; and competition impacts linked to weaker

environmental standards can significantly affect the market for individual operators. In turn, this can lead to either pressure for a weakening of EU standards, or political hostility to desirable improvements. We have argued[12] that one of the reasons for EU environmental legislation being, in general, more ambitious than what would have been adopted at national level, is the neutralisation of concerns and lobbying over competitiveness impacts as a result of all Member States moving together. Avoiding real or perceived impacts on the fairness of competition across the European market is thus an important contribution to a positive political environment for progressive environmental policies.

3.3 Ensuring delivery of relevant UK commitments:

If the environmental obligations the UK signs up to in a free trade agreement with the EU are to be implemented effectively, two things will be needed: improved UK governance; and specification on the nature of the legislation the UK adopts.

UK Governance The UK, outside the EU, will no longer be subject to requirements to report on implementation to the European Commission, or to the Commission's role in encouraging full enforcement, or, ultimately, to the threat of CJEU sanctions in the event of a failure to implement. As has been noted in earlier IEEP reports[13], the UK has a relatively weak domestic system for enforcement of environmental law; its judicial review system suffers on the one hand from barriers to access for individuals and NGOs, notably in terms of costs and standing, and on the other hand from relatively weak remedies available to the courts. While current UK Ministers have promised a consultation on improvements to governance, it is unlikely that relevant legislation will be adopted soon, and potential challenges in ensuring that new governance arrangements properly reflect the distributed policymaking responsibilities on environmental matters (with Scotland, Wales, and Northern Ireland having the potential to adopt different approaches). This means that an approach based on UK commitments to meet broadly-framed environmental objectives risks a failure to deliver those objectives in practice.

Enforceable legislation In order for the combination of UK commitments on policy objectives, and enhanced domestic governance, to operate effectively, it will be important that any flexibility allowed to the UK in delivering those objectives should avoid the risk that the UK simply enacts a vague commitment to meeting environmental targets, but without any enforceable elements to it. For example, it would be theoretically possible for the UK simply to enact legislation calling for the emissions targets in the National Emissions Ceilings Directive to be met, but without requiring any action to achieve them either by public authorities or by private operators, and without imposing any penalties in the event of non-delivery. To avoid this, the EU27 should stipulate that UK legislation implementing UK obligations under the free trade agreement should require the development of plans or detailed rules which are commensurate with the objectives; and should allow the adequacy of those steps to be challenged in the courts by individuals and public interest groups (and, potentially, EU 27 groups). It will also be important for monitoring of UK environmental outcomes to be consistent and effective, ideally through continued participation in the European Environment Agency.

[12] See Baldock et al, "The potential policy and environmental consequences for the UK of a departure from the European Union", IEEP, March 2016.

[13] See Nesbit et al, "Ensuring compliance with environmental obligations through a future UK - EU relationship", IEEP, October 2017.

3.4 Allowing for future increases in environmental ambition:

While much of the focus of the negotiations is on the static question of what obligations the UK should take on as an inheritance from the current environmental acquis, it will be important to ensure that the agreement with the UK allows for the future development of the acquis, in particular to tackle new and emerging environmental challenges, as well as to take forward the legislative underpinning of EU ambitions for reduced carbon emissions and progress towards the circular economy. Approaches which allow the UK to be consulted on emerging proposals, similar to the consultation provisions on new regulation in CETA, could be envisaged; but it will be important to ensure that the UK is not able to block or delay progress, and to ensure that the UK faced incentives to accompany the EU in implementing more ambitious policies. A corollary of this is that the UK should itself not be prevented from introducing more ambitious policies, including those that have market access impacts for EU products and services (for example, deposit return requirements, or restrictions on non-reusable packaging). Again, this should not pose difficulties. A key feature of the Environment treaty articles is the flexibility for Member States to choose to go further, provided that they do not create barriers to the internal market in so doing (thus, for example, a Member State could set a higher recycling target for itself than that specified in the Waste Framework Directive; but it would face resistance to setting new product requirements in terms of recyclability or the phase-out of single-use materials and banning imports which did not meet those standards).

There is some evidence that national governments choose to hide behind possible EU concerns about single market impacts as a reason for not taking forward ambitious initiatives. The likely UK government keenness to emphasise a political narrative of being released from EU obligations makes this less of an issue in future, regardless of the substance of such supposed constraints: the March 2018 announcement[14] about taking forward a deposit/return scheme for plastics is a case in point. It will be important to ensure, however, that future arrangements in respect of technical barriers to trade (TBT) and state aids do not inadvertently limit the potential for ambitious UK action.

3.5 Avoiding erosion of EU27 political commitment to environmental delivery:

A final, important, principle to bear in mind for the negotiations is the risk of inadvertently eroding EU27 political commitment to the delivery of ambitious environmental policy. Such an erosion could happen as a result of any flexibility the UK gains over environmental legislation, particularly if it enables weaker enforcement in the UK and less ambitious delivery. Member States and industry associations would be quick to note the contrast between the internal EU argument that full implementation of detailed EU standards was necessary for delivery of shared objectives or for maintenance of the internal market, and on the other hand a situation where the UK had access to the market while not meeting the full requirements of EU legislation. They would argue for similar flexibility for Member States. It will therefore be important to ensure that flexibility for the UK is carefully linked to its level of market access. There may, theoretically, be scope for UK policy experimentation in taking advantage of flexibility in delivery of environmental outcomes to inform future EU policy development, enabling either more efficient delivery of existing objectives or, preferably, an enhancement of the level of EU ambition. However, it will be important to ensure that such decisions are taken on the basis of a robust assessment of the effectiveness of any new approach adopted in the UK, and its replicability in the wider EU 27 economy.

[14] See the press release (28 March 2018) at https://www.gov.uk/government/news/deposit-return-scheme-in-fight-against-plastic

4 Possible approaches to environmental equivalence, and their application

The next section will look at the main elements of the areas of legislation identified by the Commission as needing to be addressed in the future arrangements with the UK, and note the relevance of different approaches to environmental equivalence in each case. The possible approaches to environmental equivalence range from strict compliance with current EU standards, through varying levels of requirement to ensure that equivalent objectives are aimed at, or that equivalent results are achieved.

There is no completely black and white categorisation that is realistic here. Some areas of legislation deal with issues that are inherently local in most conditions but may have transboundary impacts in some circumstances. The pollution of groundwater is an example; some aquifers underlie boundaries, although the majority do not. As a state with only a limited (but still significant) land boundary with the EU27, the Irish Republic, the UK is likely to have fewer transboundary issues of this kind than many other Member States; although, as the EU's negotiating position makes clear, the UK's geographical proximity makes these issues more directly relevant than is the case in most trade negotiations. There will therefore be some areas of legislation covering topics where transboundary impacts are relatively minor but nonetheless can be identified.

Single market impacts can be difficult to quantify, and sometimes difficult to predict. For example, the stringency of rules protecting groundwater from pollution are primarily a national concern. However, if they effect the returns or viability of industries utilising groundwater in a manufacturing process they may have an impact on competitiveness. As technologies and market factors change so too can the economic significance of clean groundwater and the industries exploiting it. This may not be foreseeable now but cannot be ruled out in future.

This helps to explain why most EU environmental legislation applies to EFTA countries in the EEA, and is effectively treated as single market sensitive. One important exception is the primary nature conservation measures, the Birds and Habitats directives. This is curious as there are both transboundary and competitiveness impacts from these measures, and appears to have been a result of Norway's objections to complying with legislation with significant practical requirements for them, but which they had not been able to influence when it was drafted.

The nature legislation in fact involves several transboundary impacts, including the overall goal of creating an ecologically coherent European network of protected sites, rather than an aggregation of sites selected on the basis of purely national criteria. Many protected species travel between Member States, including migratory birds. In terms of the single market, there will be economic costs associated with certain forms of conservation, for example where it precludes the cheapest options for the development of a port, or has implications for the siting of renewable and other energy infrastructure. Given the relatively limited number of large ports within the EU and some degree of competition between them, some single market impacts could be expected if there are significant differences in the level of environmental protection applied on the ground (itself a combination of legislative requirements and the way in which they are enforced on the ground). This impact on relative costs is not easy to quantify or separate from other factors influencing competitiveness but is difficult to

dismiss entirely. The issue attracted some discussion during the course of the recent Nature Directives Fitness Check.

If a precautionary approach is adopted to the application of the transboundary and single market sensitive criteria, then the list of EU environmental measures where there is no difficulty at all with the UK having the flexibility to take a quite different approach is rather small. For example, the Bathing Water directive, which is not binding on EEA countries, almost certainly does have transboundary impacts in some locations, insofar as it effects marine water quality. A few items of legislation, such as the Zoos Directive, could be described as having little or no transboundary or single market effects. However, such a list would be short.

At the same time, playing too heavily on the argument that most environmental law has significant impacts on competitiveness carries certain dangers. It suggests that the environmental acquis does place a burden of costs on the economy that is not necessarily offset by other benefits, such as the forced innovation of new products and processes. It creates potential arguments against the adoption of ambitious new measures. The argument around competitiveness impacts therefore needs to be deployed with care, and to retain a clear understanding of the long-term benefits of collective action to improve environmental standards in line with societal wishes, and the particular advantage of collective action at European scale in order to enable such improvement, and to reduce the risks of deregulatory competition.

However, it remains true that competitiveness gains could be a short-term driver for deregulation. Could the UK attract new investment on the basis that it has a light touch approach to enforcing legislation and a tolerance of voluntary measures rather than mandatory standards, even if the objectives for the environment are ultimately the same? Possibly yes in some sectors; and it is clear that this is at least among the rhetorical justifications for the UK's departure from the EU put forward by many politicians.

4.1 Which areas of environmental regulation need to be addressed?

We have set out key areas of environmental legislation which may need to be addressed in any agreement on environmental equivalence, starting with the list of areas identified by the Commission in its presentation to Member States on level playing field issues.

4.1.1 Industrial emissions

This category includes a range of legislation dealing particularly with permitted levels of pollution to different environmental media from industrial plants, especially emissions to the air and to water. The mechanisms involved vary but include permitting requirements for different plants and processes, national limits on emissions, limits on emissions from waste incinerators, etc. Both emission limits and process requirements apply. Many of the pollutants involved have transboundary impacts.

The cost of meeting standards of different levels of rigour can vary significantly and can include the necessity of replacing a process or plant with a newer, compliant one. There are undoubtedly Single Market concerns. Consequently, this is an area where the arguments for high levels of equivalence and associated compliance mechanisms and low levels of flexibility for the UK are particularly strong. Detailed technical requirements are an important part of the Industrial Emissions Directive. Parallel UK requirements would seem duplicative and inefficient, irrespective of other considerations. Strict compliance would be a priority here. It should be noted that elements of this legislation are very likely to change over time, reflecting technical change as well as rising standards. Continued parallel

development in the UK is highly desirable; although UK participation in the relevant processes (for example, the Seville process under the Industrial Emissions Directive) may be more difficult to ensure.

4.1.2 Air quality

This category includes the strategic air quality framework and National Emissions Ceiling Directives, as well as legislation on vehicle emissions, volatile organic compounds (VOCs), the sulphur content of fuels etc. Several measures contribute to reducing greenhouse gas as well as other emissions, with a high degree of transboundary impact; although other regulated pollutants (particularly particulate emissions) are more relevant to local air pollution. Requirements take various forms including national ceilings on certain emissions, the limits on industrial emissions to air mentioned above, and vehicle emission requirements applying to the full range of models produced by each manufacturer in a certain year (tightening systematically over time). As with industrial emissions, the arguments for strict equivalence are strong. In the case of vehicle emissions there appears little scope for an alternative approach in a highly integrated EU market. Member States already have considerable scope to achieve the stipulated air quality standards and do use different approaches in urban areas for example. The arguments for further flexibility are unclear.

4.1.3 Water quality - including nitrates and marine

There are several major items of legislation under this heading, including the Water Framework Directive, the Marine Strategy Framework Directive, legislation protecting groundwater, controlling effluent from sewage plants, and nitrate contamination from agricultural sources. Collectively, these measures have a very substantial positive impact on the natural environment and some transboundary impacts, particularly in the marine environment and in shared catchments. The latter are more limited in number in the UK than for several other Member States, as noted above.

The costs of compliance can be significant, especially in relation to sewage works and aspects of the WFD. Some of the costs fall on water suppliers, others on waste water treatment bodies (in both cases the UK has a greater than average level of private sector ownership in this sector). Other costs fall on those discharging to water, including agriculture, the largest source of non-point pollution in the UK and many other Member States. Compliance with the Nitrates Directive for example restricts certain activities in certain catchments and may limit the scope for discharges to certain categories of processing plant in sensitive catchments as well. Single market issues therefore arise.

If quality standards are met within the agreed timetable there may be less sensitivity about the precise requirements of certain directives. However, to maintain confidence in the integrity of a more flexible approach in the UK, a strong and transparent monitoring regime would need to be in place. There would also be a need for agreed processes to achieve compliance, rather than an entirely flexible, localised system, which might have some appeal in the UK.

4.1.4 Waste management

Waste management, recycling and related issues represent another significant block of EU environmental legislation. Measures include the Waste Framework Directive, setting the overall approach and strategy, legislation on landfill, on hazardous waste, and on waste shipments, as well as more specific legislation, such as that on waste oils and PCBs. This category could be understood to

include a further group of measures concerned with resource efficiency and the circular economy, such as packaging and packaging waste, eco-labelling, the disposal of End-of-life vehicles etc.

This is a diverse group, including legislation imposing product standards, shifting the management of waste up a hierarchy towards re-use, regulating landfill, controlling unacceptable (and usually low cost) methods of disposing of particular wastes/resources, such as sewage sludge etc. Some measures have transboundary implications, (and therefore particular importance for the debate about border arrangements between Northern Ireland and the Republic of Ireland); there are, for example, requirements in relation to inhibiting the transport of waste across frontiers to utilise less acceptable disposal options or controlling the disposal of material in the marine environment. The UK exports a considerable quantity of waste-derived fuel to incinerators on the continent and if it ceased to do so presumably would be required to invest in alternative disposal or recovery options. This also illustrates the impact of some legislation on relative costs, which are likely to fall on a combination of public sector and private interests.

Leaving aside product standards, where the case for strict compliance is particularly strong, there is probably a spectrum of single market sensitivity associated with this body of law. Different routes to meeting recycling targets are permitted already. Weaker targets and more reliance on voluntary rather than mandatory approaches in the UK, which are conceivable, would have impacts on competitiveness and might be more sensitive in some markets than others eg affecting the viability of the European market for certain products. Nonetheless, small variations at the margin might not be a pressing concern in the context of major differences already present between the Member States. Practical compliance issues can be relatively demanding to monitor in this sector and machinery to put this in place to an adequate standard would be important.

4.1.5 Nature conservation

This is a smaller group but an important one, with a high level of public and political visibility. It includes the Birds and Habitats Directives, the legislation on invasive alien species and trade in endangered species (CITES) and a family of legislation on GMOs. All these measures have transfrontier impacts to some degree. At the same time the protection of some species and sites has a primarily local impact and negligible transfrontier implications (whilst not forgetting the essentially European character of the N2K network). CITES and invasive alien species are clearly transfrontier issues and the mechanisms employed are closely related to the way in which trade is regulated, the inspection regime at borders etc. Failure to control mobile invasive species can become a transfrontier issue very rapidly.

GMOs also have transfrontier impacts, for example related to the release of modified organisms into the environment. However, there are aspects of the current regime that permit significant differences between Member States in the commercial use of GMOs in agriculture. There is considerable room for the UK and other MS to pursue differences in approach in this area, subject to some regulatory requirements.

The single market impact of these measures will vary and may be apparent in specific circumstances, as in the case of port development noted above and the control of certain alien species. Some mechanisms to achieve nature conservation goals are relatively precisely specified, as in the case of Article 4 of the Habitats directive, others allow much more flexibility. However, sub-dividing the legislation into more and less single market sensitive elements does not seem a feasible or attractive

approach. Equivalence levels would need to be relatively high in order to take account of the most sensitive elements.

UK (Defra) Ministers[15] have argued that the Habitats and Birds Directives impose unnecessary constraints, for example on housebuilding. While there is little evidence to support the claim that the Directives themselves impose significant costs on housebuilding, these comments suggest a degree of political commitment to change. In the event of the UK securing some flexibility in practice on how it implements broad nature protection objectives to maintain and restore selected habitats and species to a favourable conservation status, the most likely areas where flexibility would be introduced are on the following current requirements of the legislation:

> **The designation of Natura 2000 sites**[16]. The terrestrial network of Natura 2000 sites is largely complete, and it would seem unlikely that declassification would occur, not least because of the recent statements in the UK government's 25-year plan[17] 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, particularly in cases where there is a conflict with development objectives seen as politically important. The UK has not completed its Natura 2000 site network in the marine environment, so there is more scope for reducing the pressure for future site designations. Defra Minister 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[18]. However, this argument ignores the fact that the UK could already introduce a range of non site-specific flanking measures in addition to site designation; the two approaches are not mutually exclusive.
>
> **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 in the UK (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 are imperative reasons of overriding public interest. In such cases, the Member State is required to take the necessary compensatory measures. A weakening of this requirement could take the form of introducing a wider threshold for what is considered to be an adverse impact, widening the scope of the "exceptional circumstances" permitted, or simply removing the requirement for full compensatory measures. These could all have a significant impact in practice, depending on how they were implemented.

There is thus a strong possibility that the UK would opt for greater flexibility on these elements of the legislation, if there are no clear commitments in the context of the future relationship with the EU, or if the commitments are based on broadly-framed outcomes rather than on the detailed requirements of the legislation. This in turn could have a significant impact on biodiversity and habitat protection

[15] For example, Michael Gove comments reported in the Independent, 25 March 2017.

[16] as Special Protection Areas (under the Birds Directive) and Special Areas of Conservation (under the Habitats Directive)

[17] "A green future: Our 25-year plan to improve the environment", Defra 2018

[18] Comments at a Royal Geographical Society/Sibthorp Trust panel discussion, "People, Politics and the Planet – Any Questions?", 21 July 2016

outcomes; and could – if remaining Member States are attracted by the idea of the flexibility thereby introduced - lead to a reopening of the EU debate on revision of the Directives. A countervailing pressure, however, is that any new approach along these lines would create significant uncertainty, at least until new case law had tested the impact of the new approach.

4.1.6 Impact assessments

This is a small group of measures concerned with the process of requiring an impact assessment prior to the authorisation of developments, ranging from individual projects to sizeable public programmes**.** This legislation obliges MS to follow a specified process in their permitting/land use planning regimes, and is fairly precise about the scope of the developments/proposals to be covered. The extent to which the measures have transfrontier impacts depends on the nature of the developments being regulated (which include ports, airports etc) and the proximity of the MS in question to other countries, to the common marine environment and atmosphere etc. In some cases there will be distinctive transfrontier effects, in others they may be negligible.

Having a similar standard of development appraisal and control helps to create a level playing field within the EU; major variations in stringency can affect competitiveness although this may only be in relation to a limited number of cases and be difficult to assess. Perhaps the most pertinent concern is the danger that an investor in a large new project might choose to locate in the UK rather than in an EU 27 country because the permitting system (including the EIA element) was faster and less onerous than elsewhere in the EU (perhaps at the expense of rigour and effectiveness in identifying and addressing environmental impacts). Elements other than the EIA can be equally or more significant so this is only one aspect of development permitting. General equivalence, transparency and consistent application seem more significant than exact equivalence in this case.

In the event of the UK securing greater flexibility in these areas, it is likely (although not certain) to continue to wish to comply with the requirements of the underlying Aarhus and Espoo Conventions, although these are less stringent and detailed than the European legislation which implements them. It is unlikely that future administrations would want to reduce the scope for public consultation, although they may wish to reduce the scope of environmental information provided under public consultation. However, in cases of perceived urgency, there would be greater flexibility for public administration to reduce the time limits for public consultation, or the sequencing of consultation and decisions.

4.1.7 Transparency, permitting, controls, public & private enforcement

This is a broad topic, overlapping those covered above. The importance of transparency and adequate enforcement is clear from the discussion above of individual policy areas. Significant differences in the rigour of controls would have competitiveness impacts in a range of circumstances, for example where they result in less stringent requirements to retire polluting plant or technologies, or where they allow greater choice of location for new investment. This does not mean that every permitting decision is sensitive in this respect. Many will not be, especially given the local character of the majority of them.

There is a strong interest in the UK having an overall level of inspection and compliance that is broadly equivalent to that in the EU even if it is not precisely the same. Equally, there is a clear single market and transfrontier interest in the filling of the substantive “governance gaps” arising in the UK after

Brexit by virtue of the removal of the role played by the European Commission and other EU institutions. Seeking to establish an acceptable level of compliance is a key priority.

4.1.8 Climate change

For climate change, a distinction can be drawn between the sectors covered by the Emissions Trading System (electricity generation from fossil fuels, cement, chemicals industry, etc), and those that are not. For those covered by the ETS, it seems unlikely (given the highly integrated nature of the legislation) that the UK could continue to be covered by it. However, it should be feasible to enable a separate UK trading system to link to the EU ETS; or, failing that, to include in the agreement a requirement for the UK to apply at least a similar level of carbon price in domestic legislation. It is, however, difficult to envisage a UK role (other than in the form of consultation) in future decisions on the emissions caps in the ETS.

For sectors outside the ETS, negotiations will need to reach an accommodation over the UK's contribution to the EU's NDC (Nationally Determined Contribution) in the sectors covered by the legislation on LULUCF and the proposed Effort Sharing Regulation for 2021 – 2030. From an environmental perspective, it will be important to ensure that the EU and UK are not seen by their UNFCCC negotiating partners as in any way reducing the level of effort in the NDC. Thus, if the UK is not part of a continued system, the EU's overall contribution should remain at the overall 40% reduction from 1990 levels specified in the NDC, notwithstanding the slightly higher than expected contribution which would then be required from the EU 27 Member States.

4.1.9 Other areas of environmental legislation

Other potentially relevant areas of legislation include:

- **Chemicals policy**, based on REACH, which has both single market and transboundary implications. It seems inevitable that the UK will be outside EU systems, with significant consequences for UK holders of REACH registrations, because of the highly integrated single market nature of the legislation. However, the UK systems to be established could be required to share information with the ECHA, and to comply with similar levels of stringency.
- **Noise policy**. This comprises mostly product standards eg for motorbikes and lawn mowers, but also monitoring and planning requirements under the Noise Directive. Transfrontier impacts are low, aside from product standards, and it is difficult to see a strong argument for including the policy area in the agreement.
- **Radioactive waste policy**. This is a highly specialised topic requiring separate analysis.
- **Environmental rights policy, including freedom of information**. This has no direct transfrontier effects and only indirect effects on competitiveness but is important for wider governance reasons. We suggest it is separately considered, under the governance arrangements that could be included in an agreement.
- A number of miscellaneous measures, including the important Environmental Liability directive, which will have some indirect Single Market impact.

5 What governance structures are needed?

Much of the discussion on governance arrangements has focused on the bilateral arrangements between the UK and the EU necessary for the enforcement of any free trade agreement. This creates particular challenges for the EU in devising a system that is effective and reciprocal, but at the same time avoids giving the UK a greater degree of influence over outcomes than it currently shares as one among 28 Member States. However, it will be important to ensure that the European Institutions have the capacity to ensure that the UK continues to abide by commitments made in the trade agreement; and also that decisions on whether or not to initiate action against the UK for failure to meet regulatory and other commitments are not avoided for diplomatic or trade policy reasons. Earlier work has noted that enforcement through state-to-state governance structures is likely to be relatively weak, given that the nature of the available sanctions (an interruption to trade in the relevant sector) is likely to penalise both sides, rather than just the transgressor; and that there is a high barrier to action being considered sufficiently urgent to disrupt diplomatic and trade links. Moreover, given that UK politics has moved towards Brexit because of a sense (often inaccurate, but nevertheless widely reinforced by the UK press) of the UK being told what to do by European institutions, it would in practice be politically difficult for UK Ministers to correct implementation in response to EU pressure.

A more fruitful approach to enforcement is therefore to negotiate for the UK to approach its environmental decision-making, in terms of both structures and legislation, in ways which facilitate effective delivery; and which ensure that failure to deliver can be challenged at an early enough stage.

5.1 Governance structures

Both the Commission and the UK Government have noted that domestic governance arrangements may need reinforcement on the UK's departure from the EU. Nesbit et al (2017) set out some of the gaps that would open up in the absence of corrective action, particularly in terms of monitoring of compliance with environmental legislation, the scope for individuals and public interest groups to raise problems for attention (including the costs of court action), and the limited nature of the sanctions available to the courts. We recommend that the EU 27 pushes the UK to commit, under the future trade agreement, to enhanced domestic governance of environmental law (and potentially, of other areas of the EU acquis affected by competitiveness concerns, such as social and employment law). This should include:

- Independent monitoring of the delivery of environmental outcomes, and of the implementation of legislation aimed at delivering those outcomes, accompanied by full public transparency of information;
- An enhanced role for individuals and public interest groups to raise concerns about failures in implementation, and to take those concerns to court in the absence of a response, with access to justice being made more affordable;
- More effective remedies available to UK courts (which currently tend to limit their judgements to setting aside Governmental decisions and requiring a new decision-making process).

Equivalent commitments on the EU side could involve simply the continued application of the current roles of the Commission, and the Court of Justice. Commitments by the UK to independent and transparent monitoring could be further enhanced by an agreement for continued UK participation in the European Environment Agency.

A challenge for the UK in developing this enhanced governance will be the complex nature of the quasi-constitutional arrangements for environmental policy, with Scotland, Wales, and (when it has a

functioning devolved government) Northern Ireland having formal authority to adopt legislation on the environment, but that authority being itself contained in UK parliamentary legislation, and therefore by implication being capable of being removed or curtailed by the UK parliament. There are significant political sensitivities in the devolved administrations over future governance arrangements. However, if it can be achieved by a process which respects the competences of the respective devolved administrations, the emergence of either a single institution, or closely coordinated structures, respecting the roles of the different administrations, would clearly be preferable.

5.2 Regulatory commitments that allow for good governance to work

While enhanced governance arrangements would be a valuable step, mechanisms for enforcement depend for their effectiveness on the nature of the legislation itself, particularly whether it is designed to be enforceable. Much of the narrative of UK campaigners for Brexit, including current Ministers, is that they are committed to delivering at least equivalent environmental and other outcomes, but that EU legislation is unnecessarily inflexible, and does not allow sufficiently for policy experimentation, or for voluntary approaches. While there is scope for simplification of some environmental EU law, which is being addressed through the REFIT process, process requirements in EU law are usually designed to ensure that Member State commitments are followed by action, at an early enough stage to address any insufficiencies in delivery. A situation where the UK made use of flexibility over the delivery of environmental outcomes to enshrine those outcomes as targets in legislation, but without subsequently taking adequate measures to ensure that they are delivered, would clearly be unsatisfactory, and would lead to de facto level playing field problems.

We recommend that the future trade agreement should include a requirement, for those areas of policy where the UK accepts the need for environmental equivalence, for its legislative underpinning of that equivalence in each policy area to include:

- Establishment of a trajectory for delivery of the objectives;
- Regular and sufficiently early assessment of progress, by independent bodies;
- Scope for individuals and public interest groups to challenge the adequacy of Government regulatory and other action to deliver the objectives;
- Scope for the courts to require Government to take action.

5.3 The read-across to internal EU enforcement

The EU will also need to develop a robust response to likely arguments by UK negotiators that EU enforcement is itself often imperfect; indeed, the imperfect state of enforcement has already been acknowledged in the 7th Environmental Action Programme and in the Commission's Environmental Implementation Review. Demonstrating that the elements of improved UK governance listed above are already delivered in the EU will therefore be important. Moreover, there is scope for using the EU's call for clear UK commitments on delivery of environmental outcomes to help reinforce the urgency of improved performance within the EU 27.

5.4 Principles of environmental policymaking

Finally, the UK's approach to the design of environmental legislation, to delivery of environmental policy in practice, and to regulatory decision-making on environmental issues, will be an important element in its evolving future relationship with environmental protection policy in the EU. As noted above, there may be significant pressure from US trade negotiators for the UK to move away from the precautionary principle in practice, as part of any regulatory aspect of a future trade deal. While it is difficult to see, given the broadly-framed and constitutional nature of the precautionary principle, how

the EU side could secure commitments from the UK on its future approach, unilateral commitments from the UK on this issue could be of some value in clarifying its future intentions, and its willingness to remain closely aligned with EU regulatory practice in future.

Institute for European Environmental Policy (IEEP)
www.ieep.eu
+44 (0) 20 7799 2244 (London)
+32 (0) 2738 7482 (Bruxelles)
Twitter: @IEEP_eu

Institute for European Environmental Policy