

Planning Beyond Brexit

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Introduction

While Brexit appears to be cast as an event, for those involved in planning, as with many other activities, it will be a process that will have expected and unexpected dimensions.¹ The complexity, scale and length of time available for negotiation and implementation inevitably means daily shifts in understanding of the implications that then suggest further questions. For those engaged in planning both in its wider and more specific contexts, having some understanding of the likely changes and areas of challenge that could arise within a legal framework post-Brexit is of utmost concern—although difficult to predict. Planning is not alone in this legal uncertainty as the outgoing Supreme Court President has recently reminded Government.

In such a shifting context, this paper makes some attempt to provide a framework for understanding the likely areas of change and how these can be viewed within a wider context where this is helpful and necessary. Of course, until any final settlement is agreed, these issues remain in the territory of likely outcomes. While the Government has committed to transposing existing EU legislation in the EU (Withdrawal) Bill, this also contains proposed powers for ministerial changes in the process. In practical ways, it is likely to be through this engagement with over 1,000 expected statutory instruments that the future for planning legislation will be understood. Further, there may be a transitional period and when the legislation does come into force, there will be immediate questions about its legal anchorage, the outcomes of any legal tests and challenges and how it will be kept up to date.²

To contextualise some of the issues that will frame any post-Brexit world for planning, this paper initially discusses the ways in which the EU currently shapes legislation that is used within the planning context. It will then continue to consider those areas of agreements and UK commitment which will remain following any agreement with the EU. Following this, there will be a discussion of what is likely to most change following Brexit. The paper then discusses some of the initiatives that will be foregone with wider effects on the users of the planning system.

Finally, this paper has not been informed by any government advice or information as no statements have been made about the implications of Brexit on planning at the time of writing.

How does the EU shape UK planning now?

If asked how EU legislation most affects and influences UK planning legislation at present, most people involved in the system would respond with comments on EIA together with other environmental Directives for habitats, water or air quality. Some might respond that they are more concerned with the processes of EU procurement matters and how these affect the ability to offer and obtain contracts in the public sector while others might reflect on human rights issues in planning, which of course are set in the European Court of Human Rights and not in the EU, although they should be considered in EU decision-making.

These random and most frequently mentioned legal requirements are helpful but do not really provide a very full picture of the legal framework. The Dutch Government, also posing this question, commissioned

¹ J. Morphet, *Beyond Brexit* (Bristol: Policy Press, 2017).

² J. Gill and V. Miller, *Brexit: a reading list of post EU Referendum publications by the UK Parliament and the Devolved Assemblies* House of Commons Library Briefing Paper No.07912, 22 September 2017; V. Miller and S. Gorb, *Legislating for Brexit: EU directives* House of Commons Library Briefing Paper No.7943, 5 April 2017.

a review by their environment agency.³ Instead what is needed is an understanding of how legislation is made and underpins all those areas of activity where the UK has pooled its sovereignty with the EU and even those areas where it has not but where joint policy approaches are being developed.⁴ Before reflecting on these, it is also important to consider that the basis of EU legislation is cumulative, not episodic such as that in the UK. EU powers, as exercised by its four main institutions—the Council of Ministers (“CoM”), the European Parliament (EP), the European Court of Justice (“ECJ”) and the European Commission (“EC”), are set within what might be considered foundational treaties. These are the Treaty of Rome (1957), the Treaty for the European Union (“TfEU”) (Maastricht) (1992) and the Lisbon Treaty (2007) although others such as the Amsterdam Treaty (1997) have a part to play in decision-making. These treaties determine which issues are to be pooled and how the powers of decision-making are to be arranged among the institutions. That includes powers set within the competences of the European Commission and those where co-decision between the Parliament and Council of Ministers will prevail. The determination of the Brexit agreement falls into this latter group.

To implement the powers in the treaties, the European Commission proposes work programmes that primarily operate in seven year cycles—giving each Member State the opportunity to have a general election and policy reset to support their delivery. Within these programmes, the Commission proposes legislation, spending and investment programmes and softer measures to support joint working which may not have a more formal status. These might include associated areas of research which is commissioned most often to pave the way for subsequent initiatives and to offer an inclusive approach in agreement on definitions of the problems. The legislation that will be included as part of these programmes can take from four to seven years to develop and will be subject to final agreement by the Council of Ministers if there is any dissent or at the meeting of all heads of the member delegations—COREPER I and II—if otherwise.

All EU legislation is anchored on specific treaty provisions and subsequent legal agreements—as the whereas statements at the beginning of any regulation or directive will testify. Because this legislation is rooted in treaties, it can be regarded as cumulative and substantive at each change in the Commission’s structure in every seven-year cycle. All this is in direct contrast with the five-year Parliamentary cycle in the UK, where Parliaments are not bound by decisions enshrined in legislation made by their predecessors. This fundamental principle has a great effect on some of the post-Brexit arrangements for devolution that are currently empowered and guaranteed through EU treaty principles of subsidiarity that cannot be secured in the future for more than five-year Parliamentary periods unless the UK has a written constitution.

What will be retained after Brexit?

The EU has most frequently used directives as a means of implementing environmental legislation. However, as the UK knows to its cost, differential implementation and interpretation has meant challenges in the ECJ for non-compliance brought by both the EC and other bodies. The UK has also been at the upper end of the number of non-compliance procedures brought by the EC in comparison with other Member States. This has meant that the EC is now favouring legislation using regulations—that must be implemented in the exact language as written once agreed and adopted on a due date. These regulations are immediately in effect and do not require any Parliamentary approval or process. They might be for the EU’s own direct initiatives but it is also important to remember that the EC acts as an implementation and compliance vehicle for other international treaties including those made with the World Trade Organisation (“WTO”)—implementing trade, services, open competitive access to public services and agriculture. The WTO treaties also include environmental safeguards. These will continue as UK obligations

³ D. Evers and J. Tennekes, “Europe exposed: mapping the impacts of EU policies on spatial planning in the Netherlands” [2016] *European Planning Studies* 24(10), 1747–1765.

⁴ J. Morphet, *How Europe shapes British public policy* (Bristol: Policy Press, 2013).

post-Brexit. Additionally, the EU has an agreement with the WTO for its own members for agriculture and rural support that will be lost to the UK on Brexit.

Another area where the EC negotiates, supports delivery and assesses compliance will be for the United Nations agreements including for Climate Change, Sustainable Development Goals and the New Urban Agenda (“NUA”).⁵ The NUA was agreed in 2016 and includes UK Government commitments to planning at all spatial scales including national. This approach to planning must be within democratically accountable systems and reflect both horizontal and vertical integration between localities and policy programmes. Although many engaged in the detail of environmental legislation will be concerned at any loss of EU compliance mechanisms as well as legal formats for delivery, the principle commitments made by the UK remain the same.

While UK treaty obligations with the WTO and UN will be major determinants of continuing legal frameworks for planning and environmental matters, there may be other pressures to maintain an approach that closely mirrors that used by the EU both now and in the future. Here the pressures for EU compliance will come through trade agreements and engagement with the single market. This issue could appear at several points in the forthcoming negotiations. First, access to a UK EU trade agreement post-Brexit may be reliant on acceptance of all the EU’s environmental regulations and the jurisdiction of the ECJ in compliance and disputes. This has already been mentioned as a way forward and would be similar to the position of members of the European Economic Area (“EEA”)—although in that case, members are required to take all EU legislation without any involvement in its negotiation or approval. If this compliance is not a general requirement of trade, then individual contracts for supply of goods and services may state that these standards must be met. The withdrawal of the US from the Paris climate agreement may see this line reinforced within the EU. Thirdly, there may be public pressure to maintain environmental standards. Research undertaken by Professor John Curtice at Strathclyde University has shown that a high proportion of the electorate, whatever their stance on Brexit, wish to see environmental standards remain unaltered in the future.⁶

What else will be retained after Brexit that will have an influence on planning? Although not bound by a treaty, like the WTO and UN, the UK is a member of the Organisation for Economic Co-operation and Development (“OECD”) and it is likely that this relationship will be strengthened in a post-Brexit world. The OECD was founded in the post-1945 settlement and remains fundamentally welfarist in its approach. While being a soft power organisation, the OECD has a strong influence on education policy, as regular publication of PISA education league tables confirms. The OECD also reports on the economic performance of its members and their comparative competence in dealing with a range of regulatory and governance issues. These performance assessments also inform country judgements made by the IMF and other financial institutions.⁷

One of the key policy areas where the OECD is heavily engaged and influential among its members is that of sub-state governance and fiscal federalism.⁸ Following on from the work of Nobel economist Paul Krugman, the OECD has undertaken more research that has identified a growth in national GDP where there is a link between the alignment of administrative and economic borders and strong democratic leadership over these areas. In the UK, we see the delivery of these policies through the creation of combined authorities with directly elected mayors. These approaches have also confirmed the need for integrated spatial plans for these areas which underpin infrastructure investment within and between them. The mayors of the six new combined authorities in England together with the Mayor of London all have strategic planning powers, although each operates in separate ways. When we see the alignment between planning and investment in transport and energy this begins to look very similar to the UK’s obligations

⁵ United Nations New Urban Agenda Habitat III Quito (2016).

⁶ Political Studies Association, *EU Referendum: one year on*, UK in a Changing Europe centre Kings College London, 2017.

⁷ Economic Survey of the United Kingdom 2017: <http://www.oecd.org/unitedkingdom/economic-survey-united-kingdom.htm>.

⁸ OECD, *Local Economic Leadership* (Paris: OECD, 2015).

through the UN's New Urban Agenda. So, despite Brexit, re-ordering responsibilities below state level with planning at the heart of these processes appear likely to continue.

What will be lost after Brexit?

If many frameworks for environmental legislation and standards remain post-Brexit, what will be lost? The most obvious concerns will be about the role of the ECJ, although this must be tempered by the commentary above together with the exit treaty and new trade agreements.

Secondly, key institutional principles that will be lost are those of subsidiarity and fairness. Currently, EU treaty obligations on subsidiarity guarantees devolution and stays the government's hand on how it can centralise or retain powers that could be operated at other appropriate spatial scales. It has most resonance on issues such as devolution in Scotland, Wales and Northern Ireland and combined authorities in England. When subsidiarity is no longer a treaty obligation, all devolved powers will rest on the whim of each five-year Parliament unless the UK adopts a written constitution. There has been some assumption that devolved powers will remain the same or be increased post-Brexit but in Ch.4 of the Great Repeal Bill White Paper, transport, agriculture, rural affairs and the environment are all policy areas that have been identified as ones where there could be a diminution of devolved powers and this has been confirmed in the subsequent Bill.

The principle of fairness, set in the Treaty of Rome, has been used to support Structural Funds, differential investment programmes⁹ and the Barnett Formula that determines the differential proportional allocation of funds in Scotland, Wales and Northern Ireland. It will affect funding levels associated with growth deals, the current (although soon to be lost) local government revenue support grant and funding by organisations such as the Homes and Communities Agency. If the UK wishes to retain this principle of fairness as a basis for redistribution across the UK then Parliament will either need to adopt this principle—although this will again only last for five years—or the Government will have to legislate specifically for each programme. This issue will affect a range of local projects including those for transport projects which are supported through EU policies and legislation such as Sustainable Urban Mobility Plans,¹⁰ rural support packages and environmental interventions.

At a more strategic scale, another major loss will be the Trans-European¹¹ Networks for transport modes and energy. Established in 1996, the transport networks known initially as TEN-T define a range of cross European multi-modal corridors which, until 2013, were predominantly east-west in their orientation. In the UK,¹² these have included the improvements to the A14, Crossrail and western routes out of London, including fixed links to Heathrow. They have included station improvements and the Cambridge Guided Busway. Since 2013, these routes have switched to be predominantly north-south in their orientation and projects such as HS2 and Crossrail 2 are included in the programme list. Also in 2013, the EC launched the commitment to designating a secondary or comprehensive transport network that sits inside the core networks. Each Member State is required to propose these with a view to their legal adoption by 2030. In practice, these routes are being designated now and the work of the National Infrastructure Commission on Cambridge-Milton Keynes-Oxford ("CAMKOX")¹³ rail link, Midlands Connect and Transport for the North,¹⁴ is identifying integral route improvements that sit within this initiative. These TEN-T core and

⁹ S. Piattoni and L. Polverari (eds), *Handbook on Cohesion Policy in the EU* (Edward Elgar, 2016).

¹⁰ See <http://www.eltis.org/> [accessed 10 October 2017].

¹¹ See <https://ec.europa.eu/inea/en/connecting-europe-facility> [accessed 10 October 2017]; http://ec.europa.eu/transport/infrastructure/tentec/tentec-portal/site/index_en.htm [accessed 10 October 2017].

¹² See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/138382/ten-t-awards-list.pdf [accessed 10 October 2017].

¹³ National Infrastructure Commission, "The National Infrastructure Commission's interim report into the Cambridge—Milton Keynes—Oxford corridor" (2017).

¹⁴ Transport for the North, "Strategic Transport Plan" (2017).

comprehensive networks will be accompanied by similar energy networks that are currently being developed and implemented.

So far there has been no mention of the effects of Brexit on the designation of these networks nor the support funding that accompanies their design and implementation. Further, supplementary funding for these and other projects made available to the UK through the European Investment Bank and the European Fund for Strategic Investments (the central pillar of the EC's Investment Plan—the so-called “Juncker Plan”) will not be available.¹⁵ Also, as these routes are legally defined through regulations, there has been no need to take the principle of development through the UK Parliament. Without these EU Regulations, each infrastructure scheme will have to be considered on its merits and return to a more traditional planning inquiry approach where the principle of development is tested. There may be some optimism that the need to ensure good transport links between Ireland and the European mainland would support some specific scheme funding across the UK, as there is in Switzerland. However, the EC also has a priority for short sea shipping and this may be beneficial for transport connections to be maintained between Ireland and France, Spain and Portugal.

What else may be lost? The ending of free movement of labour means that arrangements for staff moving between countries and agreements on professional recognition may need to be changed. Other losses include access to the European Investment Bank, where the UK has been a very great user of its services and the UK loans book is one of the largest held by the bank. In diplomacy, the working together of all the EU embassies around the world to support common positions and mutual support will be lost. Finally, there will be a loss of rural subsidies that have been specifically negotiated between the EU and the WTO. Once the UK has left the EU, it will have to negotiate arrangements with the WTO which all 163 other Members will need to agree and these are very unlikely to include the rural subsidies which will be lost as a result.¹⁶

What will be foregone after Brexit?

While much of the focus will be on what will be lost or need to be renegotiated, what may be overlooked in Brexit discussions are those matters that are currently under discussion for adoption in 2021 in the next programme cycle. The definition of the comprehensive transport networks across the EU, as mentioned above, will be one.

A second important programme is the current development of a spatial investment plan for Europe to be adopted post-2030. This is bringing together the infrastructure plans and other major policy proposals for single funding and delivery programmes such as those already adopted in other parts of the EU's territory. Currently these have been agreed for the Baltic Sea, the Danube, the Adriatic and the Alpine regions.¹⁷ Each of these spatial agreements comprise horizontal and vertical programmes between the levels of the State and between States and these are approved by the European Parliament and Council of Ministers. In determining which areas will have investment priority, the UK would have been part of this discussion and, based on experience, would probably have been very successful in securing investment programmes to support delivery. However, even the discussions about this approach are now excluding the UK on a practical basis. These discussions are also extending to heritage, tourism and cultural policy, and affordable housing areas which again the UK would have expected to have a major input.

Although the EC attempted to develop a spatial plan for the EU's territory in the 1990s, this was not adopted following the UK's challenge to the Commission's legal powers. This initiative was accompanied

¹⁵ See <http://www.eib.org/efsi/efsi-projects/>; https://europa.eu/newsroom/events/president-junckers-state-union-speech-2017_en [accessed 10 October 2017].

¹⁶ J. Morphet, *Beyond Brexit* (Bristol: Policy Press, 2017).

¹⁷ See http://ec.europa.eu/regional_policy/en/newsroom/news/2016/12/16-12-2016-the-commission-publishes-the-first-ever-single-report-on-the-implementation-of-eu-macro-regional-strategies [accessed 10 October 2017]; http://ec.europa.eu/regional_policy/en/policy/cooperation/macro-regional-strategies/ [accessed 10 October 2017].

by a review of the planning systems including regulations and policies in each Member State. The Commission has now resumed this work to support the emerging plan and, by 2030, the EU could be on its way to a common planning system across its territory.¹⁸ Finally, in the spatial planning sphere, the EU currently has a model integrated territorial investment programme approach¹⁹ that is voluntary and provides a basis for planning and delivery in combined authorities and functional economic areas. These are similar to spatially configured strategic economic plans currently prepared by Local Enterprise Partnerships but would need to be democratically approved and linked to delivery programmes. The UK has one of these in Cornwall²⁰ and they could have provided a useful method of linking strategic spatial planning, investment and delivery.

Finally, not much spoken of, but in the background, has been the EU's macro-prudential economic framework which is within the competence of the EC.²¹ Here, since 2010 there have been six-monthly reviews of the UK's performance against four principal areas of defined weakness in the economy—planning, housing, infrastructure and youth skills. Without the EU's commentary and monitoring of the UK's actions, there may be fewer short term measures but there will also be a loss of focus as other parts of the economy vie for attention (e.g. the automotive sector).

How will the EU change without the UK?

How will the EU change without the UK's input and policy advice? The UK, once outside this system will have to spend time catching up, particularly where there is trade in goods and services and there may be additional costs in doing this. The current position of the US President in relation the environment may also mean that the EU becomes tighter and more cohesive in relation to this policy area and its progress may be more rapid than the UK would prefer. While the UK is assuming that the EU is dominated by thoughts of Brexit, it may be about prioritising how to build its own strength rather than how to retain the UK as a trading partner.

The environment will be a consistent factor in the relationship between the UK and the EU whatever happens over the coming years. This will be driven by physical proximity, the UN and WTO overarching treaty frameworks and lastly the need to trade. People in the UK do not want to see their environment downgraded (as the recent challenges to the Government on air quality have demonstrated) and UK beaches have slipped down the EU ranking again. As the EU steadily moves towards more consistent and integrated spatial planning frameworks and regulation, the UK may be nudged into moving in the same direction to reduce wider costs, although problems are likely to return on the planning issues surrounding strategic infrastructure. We will see when these issues emerge onto the agenda as they are not there yet.

Planning and Brexit: Ways to engage with change?

In engaging with the negotiations and providing informed comment and advice about the likely effects on planning legislation and outcomes, what are the issues to consider?

- **Keeping up to date:**

This is difficult when so many dimensions of the negotiations are being conducted at the same time and planning is spread across so many different government departments. Working with organisations such as UKELA is a practical approach;

¹⁸ See <https://www.espon.eu/> [accessed 10 October 2017].

¹⁹ See http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/iti_en.pdf [accessed 10 October 2017]; http://ec.europa.eu/regional_policy/en/information/publications/reports/2015/scenarios-for-integrated-territorial-investments [accessed 10 October 2017].

²⁰ See <https://www.cioslep.com/strategy/iti-strategy> [accessed 10 October 2017].

²¹ See https://ec.europa.eu/info/strategy/european-semester/framework/europe-2020-strategy_en [accessed 10 October 2017]; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/610202/PU2073_National_Reform_Programme.pdf [accessed 10 October 2017].

- **Transparency:**

The EU is providing more information about the status of negotiations, their positions and those of the UK;²²

- **EU as minimum standards:**

The Bill suggests that the current EU standards will be minima and that devolved nations can exceed them. Where would these actions be useful?

- **The role of SIs and how to engage with their framing:**

This will be time-consuming and the Parliamentary procedures for engaging in changes to proposed SIs will be difficult—some organisations are seeking a reform of this process to allow more debate;

- *What will be the mechanisms for establishing mutual recognition of standards and compliance?*

- **What will be the need for intermediary or transitional arrangements?**

This is particularly an issue for specific sectors, e.g. chemicals, pharmaceuticals, nuclear;

- **Are there any opportunities from Brexit?**

Some have suggested that Brexit will provide opportunities for improved legislation and processes—how will this be achieved in the short run?

²² See https://ec.europa.eu/commission/brexit-negotiations_en [accessed 10 October 2017].