Review of the Balance of Competences Call for Evidence

Environment and Climate Change: Legal Annex

Introduction

The Treaty on the European Economic Community (EEC Treaty) was signed in Rome on 25 March 1957 – along with the Treaty establishing the European Atomic Energy Community ('EAEC Treaty' or 'Euratom') – and entered into force on 1 January 1958. The EEC Treaty had a number of economic objectives, including establishing a European common market. Since 1957 there has been a series of Treaties extending the objectives of what is now the European Union beyond the economic sphere. The amending Treaties (with the dates on which they came into force) are:

- the Single European Act (1 July 1987), which provided for the completion of the single market by 1992;
- the Treaty on European Union – the Maastricht Treaty (1 November 1993), which covered matters such as justice and home affairs, foreign and security policy, and economic and monetary union; and
- the Treaty of Amsterdam (1 May 1999), the Treaty of Nice (1 February 2003) and the Treaty of Lisbon (1 December 2009), which made a number of changes to the institutional structure of the EU.

Following these changes, there are now two main Treaties which (together with the EAEC Treaty) set out the competences of the European Union:

- the Treaty on European Union (TEU);
- the Treaty on the Functioning of the European Union (TFEU).

The Union must act within the limits of competence conferred on it by the Member States. Articles 3 to 6 TFEU set out the categories of exclusive, shared and supporting competencies into which EU policies and actions fall. In the majority of contexts, competence is shared between the EU and Member States; however there are certain areas where the EU has only a supporting competence and limited situations where its competence is exclusive.

Article 2(2) TFEU provides that in areas of shared competence the Member States may exercise their competence to the extent that the EU has not exercised its competence. The areas of shared competence are set out in Article 4(2) TFEU and include:

> (a) internal market; . . .
>
> (e) environment; . . .

This means that to the extent that the EU has enacted legislation relating to the environment, the UK generally does not have competence to act other than in accord with that legislation. The effect of EU harmonising legislation is that Member States must enact domestic legislation to give effect to it and remove national legislation that is inconsistent with it. However, where EU environmental legislation sets out minimum standards to be attained, Member States may adopt more stringent

protective measures provided that these are compatible with the Treaties and notified to the Commission (Article 193 TFEU).

The EU also has exclusive competence in (amongst others) the areas of the customs union, the common commercial policy and the conservation of marine biological resources under the common fisheries policy (Article 3(1)(a), (d) and (e) TFEU). The UK does not therefore have competence to act in relation to trade with third countries when measures are made in reliance on these Treaty bases.

The EU has supporting competence in (amongst others) the area of protection and improvement of human health (Article 6(a) TFEU).

In the areas of development cooperation and humanitarian aid (which are relevant to certain aspects of environment-related international aid), the EU has competence to carry out activities and conduct a common policy, but the exercise of that competence does not result in Member States being prevented from exercising their own competence (Article 4(4) TFEU).

The EU legislative process

EU legal acts such as Regulations and Directives are generally adopted by what, after the Lisbon Treaty, is known as the 'ordinary legislative procedure' (formerly known as the 'co-decision procedure'). In most cases, only the European Commission can propose a new legal act. But it cannot become law unless it is jointly adopted by the Council (which is composed of ministers from each Member State) and the European Parliament. Under this procedure, the Council acts on the basis of qualified majority voting (QMV), where only a specified majority of votes is required and the share of votes of each Member State reflects its population size. The Treaties also set out a small number of cases where EU legal acts are adopted under different procedures (referred to as 'special legislative procedures').

Some Treaty Articles, such as those promoting free movement or prohibiting anti-competitive practices within the EU, are of direct effect in themselves. Other Articles provide the legal base on which secondary EU legislation (Regulations and Directives) made by the European Parliament and Council can be founded. Secondary legislation may delegate power to the Commission to make further legislation (see Articles 288 to 290 TFEU). Since the Treaty of Lisbon, EU tertiary legislation must be in the form of either delegated acts or implementing acts.

Delegated acts supplement or amend non-essential elements of secondary legislation. Controls over the Commission are provided through powers of the Council or European Parliament to revoke or object to particular delegated acts.

There are several types of procedure for the other type of tertiary legislation, implementing acts, but the most common is where the Commission can act with control provided by Member States in the form of an expert committee. In this case there are two mechanisms for adoption of an implementing act – the advisory procedure and the examination procedure. The advisory procedure gives minimal Member State control over the Commission; the examination procedure gives greater control to Member States and includes the use of an appeals committee if a qualified majority vote (QMV) by Member States delivers a negative opinion on the

Commission's proposals. If under the examination procedure the committee of Member States gives no opinion (i.e. there is no QMV for or against the proposal) then the Commission can chose to adopt the measure (subject to certain constraints). This can work in the UK's interest if we are in a minority in favour of a proposal, but equally works against us if we are in the minority against.

Development of Competence

The original EEC Treaty contained no reference to environmental matters. From 1958 to 1972 any environmental considerations in legislation were incidental to the primary purpose of ensuring the free movement of goods. For example, Council Directive 70/157/EEC relating to the permissible sound level and the exhaust system of motor vehicles was made under Article 100 EEC (now Article 114 TFEU) which conferred powers "for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."

From 1972 until the entry into force of the Single European Act in 1987, EU environmental policy developed in the absence of any specific environmental Treaty bases, primarily through the use of Articles 100 and 235 EEC (now Articles 114 and 352 TFEU). Article 100 EEC could only be used to address differences in national environmental rules which affected the functioning of the common market, while Article 235 EEC allowed legislation to be made which was "necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers." Both Articles required unanimous voting in Council (as the general power contained in what is now Article 352 TFEU still does).

At the time, the objectives of the EEC Treaty (as set out in Article 2 EEC) did not include an express reference to the environment, referring only to the promotion, through the establishment of the common market, of "a harmonious development of economic activities" and "a continuous and balanced expansion". However, a 1973 Declaration by Ministers launched the first Environmental Action Programme, noting that those objectives

> "cannot now be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment" ([1973] OJ C112/1, preamble).

In 1985 the European Court of Justice (ECJ) in Case C-240/83 *ADBHU* upheld the validity of a directive on the disposal of waste oils made using Articles 100 and 235 EEC on the grounds that:

> "The directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives" (paragraph 13).

This judicial identification of environmental protection as an essential EU objective confirmed that Article 235 EEC could be used to form the sole basis for EU environmental measures.

In 1987 the Single European Act amended the EEC Treaty so as to introduce (amongst other things) specific Treaty powers for EU environmental action (Articles 130r, 130s and 130t EEC). The new provisions enshrined principles that remain central to EU environmental law:

> "(1) Action by the Community relating to the environment shall have the following objectives:
>
> - to preserve, protect and improve the quality of the environment;
>
> - to contribute towards protecting human health,
>
> - to ensure a prudent and rational utilization of natural resources.
>
> (2) Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies" (Article 130r(1) and (2) EEC).

These powers could be exercised by the Council acting unanimously or, where the Council so decided, by QMV (Article 130s EEC). The European Parliament had a right to be consulted on proposals.

Under Article 130t EEC Member States retained the right to maintain or introduce more stringent protective measures, provided that such measures were compatible with the Treaty.

In 1993 further changes to EU competence in relation to the environment were introduced by the Maastricht Treaty. Article 2 EC now provided that the aims of the EU should include the promotion of "sustainable and non-inflationary growth respecting the environment", while Article 3 EC stated that the EU's activities should include "(k) a policy in the sphere of the environment". A new objective of "promoting measures at international level to deal with regional or worldwide environmental problems" was added to the objectives set out in Article 130r(1) EC. The principles on which environmental action should be based were expanded so as to "aim at a high level of protection taking into account the diversity of situations in the various regions of the Community" and to "be based on the precautionary principle", while "environmental protection requirements must be integrated into the definition and implementation of other Community policies" (Article 130r(2) EC).

Following the Maastricht Treaty, environmental legislation could be adopted by the Council by QMV if the European Parliament agreed, or by the Council acting by unanimity if the European Parliament did not (Article 189c EC). The Council also retained the right to act by unanimity in relation to:

> "- provisions primarily of a fiscal nature;
>
> - measures concerning town and country planning, land use with the exception of waste management and measures of a general nature, and management of water resources;

- measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply" (Article 130s(2) EC).

The Maastricht Treaty introduced the concept of general action programmes setting out priority objectives to be attained (Article 130s(3) EC, now Article 192(3) TFEU), to be adopted under the co-decision procedure. Article 130t EC was also modified; although Member States retained the right to maintain or introduce more stringent protective measures in areas where harmonisation measures had been adopted at EU level, these now needed to be notified to the Commission (whose approval is needed before they came into force (see Article 114(6) TFEU)).

The 1999 Amsterdam Treaty amended the EU's environmental competence in several ways:

- amending the wording of the EU's objectives in Article 2 EC to introduce a direct reference to promoting sustainable development: "a harmonious, balanced and sustainable development of economic activities, . . . sustainable and non-inflationary growth, . . . a high level of protection and improvement of the quality of the environment . . ."

- inserting a new provision on integration: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development" (Article 3c EC, renumbered Article 6 by the Treaty of Nice)

- making the co-decision procedure the standard decision-making procedure for environmental legislation (Article 35 of the Treaty of Amsterdam).

Current State of Competence

The Treaty of Lisbon did not introduce significant changes in the EU's competence in relation to the environment. The provisions governing the environment in Articles 191 to 193 TFEU are essentially the same as those previously contained in the Treaty establishing the European Community as last amended by the Treaty of Nice, with the exception that the objectives of EU policy on the environment in Article 191(1) now refer to "combating climate change" in the context of promoting measures at international level to deal with regional or worldwide environmental problems. The addition of this reference does not extend the actual scope of the powers.

Since the entry into force of the Treaty of Lisbon in 2010, environmental legislation is made under the ordinary legislative procedure except in relation to those measures reserved for the Council acting unanimously by Article 192(2) TFEU. These exceptions follow closely those introduced by the Maastricht Treaty (in Article 130s (2) EC, quoted above).

Article 11 TFEU contains an identical provision on integration of environmental protection requirements into the definition and implementation of EU policies to the one previously set out in Article 6 EC. This is now only one integration provision

among the several set out in Articles 7 to 11 TFEU, which cover subjects such as the promotion of a high level of employment and the combating of discrimination, although it remains arguably the most strongly-worded.

Environmental protection is also referred to in the provisions relating to the internal market, which Article 3(3) TEU states:

> "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment".

Article 114(3) TFEU further provides that, in relation to measures which have as their object the establishment and functioning of the internal market:

> "The Commission, in its proposals . . . concerning health, safety, environmental protection and consumer protection, will take as its base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective."

Gibraltar, Isle of Man and the Channel Islands

In general, EU environmental law applies to Gibraltar (under Article 355(4) TFEU). Gibraltar is also bound by measures adopted under Article 114 TFEU that are intended to harmonise conditions of competition. It is however not bound by provisions relating to the movement of goods, including measures adopted under Article 114 TFEU that are intended to promote the free movement of goods(and it should be noted that Article 114 and its predecessors provided the legal base for much of the original legislation in the environment field).

The Isle of Man and the Channel Islands are generally not bound by EU environmental law except to the extent, if any, that it concerns customs rules, quantitative restrictions and levies, and other import measures in respect of agricultural products (see Article 355(5)(c) TFEU).

Sector-Specific Legislation

Climate change

The earliest institutional documents evidencing European Community interest in the problem of global warming are a European Parliament Resolution of 1986 ([1986] OJ C255/272), a Commission Communication of 1988 (COM/88/656 FINAL) and a Council Resolution of 21 June 1989 on the greenhouse effect and the Community ([1989] OJ C183/4). Soon after, the European Council in June 1990 urged "all countries to introduce extensive energy efficiency and conservation measures and to adopt as soon as possible targets and strategies for limiting emissions of greenhouse gases" and requested concrete proposals from the Commission "in particular, measures relating to carbon dioxide emissions, with a view to establishing a strong Community position in preparation for the second World Climate Conference." (European Council, Dublin 25-26 June 1990, Annex I, page 22). In October 1990 the Environment and Energy Council looked for action to stabilise CO_2

emissions in the Community at 1990 levels by 2000 (in the context of negotiations for international agreement to that effect, which culminated in the adoption of the United Nations Framework Convention on Climate Change in Rio in 1992).

The earliest EU legislation directly on climate change was Council Decision 93/389/EEC for a monitoring mechanism of Community CO_2 and other greenhouse gas emissions (made under what is now Article 192 TFEU). Council Decision 93/500/EEC (made under what are now Articles 192 and 352) also authorised the start of the Altener Programme on the promotion of renewable energy.

The cornerstone of current EU legislation on climate change is Directive 2003/87/EC, which established the EU's Greenhouse Gas Emissions Trading Scheme ("EU ETS"). This was amended by Directive 2004/101/EC (known as 'the Linking Directive') to allow the EU ETS to use carbon credits generated by the flexible mechanisms of the Kyoto Protocol; Directive 2008/101/EC which included international aviation emissions within the scope of the EU ETS; and Directive 2009/29/EC which modernised the scheme and made detailed provision for the period to 2020 and beyond. These Directives were all made under what is now Article 192 TFEU.

The EU ETS covers energy intensive industry, including electricity generation, which is responsible for approximately 45% of greenhouse gas emissions in the EU. For emissions not covered by the EU ETS, Decision No 406/2009/EC of the European Parliament and of the Council lays down the minimum contribution of Member States to meeting the greenhouse gas emission reduction commitment of the Community (currently a reduction of 20%) for the period from 2013 to 2020, in the fields of energy (including fuel combustion and fugitive emissions), industrial processes not covered by the EU ETS, solvents and product use, agriculture and waste.

These measures were part of the EU's "20-20-20" climate and energy package, which aimed at:

- a 20% reduction in EU greenhouse gas emissions from 1990 levels;

- raising the share of EU energy consumption produced from renewable resources to 20%;

- a 20% improvement in the EU's energy efficiency.

The provisions on renewable energy and energy efficiency will be dealt with in the Energy review, together with the 'fourth element' of the strategy: Carbon Capture and Storage.

The EU and its member states also play a leading role in international climate action, particularly in the context of negotiations under the United Nations Framework Convention on Climate Change and the related Kyoto Protocol. As this is an area of shared competence (as explained above), in which both the EU and Member States are Parties to the treaties, the EU position has, to date, been agreed in the form of Council Conclusions encapsulating both matters within EU competence (such as the minimum standards for emissions reductions in sectors covered by the EU ETS) and matters of Member State competence (such as finance issues). The EU and its Member States negotiate as a 'bloc' with other negotiating blocs (such as the

developing countries' 'Group of 77 and China') by means of a team of negotiators from both the Commission and Member States, chosen by reference to expertise rather than the delineation of competences. So, for example, at recent UNFCCC conferences the EU bloc has been represented by lead negotiators from the Commission, UK, France, Germany and Poland, and by the Climate Change Commissioner and Ministers from EU Member States.

Water and marine

There is a considerable body of EU legislation concerning the environmental protection of fresh water and the sea.

Bathing Water

The first Bathing Water Directive 76/160/EEC (made under what are now Articles 114 and 352 TFEU) was one of the earliest pieces of EU environment law, aimed at improving the quality of bathing waters. It was replaced by a revised Directive 2006/7/EC (made under what is now Article 192 TFEU) in 2006.

In the 1980s the Commission successfully brought infringement proceedings against the UK for under implementation of the Directive, one example of which related to the non-designation of Blackpool beach as a bathing water because user numbers were relatively low compared to those at southern EU resorts. After this a test for "historic" usage and facilities for bathing came into play as a criterion for designation. The Directive is monitored by the European Topic Centre for Water, which is part of the European Environment Agency, and is due to be fully reviewed by the Commission in 2020.

Shellfish Waters

The original Shellfish Waters Directive 79/923/EEC (made under what are now Articles 114 and 352 TFEU) had two aims, to protect shellfish growing waters and to contribute to public health by ensuring shellfish were safe to eat. It will be repealed in December 2013 when it is to be replaced by the Water Framework Directive (see below). However, while the Water Framework Directive covers the ecological health of the shellfish, it does not make specific provision for shellfish waters, and especially for the commercially significant microbial standard, which has caused uncertainty and led to calls by industry bodies for a replacement Shellfish Waters Directive. Such a directive might also cover viruses, which are an emerging issue.

Drinking Water Directive

The Drinking Water Directive 80/778/EEC (made under what are now Articles 114 and 352 TFEU) required Member States to set standards for water intended for human consumption and to undertake regular monitoring of supplies. It replaced in 1988 by the second Drinking Water Directive 98/83/EC (made under what is now Article 192 TFEU) which reduced the number of parameters that Member States were obliged to monitor.

Urban Waste Water Treatment Directive

The Urban Waste Water Treatment Directive 91/271/EEC (made under what is now Article 192 TFEU) requires the collection and treatment of urban waste water

(domestic waste water from kitchens and bathrooms, industrial waste water discharged into sewers, and rainwater run-off from roads, roofs etc.).

Compliance with the Urban Waste Water Treatment Directive is one of the most challenging directives for Member States to fully comply with. In the UK, this is partly due to the Victorian infrastructure legacy involving many Combined Sewer Overflows. The UK has faced a number of infractions under this Directive and lost a recent action brought by the Commission (Case C-301/10) relating to the implementation of the Directive in London and Whitburn where spills from Combined Sewer Overflows were considered too frequent.

Environmental Quality Standards Directive

The Environmental Quality Standards Directive 2008/105/EC (made under what is now Article 192 TFEU) is designed to replace the existing EU legislation in this area (derived from the Dangerous Substances Directive 76/464/EEC and its daughter directives which deal with the control of pollution of the aquatic environment by dangerous substances). Its main function is to establish environmental quality standards for a list of 33 'priority substances'. It sets out the 'priority substances', which includes a subset of 'priority hazardous substances' which are incorporated into the Water Framework Directive. This list of priority substances is subject to review every four years.

There is currently a Commission proposal to amend the Environmental Quality Standards Directive by making changes to environmental quality standards and by introducing new priority substances and priority hazardous substances.

Nitrates Directive

The Nitrates Directive 91/676/EEC (made under what is now Article 192 TFEU) aims to reduce diffuse nitrate pollution of agricultural origin, and in so doing to promote more efficient use of nitrate-containing fertilisers. It requires Member states to designate as Nitrate Vulnerable Zones (NVZs) areas of land that drain into polluted waters, or waters at risk of pollution from nitrates, and to set up an Action Programme imposing certain measures in these zones. The Action Programme and the NVZ designations are reviewed every four years. The key Action Programme measures:

- limit the amount of livestock manure farmers in NVZs may spread on farm;

- prohibit the spreading in the NVZs of organic manures and chemical fertiliser at specified times ("closed periods") when their use to plants is low and the risk of nitrate loss to water is high (in the UK, this is, broadly, autumn and winter);

- require farmers in the NVZs to store organic manure in specified ways, and to maintain sufficient slurry storage capacity to hold slurry produced on the farm during the closed period (slurry storage construction standards are specified in other domestic regulations originally predating the NVZs);

- plan nitrate applications to farmland in NVZs.

Farmers are required to record their plans, and keep details of when and how much fertiliser they apply. Over time, designated areas have grown, and the obligations imposed on farmers have become more onerous. However, at the last review of NVZs and Action Programme measures in England, there was a small net reduction in areas designated as NVZs, and there were only minor changes to the Action Programme, including a small reduction in certain record-keeping requirements. The cost to farmers of implementation is a continuing issue.

Water Framework Directive

The Water Framework Directive 2000/60/EC (made under what is now Article 192 TFEU) is intended to provide an integrating framework to coordinate action under the existing, fragmented EU legislation applicable to water, which was designed to address specific issues in particular categories of water, as well as addressing issues and categories of water that were not already covered by existing EU law. The stated aims of the Directive include protecting and enhancing the status of water bodies, in particular by reducing or phasing out discharges of priority substances, promoting sustainable water use, and mitigating the effects of floods and droughts.

The Water Framework Directive establishes a strategic planning process based on a six year cycle of assessment, analysis, objective setting and planning and delivery of improvement measures. One of the key objectives is for all water bodies to reach at least 'good' status by 2015.

The Directive requires the relevant member states to produce a single coordinated River Basin Management Plan where a river basin district falls within the territory of more than one member state. That is relevant to the UK because there is one such district, straddling Northern Ireland and the Republic of Ireland. The required River Basin Management Plans provide a record of the planning process and set out objectives for each water body. The Directive also includes an economic component that allows for cost to be considered in the decision making process; it requires Member States to make provision for public involvement in the planning process; it recognises and makes allowance for essential uses of the water environment that may prevent the achievement of the default objective of good status for all water bodies; and it allows for differences between the environments of different Member States. As a framework directive, it is supported by a library of guidance documents on various aspects of implementation in the development of which UK has played a substantial role

A number of other Directives have been or will be repealed by the Water Framework Directive because it now supersedes them (for example shellfish waters). Other Directives such as the Urban Waste Water Treatment Directive and the Nitrates Directive remain key instruments for meeting some of the objectives of the Water Framework Directive, although it is thought that incorporation into the Water Framework Directive could provide helpful clarity as to the relationship between them.

In terms of future proposals, the recent Commission document "Blueprint to Safeguard Water Resources" (COM/2012/0673) concluded that existing legislation on water quality was sufficient and the focus now should be on full implementation of

it rather than development of any new legal measures. It also proposed new guidance on a number of areas to clarify obligations.

Floods Directive

Following severe flooding across Europe in 2002, the French and Netherlands Governments put forward a proposal for a flood management Directive in 2004. The proposal focused on a transnational agreement on managing flooding of major rivers particularly with regard to the effects on downstream nations but had wider implications. The UK was neutral about the proposal for a transnational agreement but opposed the wider implications; a non-legally binding document in the form of a Floods Action Plan was agreed upon.

In January 2005 the EU expressed an intention to propose a Floods Directive. The Commission had wanted flood management to be an integral part of the Water Framework Directive and a new Floods Directive was seen as a means of achieving that link. The UK opposed the new Directive on the basis that the Directive was not necessary to achieve effective flood management but supported the aspects of transnational co-operation which would not have affected the UK.

Directive 2007/60/EC on the assessment and management of flood risks (made under what is now Article 192 TFEU) entered into force in 2007. The Directive goes beyond establishing transnational co-operation and sets a six yearly cycle of actions governing how Member States manage all flood risks.

Marine

The Marine Strategy Framework Directive 2008/56/EC (made under what is now Article 192 TFEU) establishes a framework within which Member States must take measures to maintain or achieve 'good environmental status' in the marine environment by 2020. Under this Directive, marine strategies must be developed by Member States which include environmental targets and a programme of measures designed to achieve or maintain good environmental status.

Recommendation 2002/413/EC of the European Parliament and of the Council on Integrated Coastal Zone Management set out principles for good coastal planning and management and measures to implement them. In March 2013 the Commission published a proposal for a Directive establishing a framework for integrated coastal zone management, as well as maritime spatial planning, aimed at promoting sustainable growth of maritime and coastal activities and the sustainable use of coastal and marine resources. The proposal provides for the establishment and implementation by Member States of maritime spatial plans and integrated coastal management strategies.

Air quality

The National Emission Ceilings Directive 2001/81/EC (made under what is now Article 192 TFEU) sets upper limits for each Member State for emissions of certain atmospheric pollutants (sulphur dioxide, nitrogen oxides, volatile organic compounds and ammonia) to be met by 2010. A number of Member States have yet to comply with their ceilings.

Directive 2008/50/EC on ambient air quality and cleaner air for Europe sets mainly health based standards for various pollutants in outdoor air such as particulate matter and nitrogen dioxide, and prescribes the assessment, public information and annual reporting arrangements Member States must maintain. This Directive replaced various other directives dealing with limit values. However Directive 2004/107/EC, which sets emission target values and criteria for assessment of concentrations of substances such as arsenic and mercury, is still in force. Both of these Directives were made under what is now Article 192 TFEU.

In light of widespread compliance problems across Member States, the Commission is currently considering its approach to enforcement. Making more progress in achieving the current air quality standards is one of the objectives of the Commission's wider review of air quality policies, due to conclude in October 2013.

In relation to nitrogen dioxide there are special provisions in Directive 2008/50/EC permitting postponement of the 2010 compliance deadline by five years on presentation of air quality plans acceptable to the Commission. However, air quality plans for zones in various Member states have been rejected. On 1 May 2013 the Supreme Court ruled that the UK was in breach of its obligation under Directive 2008/50/EC not to exceed the limit value for nitrogen dioxide. The Supreme Court also decided to make a reference to the European Court of Justice to seek guidance on the effect of the obligation on Member States and national courts in the event that limit values have not been met.

Industrial pollution

The first EU legislation aimed at preventing or reducing industrial pollution was Directive 84/360/EEC on combating air pollution from industrial plants (made under what are now Article 114 and 352 TFEU). This was repealed and replaced by Directive 96/61/EC on integrated prevention and control of pollution (IPPC), later codified as Directive 2008/1/EC. IPPC, based largely on the approach established in the UK by the Environmental Protection Act 1990, addresses potentially significant emissions to air water and land and also requires measures to be taken to minimise waste and to use energy efficiently. It was recast by the Industrial Emissions Directive 2010/75/EU (made under what is now Article 192 TFEU).

The Industrial Emissions Directive repeals the following directives from 7 January 2014:

- Directive 78/176/EEC on disposal of titanium dioxide industrial waste;

- Directive 82/883/EEC on the surveillance and monitoring of titanium dioxide waste;

- Directive 92/112/EEC on the reduction of titanium dioxide industrial waste;

- Directive 1999/13/EC reducing emissions of volatile organic compounds;

- Directive 2000/76/EC on waste incineration.

Directive 2001/80/EC on large combustion plants will be repealed by the Industrial Emissions Directive from 1 January 2016.

In all these cases, the repeals are made because the Industrial Emissions Directive has incorporated the requirements of the directives virtually without change (Directives 1999/13/EC, 2000/76/EC), in much simplified form (the three Directives concerning titanium dioxide) or in significantly tighter form (Directive 2001/80/EC)

Commission Implementing Decisions have already been taken under the Industrial Emissions Directive establishing conclusions on best available techniques (BAT) for the glass, iron and steel, cement and lime, and tanning industry sectors. These Commission Implementing Decisions have been taken after qualified majority vote at the end of an information exchange process established under the Industrial Emissions Directive (but similar to that under the IPPC Directive). Over the remainder of this decade and into the next, this process will extend to some 25 other industry sectors.

Pollutant emissions from the larger installations subject to the industrial emissions Directive have to be reported annually, under Regulation 166/2006, which established a European Pollutant Release and Transfer Register.

Chemicals

The Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation 1907/2006 (made under what is now Article 114 TFEU) provides for controls over the manufacture, supply and use of chemicals. The Regulation entered into force on 1 June 2007 with its provisions being phased-in over 11 years. The aim of REACH is to improve the protection of human health and the environment through the better and earlier identification of the intrinsic properties of chemical substances.

Before REACH the EC legislative framework for chemical substances was a patchwork of many different directives and regulations which had developed historically. There were different rules for “existing” and “new” chemicals. However, this system did not produce sufficient information about the effects of the majority of existing chemicals on human health and the environment.

REACH applies to all chemicals imported or produced in the EU. When REACH is fully in force it will require all companies manufacturing or importing chemical substances into the EU in quantities of one tonne or more per year to register these substances with the European Chemicals Agency in Helsinki. Since REACH applies to some substances that are contained in objects, any company importing goods into Europe could be also be affected. The European Chemicals Agency will manage the technical, scientific and administrative aspects of the REACH system.

Registration also involves collecting and sharing data on the properties and effects of substances when used in certain ways, so that:

- buyers and users are aware of the risks of using such substances,

- dangerous substances/uses can be identified and controlled, and

- the repetition of testing (including animal testing) can be minimised.

Supply of substances to the European market which have not been pre-registered or registered is illegal. Following the submission of dossiers prepared by industry as part of the registration process, the European Chemicals Agency sample and evaluate substances, along with national authorities. A decision may be taken to impose restrictions on the supply or use of the substance or to classify it as a 'substance of very high concern', requiring authorisation for its supply and use. REACH also calls for the progressive substitution of the most dangerous chemicals when suitable alternatives have been identified.

Nanotechnologies

Nanomaterials are currently regulated at EU level across several areas of legislation. The definition of "substances" in the REACH Regulation 1907/2006 applies to nanomaterials, making them subject to this legislation. Registration dossiers, based on the amount of substance that is manufactured or imported into the EU, may need to include information on the properties and risks of a material in nanoform separate to what is provided in respect of the material in bulk form. The information gathered under REACH is intended to inform decisions on whether substances should be subject to authorisation or restrictions, as well as the application of other legislation, including on product and worker safety. The European Chemicals Agency and the Commission are closely involved in the gathering and dissemination of this information under REACH, and have provided guidance on how the legislation applies to nanomaterials even though it does not, at present, make specific provision for them.

Nanomaterials may also be subject to the Classification, Labelling and Packaging Regulation 1272/2008 (made under what is now Article 114 TFEU) where they are considered hazardous, meaning that they must be classified and labelled. Again these processes are overseen by the European Chemicals Agency, which is responsible for an EU-wide inventory of such materials.

Commission Recommendation 2011/696/EU puts forward a definition of "nanomaterial" which Member States, EU institutions and economic operators are invited to use when adopting and implementing legislation, policy and research in this area. This was in response to a 2009 call from the European Parliament for the introduction of a definition in EU legislation. Although the definition is not binding, it is an indication that further, more tailor-made legislation or legislative amendments are expected in relation to nanomaterials at the EU level. For example, the Commission has indicated that, following a review of REACH, it is assessing whether to propose amendments to include a definition of nanomaterials and to make specific provision for substances manufactured, imported or used in this form.

Import and export of hazardous chemicals

The UK and the EU are Parties to the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, which is applied in the EU by Regulation 649/2012 concerning the export and import of dangerous chemicals (made under Articles 192 and 207 TFEU). It also implements certain aspects of the Stockholm Convention on persistent organic pollutants.

Control of major accident hazards

The original 'Seveso' Directive 82/501/EEC on major accident hazards of certain industrial activities was based on what are now Articles 114 and 352 TFEU. The system was most recently adapted in 2012, through the 'Seveso III' Directive (2012/18/EU, made under what is now Article 192 TFEU), mainly to reflect changes to the EU's chemicals classification criteria introduced by Regulation 1272/2008 on the classification, labelling and packaging of substances and mixtures.

Pesticides

The first EU legislation concerning pesticides, Council Directive 79/117/EEC prohibiting the placing on the market and use of plant protection products containing certain active substances, was made under what is now Article 114 TFEU. It was repealed and replaced by Regulation 1107/2009 concerning the placing of plant protection products on the market, a measure made under the Treaty bases relating to the Common Agricultural Policy, the internal market and public heath (now Articles 43, 114 and 168(4)(b) TFEU). This Regulation, and a number of detailed guidance documents, sets out a two tier process of scientific risk assessment and decision-making. Active substances are assessed and approved at EU level; products containing these substances are assessed and authorised by Member States.

Regulation 396/2005 on maximum residue levels of pesticides in or on food or feed of plant and animal origin was also made under what are now Articles 43 and 168(4)(b) TFEU. In contrast, Directive 2009/128/EC establishing a framework for Community action to achieve the sustainable use of pesticides was made under what is now Article 192 TFEU.

Biocides

The Biocidal Products Directive 98/8/EC (made under what is now Article 114 TFEU) will be replaced on 1 September 2013 by Regulation 528/2012 concerning the making available on the market and use of biocidal products (made under Article 114 TFEU). The Regulation establishes a list of active substances approved for use in biocidal products and sets out the procedures for gaining approval of new substances. Recital (6) to Regulation 528/2012 states that:

> "Taking into account the main changes that should be made to the existing rules, a regulation is the appropriate legal instrument to replace Directive 98/8/EC to lay down clear, detailed and directly applicable rules. Moreover, a regulation ensures that legal requirements are implemented at the same time and in a harmonised manner throughout the Union."

Genetically Modified Organisms (GMOs)

EU legislation covers various aspects of the testing, release, use and movement of GMOs. The two main aims of the legislation are:

- to protect human health and the environment, and

- to ensure the free movement of safe GM products in the EU.

The EU legislation also implements requirements under the Cartagena Protocol to the UN Convention on Biological Diversity and requirements under the Aarhus Convention on public participation in decisions on the deliberate release into the environment and the placing on the market of GMOs.

The deliberate release of GMOs into the environment is regulated under Directive 2001/18/EC (made under what is now Article 114 TFEU). Another early area of EU legislation concerns the contained use of genetically modified microorganisms (GMMs). Directive 90/219/EEC (made under what is now Article 192 TFEU) governs the study and use of GMMs in conditions of containment and for industrial or research applications.

Concerns over the import of GM food into the EU and different approaches between Member States on how such food was labelled led to the development of further EU-wide legislation. The Traceability and Labelling Regulation 1830/2003 (made under what is now Article 114 TFEU) was adopted in order to ensure that GM products can be monitored and so that consumers and users throughout the single market are able to make informed choices. These labelling requirements are also a driver for provisions in Directive 2001/18/EC which allows Member States to take measures to avoid the unintended presence of GMOs in, for example, food crops.

Requirements on the transboundary movement of GMOs are set out in Regulation 1946/2003 (made under what is now Article 192). These include an obligation to notify and secure express consent for exports of GMOs intended for deliberate release into the environment prior to a first transboundary movement, and to provide information to the public and those outside the EU on EU practices, legislation and decisions on GMOs.

Where a GMO is proposed for environmental release as a food or feed product (e.g. a GM crop for commercial cultivation), it is considered for possible EU authorisation under Regulation 1829/2003. This cross-refers to Directive 2001/18/EC in terms of the environmental risk assessment that needs to be performed.

Waste

Council Directive 75/442/EEC on waste (made under what are now Articles 114 and 352 TFEU) introduced a definition of waste linked to national law and contained provisions requiring Member States to take steps, amongst other things, to encourage the prevention, recycling and processing of waste. It contained rules relating to waste, particularly its disposal, and provided, in accordance with the ‘polluter pays’ principle, that the cost of disposing of waste should be borne by waste holders and/or producers of products from which the waste came.

Amendments were made to the 1975 Directive by Council Directive 91/156/EEC, including a EU-wide definition of waste, and the introduction of a form of waste hierarchy that encouraged the prevention or reduction of waste production and its harmfulness above the recovery of waste or its use as a source of energy. The requirement to have a permit for certain operations was also introduced.

The 1975 Directive and its subsequent amendments were consolidated by Directive 2006/12/EC, which in turn was replaced by Directive 2008/98/EC on waste (both

made under what is now Article 192 TFEU). This 'revised Waste Framework Directive' set out for the first time a more detailed waste hierarchy, and established recycling targets for Member States.

Other EU legislation concerning waste includes:

- Directive 1999/31/EC on the landfill of waste;
- Directive 2000/76/EC on the incineration of waste;
- Regulation 1013/2006 on shipments of waste;
- Directive 94/62/EC on packaging and packaging waste;
- Directive 2000/53/EC on end-of-life vehicles;
- Directive 2012/19/EU on waste electrical and electronic equipment.

Nature protection/biodiversity

The Wild Birds Directive 79/409/EEC (subsequently codified by Directive 2009/147/EC) was adopted in 1978. It therefore originally predated the environment provisions in the Treaty and was made under Article 235 EEC (now Article 352 TFEU). The Directive requires the conservation of all species of naturally occurring wild birds and their habitats. In particular it requires special measures be taken in relation to the protection of certain species of birds, including all regularly migratory birds, including the classification of special protected areas. The Directive also requires the control of the hunting, killing, disturbance and keeping of wild birds and their eggs. The WBD has limited derogations, and these have been strictly construed by the ECJ (see, for example Case C-98/03, where the court noted that "faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories").

The Habitats Directive 92/43/EEC (made under what is now Article 192 TFEU) builds upon the Wild Birds Directive, and relates to the protection of non-avian biodiversity. It aims to contribute to the overall protection of biodiversity in the EU by requiring measures to be taken to maintain or restore specified non-avian species and habitat types, of Community interest, to a favourable conservation status. In particular it requires the classification of protected sites. These sites, together with those classified under the Wild Birds Directive, form an ecological network of sites known as the Natura 2000 network. The Habitats Directive requires the strict protection of specified species wherever they occur.

These two Directives have generated a considerable body of case law, largely relating to enforcement action by the Commission against unlawful derogations or failures to act by Member States resulting from socio-economic considerations. The ECJ has taken the view that where biodiversity is required to be subject to special protection, a precautionary interpretation of those provisions is required. For example, in relation to the protection of species from disturbance the Court has found that preventing "deliberate" acts includes preventing "reckless" ones (Case C-103/00); and that in considering whether activities are "likely" to significantly affect a

protected site, it is sufficient that the site may be so affected (Case C-127/02). To date the majority of cases have involved the designation and protection (especially from development) of Natura 2000 projects.

Other EU legislation relevant to the protection of wild animals includes:

- Regulation 338/97, which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- Directive 83/129 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, and Regulation 1007/2009 on trade in seal products;
- Regulation 3254/91 prohibiting the use of leghold traps in the EU and the introduction into the EU of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards;
- Regulation 348/81 on common rules for imports of whales or other cetacean products.

The EU has also introduced two pieces of legislation aimed at tackling the problem of illegally harvested timber and the associated deforestation. The Forest Law Enforcement Governance and Trade (FLEGT) Regulation 2173/2005 (made under what is now Article 207 TFEU) establishes a system of bilateral agreements with third countries under which only legally harvested timber from those countries can be imported into the EU. Such timber is exempt from the requirements of the EU Timber Regulation (made under Article 192 TFEU), which prohibits the placing on the EU market for the first time of illegally harvested timber or timber products and which requires operators placing timber or timber products on the EU market for the first time to exercise due diligence.

Noise

Early European noise legislation was fairly narrowly focused. Rather than dealing with noise generally it tended to fix maximum sound levels for certain types of vehicles with a view to completing the single market. It included Directive 70/157/EEC relating to the permissible sound level and the exhaust system of motor vehicles (made under what is now Article 114 TFEU), and Directive 80/51/EEC on the limitation of noise emissions from subsonic aircraft (made under what is now Article 100 TFEU, which covers air transport). The 1993 Fifth Environmental Action Programme included noise abatement targets to be achieved by the year 2000. This led to further legislation relating to discrete noise sources such as Directive 2000/14/EC relating to the noise emission in the environment by equipment for use outdoors (made under what is now Article 114 TFEU).

A departure from the approach of addressing discrete noise sources came with Directive 2002/49/EC relating to the assessment and management of environmental noise (the Environmental Noise Directive, made under what is now Article 192 TFEU). Under this Directive Member States are required to prepare strategic noise

maps for various sources of noise and prepare action plans designed to manage certain noise issues within their territories.

Cross-cutting Legislation

Environmental assessment

The Environmental Impact Assessment Directive 2011/92/EU was made under Article 192 TFEU. It consolidated and replaced the original Environmental Impact Assessment Directive 85/337/EEC, which was made under what are now Articles 114 and 352 TFEU. The Directive applies to all projects which are likely to have a significant effect on the environment. It requires a detailed assessment, prior to development consent being granted, of the direct and indirect effects of the project on:

(a) human beings, fauna and flora;

(b) soil, water, air, climate and the landscape; and

(c) material assets and the cultural heritage;

and on the interaction between these factors. Assessment may be through a case-by-case examination or by reference to thresholds or criteria set by the Member State, or both. Where a project in one Member State is likely to have significant effects on the environment in a second Member State the Directive establishes a procedure to allow the second Member State to participate in consultations on the project.

The Strategic Environmental Assessment Directive 2001/42/EC (made under what is now Article 192 TFEU) requires a prior environmental assessment to be carried out for plans and programmes prepared by public authorities in Member States, other than national defence, civil emergency, financial or budget plans or programmes. Again, the Directive establishes a procedure to allow other Member States likely to be affected by a plan or programme to participate in consultations on the project.

Access to environmental information

Directive 90/313/EEC on freedom of access to environmental information was adopted in 1990. A number of difficulties in implementing the directive throughout the EU, including in respect of the definitions of ‘environmental information’ and ‘public authority’ and the applications of the time limits and exceptions, led to the Commission proposing alignment between a revised directive and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The Convention was signed by the UK and the EU in 1998, and has become one of the main drivers for EU legislation on access to information. The revised Environmental Information Directive 2003/4/EC (made under Article 192 TFEU) is heavily based on the Convention, and helped to enable EU ratification in 2005.

The Environmental Information Directive requires Member States to ensure that public authorities are required to make environmental information they hold available to any applicant on request, without that applicant having to state an interest. There

is also a duty to distribute all information held relating to imminent threats to human health or the environment to the members of the public likely to be affected. Information is to be provided within one month unless the volume and complexity of the information justifies an extension to two.

A request for information may be refused if the authority does not hold the information, if the request is manifestly unreasonable or formulated in too general a manner, or if it concerns material in the course of completion or internal communications. There are limited exceptions to the duty to disclose information on request, which must be balanced against the public interest in disclosing information, include requests where disclosure would adversely affect international relations, defence or security.

Environmental liability

The Environmental Liability Directive 2004/35/EC (made under what is now Article 192 TFEU) requires operators of specified occupational activities to prevent or remedy environmental damage. It defines "environmental damage" as:

> (a) damage which has significant adverse effects on protected species and natural habitats;
>
> (b) damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of water;
>
> (c) any land contamination that creates a significant risk of human health being adversely affected by the introduction in, on or under land of substances, preparations, organisms or micro-organisms.

Competent authorities established by Member States may require operators to take preventive action where there is an imminent threat of environmental damage or to take approved remedial action to remedy any such damage. The operators must bear the costs for such actions in most cases but not, for example, where the operator can prove that the damage was caused by a third party or resulted from compliance with an instruction from a public authority.

Environmental crime

Directive 208/99/EC on the protection of the environment through criminal law (made under what is now Article 192 TFEU) requires Member States to provide for criminal penalties in respect of serious infringements of a large number of specified provisions of EU law on the protection of the environment. It leaves the details of criminal procedures and levels of penalties to Member States, subject to the provision that offenders should face "effective, proportionate and dissuasive penalties" (Article 6).

The European Environment Agency

Regulation 1210/90 established the European Environment Agency and the European Environment Information and Observation Network. The Regulation was made under what is now Article 192 TFEU. The Agency is based in Copenhagen. It

does not have the power of inspection in the Member States, and its tasks relate primarily to the gathering, analysis and dissemination of environmental information.

The 7th EU Environmental Action Programme

Article 192(3) TFEU provides for general action programmes setting out priority objectives to be attained in relation to the EU's environment policy to be adopted by the European parliament and the Council, acting in accordance with the ordinary legislative procedure.

The 7th EU Environmental Action Programme, proposed by the Commission in November 2012 (COM(2012) 710 final) and currently under negotiation, sets out a possible overarching framework for EU environmental policy up until 2020. Its main focus is the better implementation of existing EU environmental law. It aims to establish nine priority objectives for EU environment policy which (under Article 193(3) TFEU) must be achieved by separate implementing measures.

LIFE

Since 1992 the EU has funded projects relating to the protection and improvement of the environment through its LIFE programme. The latest phase of the programme (LIFE+), which runs from 2007-2013, has a budget of EUR 2.143 billion. Its legal base is Regulation 614/2007 concerning the Financial Instrument for the Environment (made under what is now Article 192 TFEU).

Proposals for an instrument governing the next phase of the LIFE programme, to cover the period 2014 to 2020, are currently under negotiation in Brussels. These include a new sub-programme for climate action. The Commission has proposed a budget of EUR 3.2 billion.

The External Dimension

The EU plays an active role in the negotiation and implementation of international agreements concerning the environment. This is consistent with Article 3(5) TEU, which states that the EU "shall contribute to . . . the sustainable development of the Earth". Article 21(2) TEU also stresses the importance of environmental considerations in the EU's international relations:

> "The Union . . . shall work for a high degree of cooperation in all fields of international relations, in order to:
>
> > (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".

The EU's external competence in relation to the environment was first given an explicit Treaty base by the Single European Act in 1987; prior to that the EU had concluded environmental agreements with third countries on the basis of an implied external competence in areas where either the EU had already implemented internal measures on the basis of an internal competence or where the exercise of external powers was necessary to obtain the EU's objectives. Article 191(4) now sets out the scope of the EU's competences for external relations:

> "Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.
>
> The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

Both Member States and the EU may adopt international agreements in the area of environmental protection but Member States may only exercise their competence to the extent that common EU rules are not affected or likely to be affected by such Member State action (see Case 22/70 *Commission v Council (AETR)*, paragraph 22). Where the EU has laid down internal harmonising rules relating to environmental protection, the Member States will no longer have the competence to enter into international agreements affecting those rules. However, where the EU has only laid down minimum standards relating to environmental protection, Member States retain the power to enter into international agreements establishing higher standards provided that these are not incompatible with the EU rules

The EU is a party to numerous international conventions including:

- the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats in the EU;

- the 1979 Geneva Convention on Long Range Transboundary Air Pollution (CLRTAP)

- the 1982 United Nations Convention on the Law of the Sea (UNCLOS);

- the 1985 Vienna Convention for the Protection of the Ozone Layer;

- the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;

- the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context;

- the 1992 United Nations Framework Convention on Climate Change, the 1992 Convention on Biological Diversity and the 1992 United Nations Convention to Combat Desertification (the 'Rio' Conventions);

- the 1992 Helsinki Convention on the Transboundary Effects of Industrial Accidents;

- the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes;

- the 1992 "OSPAR" Convention for the Protection of the Marine Environment of the North-East Atlantic;

- the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

The EU can only become a party to a treaty if the other parties agree. Thus the EU has not so far been permitted to accede to the 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (although this is imminent). However the EU does apply measures equivalent to the provisions of this Convention unilaterally, through Regulation (EC) No 338/97.

The EU is currently an observer, but has enhanced rights of participation, at the global Environment Assembly of the UN Environment programme.