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Report

# Divergence of environmental policy post Brexit

Initial reflections by IEEP UK

Institute for European Environmental Policy



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## **CORRESPONDING AUTHORS**

*David Baldock (dbaldock@ieep.eu) & Michael Nicholson (mnicholson@ieep.eu)*

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### **IEEP main office**

Rue Joseph II 36-38,  
1000 Brussels, Belgium  
Tel: +32 (0) 2738 7482  
Fax: +32 (0) 2732 4004

### **London office**

IEEP  
25EP, 25 Eccleston Place  
Belgravia SW1W 9NF  
Tel: + 44 (0)204 524 9900

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## 1. FOR GOOD OR ILL...

For several decades EU and UK environmental law and policy have shared much the same foundations and provisions, with the majority of environmental law agreed at a European level. Now, with the withdrawal of the UK from the EU, as each side goes its separate ways, there is the potential for environmental law and policy to diverge. This will have a range of implications, not least for the protection of health and the environment.

While it is relatively early days, the issue of divergence in environmental law and policy has gained new prominence and relevance with the UK's departure from the European Union. Two strands of potential and actual divergence are of particular note. First, the greatly increased room for divergence between the EU and the UK, with its four constituent nations. Second, an accentuation of an existing set of divergences within the UK, arising because the scope to exercise powers devolved to Northern Ireland, Scotland and Wales has grown very significantly now that the obligation to comply with EU law has ceased.

It is no surprise that divergence is starting to occur and is widely expected to continue, whether by design or default. On both sides of the Channel existing legislation is being examined and revised as well as new measures being developed and adopted. Different institutions are involved in this process, even when the measures involved are very similar. Furthermore, the UK Government has stated clearly that it intends to review the body of Retained EU Law, the extensive corpus of legislation that was transferred to the UK's statute book in the European Union (Withdrawal) Act of 2018<sup>1</sup>. A significant slice of this large legislative bundle concerns the environment.

In contrast to the Scottish government, which sees merit in staying aligned with EU law, not least to facilitate renewed membership of the EU should the opportunity arise, the Westminster government favours active review of measures of EU origin and is seeking ideas and opportunities to amend them, apparently seeking a better "fit" with British or English conditions and preferences. This will be pursued with the aid of legislation to be brought forward fairly quickly in 2022, as confirmed in the Queen's speech, "My Government will continue to seize the opportunities of the United Kingdom's departure from the European Union, to

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<sup>1</sup> UK Government Press release, *Prime Minister pledges Brexit Freedoms Bill to cut EU red tape*, <https://www.gov.uk/government/news/prime-minister-pledges-brexit-freedoms-bill-to-cut-eu-red-tape> & Lord Frost, <https://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021> accessed, 06.12.21 & Independent, <https://www.independent.co.uk/news/uk/politics/brexit-lord-frost-trade-eu-b1962431.html> accessed 06.12.21

support economic growth. Regulations on businesses will be repealed and reformed. A bill will enable law inherited from the European Union to be more easily amended [Brexit Freedoms Bill].<sup>2</sup>

After decades of acceptance that there are strong arguments for avoiding too much divergence within the EU (incidentally, a stance also visible in the UK's Internal Market Act 2020), there are now plans for legislative measures to accelerate divergence. Indeed, for some it seems to be almost self-evidently beneficial, at least in economic terms, especially so if the legislation can be slotted into the capacious "red tape" category.

Given this, the stage seems to be set for greater divergence.

Whether this is a matter of any concern, or perhaps a new opportunity, may not be immediately obvious. For the moment at least, the UK and EU broadly share a similar outlook on the need for environmental progress and a largely common body of law; net zero commitments are not exactly the same but have many similarities and more ambition in nature restoration is also a shared theme. Both are active at the global level and at times have been vying to take the leadership role in global climate talks. Whilst the extensive powers of the European Commission and the Court of Justice of the European Union (CJEU) to oversee and seek to enforce compliance with environmental law no longer apply in the UK (with exceptions in the case of Northern Ireland), new bodies have been or will be created within the four countries to take on a domestic version of many of these functions.

This paper begins with a short reflection on why, despite the parallels, this may be a topic of interest, meriting further scrutiny. Then in a second section, different elements of divergence are explored in an elementary typology. This leads to a third section considering some of the kinds of divergence that are beginning to emerge between the EU and the UK.

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<sup>2</sup> Queen's Speech 2022, <https://www.gov.uk/government/speeches/queens-speech-2022>, accessed 26.05.22

## 2. WHY IS DIVERGENCE OF INTEREST?

A number of practical concerns can be expected to emerge over time. These include the environmental, commercial and administrative consequences of adopting different standards and processes, variations in the timing of measures and the obligations entailed, the prospect of different monitoring regimes and data requirements, the potential burdens arising from needing to comply with more than one regulatory system, the opacity created by less comparable reporting, evaluation and recording systems, and the cost and complications of institutions with largely parallel purposes but differing capacities.

On the other hand, in considering potential gains, there is the possibility of faster action by the UK outside the EU, sharper focus on issues of particular national concern, less need to compromise with other jurisdictions where this contributes no overall environmental benefit and adds costs, greater scope for innovation (although there is considerable room for this within the EU) and the option of piloting new approaches in ways that can be difficult within the EU.

New questions and uncertainties arise in this unfolding territory. How will this tangle of possible drawbacks and benefits play out? Will the obligations set out in the Trade & Cooperation Agreement (TCA) have much influence on events? Will active divergence by and within the UK give rise to any economic or environmental benefits and in parallel, will it create higher costs, reduced transparency and institutional duplication on a significant scale? Will the possible benefits to the EU of having the UK as an outlier willing and able to move faster in some areas be eliminated by a lack of trust and atrophying cooperation in the environmental field? The UK's pointed departure from the European Environment Agency is one of several indications that cooperation is not a major priority at present. How will we know if divergence is occurring? Simply following, or 'tracking' legislative changes between the EU and UK as well as within the UK itself since Brexit has not been especially easy, with one of the few signposts being provided independently by *UK in a Changing Europe*.<sup>3</sup>

In essence, the prospect of growing divergence creates uncertainties about the impact on both environmental law and policy, on the environment itself, on the level playing field and those affected, in business, regulated professions and elsewhere. Some of the uncertainty is especially acute at the moment while the

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<sup>3</sup> UK in a Changing Europe, *UK-EU regulatory divergence tracker: third edition*, 31.03.22, <https://ukandeu.ac.uk/research-papers/uk-eu-regulatory-divergence-tracker-third-edition/> accessed, 31.05.22

Government's intentions are unclear and it is difficult for industry in particular to plan ahead.<sup>4</sup> But there is a longer-term dimension too.

Most contemporary environmental law stems from a wave of EU initiatives, beginning in the 1970s and over time creating a highly comprehensive, well established and almost certainly the most influential body of environmental legislation in the world.<sup>5</sup> This was brought into being by increasingly diverse Member States acting together and treating environmental progress as a largely collective endeavour in which it was acceptable to compromise where necessary on national interests, adopt common approaches to avoid adverse spill overs between countries and accept that costs may be significant and not necessarily shared. The EU's neighbours, such as Norway and Switzerland, exercised their own interests in some domains, for example fisheries management, but generally followed the EU approach. The UK was an active and influential player in this period of construction. However, it is now an external actor and in England the Government is signalling its desire to exploit its freedom to plough a more individual furrow. Aside from the impact of shorter-term variations in specific legislation, over time this could amount to a significant departure from the EU model, possibly creating an alternative lighter touch and more discretionary regulatory pole or a halfway house between the EU and US poles. This could have considerable ramifications beyond the UK itself.

This would be of interest even if the building of environmental regulation were now a largely completed project with the primary expectation being refinement and tinkering in the years ahead. This however is not the case. To reach net zero and a growing assembly of other targets, in biodiversity, the circular economy, the control of pollution, chemicals and other spheres, a caravan of interventions will be required, globally and in all parts of Europe. There is also time pressure. Policy failure will have a considerable cost. Delays in arriving at the best approaches are to be avoided.

For the moment, stakeholders and observers are wondering what will diverge, how quickly, and how will that impact upon environmental outcomes?

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<sup>4</sup> Peter Foster, *Financial Times*, *Signs of UK government's deregulatory agenda are emerging*, 19.05.22, <https://www.ft.com/content/4b2bd4c6-3891-49ba-9f98-a81ab381c352> accessed 26.05.22

<sup>5</sup> Nigel Haigh, *EU Environmental Policy, Its journey to centre stage*, Routledge 2015



### 3. THE TAXONOMY OF DIVERGENCE

What do we mean by divergence and what forms will it take?

Divergence is a dynamic process with a variety of forms, explanations and consequences. There are several alternative ways of breaking it down into different components. One form of taxonomy is to distinguish various facets of environmental law where differences and divergence can arise, even between jurisdictions with rather similar environmental objectives. Such components could include:

- A. *Motivation and drivers for intervention.* Some of these motivating sources will be the same on both sides of the channel, for example the need to implement international agreements into domestic law or policy. This is not trivial as the number of Multilateral Environmental Agreements seems set to grow. Another example would be those occasions when new science or emerging technologies or powerful public campaigns point strongly to an intervention and governments in the OECD and perhaps other countries will be exposed to similar pressures to respond. On the other side will be indigenous factors driving action, taking a variety of forms. Some issues will have a strong domestic element because of specific geographies, industrial structures and social conditions. Political dynamics clearly have a role and there seem likely to be cases where there is a political preference for divergence to demonstrate independence or difference for its own sake. Domestic institutions within the UK will also have an influence, different to that of EU bodies, which need to consider interventions that fit and can be applied across 27 different countries. UK advisory bodies, such as the Climate Change Committee, have a potentially more strategic role since the four nations have more scope to devise their own approaches in an enlarged sphere. Actors will continue to influence one another. For the UK the intentions or actions of the EU will be a significant factor and probably vice versa (the EU's decision to move ahead with a Carbon Border Adjustment Mechanism is a case in point). In this and other respects Northern Ireland will be a special case. In short, the drivers will vary between issues and occasions and will not be identical between jurisdictions. A degree of divergence would be an unsurprising outcome.
- B. *The Issues Addressed.* Given differences in drivers, in political preferences, the work of scientific bodies and environmental agencies and the influence of civil society, future divergence in the topics addressed in environmental policy may occur. There may be concerns about a substance used in the EU but not in the smaller geographical parameters of the UK for example.

- C. *Regulatory strategy and philosophy.* There has been evolution within EU environmental law and policy, with a place for voluntary as well as mandatory measures, a growing role for various economic instruments, such as the Emissions Trading System and the deployment of targets, strategies and Action Programmes. At the same time, regulation, including specified requirements and processes has often been seen as the most effective approach. This is especially the case with regard to product standards, which are an important strand of EU environmental policy and component of the Single Market Law which is underpinned by environmental principles, such as the precautionary principle, generally interpreted in a different way to that in the US for example. The UK, or countries within it, may choose a different philosophy, preferring more voluntary than regulatory approaches if history is a guide. On one model this might involve taking some binding requirements out of an environmental law altogether, leaving issues within the scope of decisions of bodies such as the Environment Agency, creating the potential either for a softer approach or a more ambitious version of the voluntary approach, going beyond what is required for formal compliance. At a structural level, regulation might be cast in a more general form with fewer absolute requirements and stipulated processes, more enabling powers granted to ministers and scope for discretion in meeting objectives.<sup>6</sup> The selection and legal force of environmental principles in the UK has already diverged from that in the EU and differs within the UK as well.
- D. *The policy instruments adopted.* These include the setting of targets, mandatory and aspirational, the use of economic instruments, emissions ceilings, emission limit values, product specifications, banned substances, restrictions on the use of products etc. Generally, there has been caution about adopting economic instruments at the EU level, another factor contributing to the preponderance of regulation, whereas this may not be the case within the UK. In any event, the menu of environmental policy instruments continues to enlarge. The four nations within the UK may choose different instruments or combinations of instruments to one another and to the EU in addressing a similar or identical issue. An example of this would be a decision within the UK to replace the existing Emissions Trading System with a carbon tax, an option that has been contemplated. Other examples are given in the Boxes below. Such choices may be an expression of a wider regulatory philosophy but equally may arise from a more pragmatic consideration of cost, administrative convenience or the availability of data sets that might not be available elsewhere.

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<sup>6</sup> Hansard Society, *Delegated Legislation Review*, <https://www.hansardsociety.org.uk/projects/delegated-legislation-review> accessed 26.05.22

**Box 1: Chemicals policy and UK Reach: Early forms of divergence**

The former Secretary of State for Environment in 2017 promised to maintain and enhance protections for health and the environment and that chemicals regulation would be 'better' after Brexit<sup>7</sup> but concerns are emerging from a variety of quarters about how the new UK REACH system<sup>8</sup> is operating.<sup>9</sup>

The concerns range from the burden of costs and bureaucracy on British and EU based companies which now have to register their chemicals in the UK (as well as in the EU if they are trading in both jurisdictions), the UK's lack of access to ECHA's EU REACH chemicals safety database (containing detailed and complex data of over 20,000 known chemicals), the approach to designating substances of very high concern (SVHCs),<sup>10</sup> and the comparative lack of regulatory capacity and resources to assess and control risks which means UK REACH is considering fewer protective controls on hazardous substances. In the EU for example, five restrictions on the use of hazardous chemicals have been adopted since Brexit and 20 more are in the pipeline of the restriction process whereas in the same period in the UK just two restrictions are being taken forward – one on lead ammunition and another on certain harmful substances found in tattoo ink.

Furthermore, the EU is accelerating its restrictions process and over the next several years is taking forward a range of reforms under its *EU Chemicals Strategy for Sustainability*, very possibly leaving HSE as managers of UK's REACH with more work to do if it is to avoid significant divergence.

<sup>7</sup> ENDS Report, *Gove champions green Brexit*, 21.07.17 <https://www.endsreport.com/article/1530357/gove-champions-green-brexit>, accessed 22.12.21.

<sup>8</sup> Health & Safety Executive, *REACH after Brexit*, <https://www.hse.gov.uk/reach/brexit.htm>, accessed 22.12.21.

<sup>9</sup> National Audit Office, *Regulating after EU Exit*, 18.05.22, <https://www.nao.org.uk/report/regulating-after-eu-exit/> accessed 31.05.22. See also: CHEM Trust, UK REACH: challenges and next steps, April 2022, <https://chemtrust.org/wp-content/uploads/UK-REACH-challenges-and-next-steps.pdf>.

<sup>10</sup> ENDS Report, *'Hammer blow to public health': NGOs slam 'Henry VIII' reform to chemicals regulation*, 16.12.21, <https://www.endsreport.com/article/1736049/hammer-blow-public-health-ngos-slam-henry-viii-reform-chemicals-regulation>, accessed 23.12.21. See also: Peter Foster, Financial Times, 16.12.21, <https://www.ft.com/content/32e6d8e0-5869-459e-9391-d168f6dafb17>, accessed 31.05.22

**Box 2: Energy Efficiency: Differing strategies for the *passivhaus*<sup>11</sup>**

The UK's *Net Zero* policy and the EU's *European Green Deal* both share the long-term target of decarbonising the economy by 2050. Alongside the efforts to make energy supply and particularly electricity generation *green* (the 'supply' side), both the UK and the EU have emphasised through policy statements that reaching those long-term targets should and *must* include energy efficiency as part of the mix. Focus on the demand side - the 'fabric first' approach, has had some attention but the approaches taken thus far have been more limited, mixed and varied.

After last setting out its energy efficiency strategy over nine years ago<sup>12</sup>, the UK Government recently published a *Heat and Buildings Strategy* (H&B Strategy) which mentions the *fabric first* approach but is relatively light on substance.<sup>13</sup> The even more recent *British Energy Security Strategy* pointedly places energy efficiency at the top of the document but again says little about how it will achieve it.<sup>14</sup>

In contrast, the EU's *Fit for 55* package which includes a proposal for a new Energy Efficiency Directive (EED) sets out 'energy efficiency as an energy source in its own right' and puts the *energy efficiency 1st principle* on a legal footing. The EED also requires Member States to: ensure that at least 3% of public building floor space is to be renovated each year (the H&B Strategy includes a target to reduce emissions from public buildings by 75% against a 2017 baseline by the end of 2037), increase annual energy savings for end use consumption for the period up to 2030 by 1.5% and reduce primary energy consumption (by 39%) and final consumption

<sup>11</sup> Energy Saving Trust, <https://energysavingtrust.org.uk/passivhaus-what-you-need-know/>

<sup>12</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/65602/6927-energy-efficiency-strategy--the-energy-efficiency.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/65602/6927-energy-efficiency-strategy--the-energy-efficiency.pdf)

<sup>13</sup> Heat and Buildings policy is partly a devolved competence and Wales, Scotland and Northern Ireland have put in place their own strategies such as the Welsh Government's *Energy Efficiency Strategy* <https://gov.wales/energy-efficiency-strategy>, the Scottish Government's *Energy Efficient Scotland: Route Map* <https://www.gov.scot/publications/energy-efficient-scotland-route-map/> and Northern Ireland's *Energy Strategy* <https://www.economy-ni.gov.uk/publications/energy-strategy-path-net-zero-energy>. This section will focus on the Heat and Buildings Strategy published by the Department for Business, Energy and Industrial Strategy in October 2021, covering mostly England but with some exceptions.

<sup>14</sup> The Times (Editorial), *The Times view on the energy security strategy: Wasted Energy*, 07.04.22, <https://www.thetimes.co.uk/article/the-times-view-on-the-energy-security-strategy-wasted-energy-m73wkc0mx>, accessed 26.05.22

(by 36%) across the whole economy by 2030 (the H&B Strategy has no easily discernible comparison).

Similarly, the EU's current proposal for a revised *Energy Performance of Buildings Directive* (EPBD), includes an objective to at least double the annual energy renovation rate of buildings by 2030. This proposal, despite criticism,<sup>15</sup> will also require existing owners of houses that fall in the F & G energy performance class to improve them to at least an E rating by 2033. The UK Government's H&B Strategy explains that the Government is "exploring opportunities to improve the energy performance of owner-occupier homes and plan to consult on options to upgrade homes in this sector" and has an ambition to improve as many homes as is 'reasonably practicable'.<sup>16</sup>

- E. *Detailed policy design.* Given that there are many hundreds of environmental laws in place, some with complex provisions, the scope for divergence in the design and details of interventions is particularly evident and this is already taking place. There are innumerable possibilities. For example, there could be differences in the environmental scope of measures (all rivers/some rivers), the economic reach and specified thresholds (all powerplants/only those above 30GW capacity), exceptions and derogations, the limits on emissions, the way they are measured, the processes required for compliance, the certification, reporting and labelling regimes and much else.
- F. *The timing of intervention.* UK nations could intervene before or after the EU, which could have substantive consequences in some cases, for example in influencing the choice of location for new industrial plants. For companies present in a range of jurisdictions this can be a significant concern. Moving faster may or may not be symptomatic of one party being the leader and the other the follower, an important consideration in its own right. Given differences in legislative processes, including the vagaries of the Parliamentary timetable in the UK and the difficulty of obtaining slots for primary legislation, enacting such legislation at exactly the same moment as the EU seems unlikely unless this is a deliberate choice on the UK side. However, this is not the case

<sup>15</sup> BPIE, *Ready for carbon neutral by 2050? Assessing ambition levels in new building standards across the EU*, <https://www.bpie.eu/publication/ready-for-carbon-neutral-by-2050-assessing-ambition-levels-in-new-building-standards-across-the-eu/>

<sup>16</sup> HM Government, *Heat and Buildings Strategy*, October 2021, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1036227/E02666137\\_CP\\_388\\_Heat\\_and\\_Buildings\\_Elay.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1036227/E02666137_CP_388_Heat_and_Buildings_Elay.pdf), pp.197

for secondary legislation, notably Statutory Instruments (SIs), which are by far the most frequently used form of environmental legislation. In enacting SIs, the UK generally is able to move more quickly than the EU if it wants to, with fewer institutions and governments involved. For devolved administrations, particularly Scotland, with equal capacity to act nimbly, there may be dilemmas between the merits of moving faster on their own or keeping in step with EU timetables or UK/England timetables.

- G. *The implementation and enforcement of legislation.* As the volume and both the environmental and economic significance of law in this sphere grows, the extent to which it is implemented through effective action by those concerned and that compliance is ensured becomes an ever more important aspect of intervention. Both levels of compliance and of efforts to improve them vary within the EU as they do within the UK but measurement of performance in this sphere is not particularly easy. Greater investment in independent evaluation is needed to assess performance and allow judgements about how far divergence might be occurring. The National Audit Office has reported<sup>17</sup> for example the time taken to build operational capacity in certain domestic agencies post Brexit. Challenges noted included those in recruiting specialist skills such as toxicologists and in training staff ("In 2021-22 HSE reported that 25% of staff time was spent on training"); delays to new regulatory requirements; and the extension of deadlines because fully functioning regulatory regimes are still in progress. There is also the loss of access to data and information (for example, the HSE no longer has access to chemical safety data underpinning EU REACH) and a lack of clarity over longer term strategic development. Oversight bodies, notably the European Commission in the EU and the Office for Environmental Protection (OEP) and Environmental Standards Scotland (ESS) in the UK, have a critical role and it is notable that enforcement is recognised as an obligation on both sides in the TCA. This is one of many reasons why cooperation between "supervisory bodies" could be helpful.
- H. *Reporting, data gathering, evaluation and transparency.* Divergence in this domain is inevitable and has occurred already, for example the reporting requirements in many transposed EU Directives have fallen away in UK legislation or been revised to align with domestic institutions. Legislative measures on the environment may involve the collection of data of various kinds and if the resulting datasets begin to differ markedly this is likely to have impacts on transparency and comparability. It may also influence the form of future legislation as the availability of certain data sets and the lessons that

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<sup>17</sup> National Audit Office, *Regulating after EU Exit*, 18.05.22, <https://www.nao.org.uk/report/regulating-after-eu-exit/> accessed 31.05.22.

can be drawn from them can influence the detailed design of modifications and revisions made to current legislation over time.

- i. *Flanking measures*. Environmental legislation and the wider gamut of related policies sit alongside a variety of other governmental interventions with the potential to influence their design and implementation, even if this is not amongst their particular objectives. These can be brought together under the loose category of flanking measures for the purpose of this paper. Amongst these are policies in the domains of trade, taxation, internal markets, industrial and energy policy, research and development, funding arrangements for regions and public bodies, including delivery agencies, freedom of information and public participation. Such policies have never been uniform within the EU but, now that the UK has departed, the extent of differences between the two sides is likely to grow. The UK is no longer bound by that portion of the flanking measures that are determined primarily at the EU level, for example in relation to trade and agriculture. Funds targeted at environmental improvement within the EU, such as LIFE+ and elements of the Structural Funds will no longer be available in the UK and the alternatives will take a different form. Over time the cumulative influence of this panorama of different influences seems set to contribute to divergence by the UK from the current level of alignment with the EU and to contribute to divergence within the UK as well.

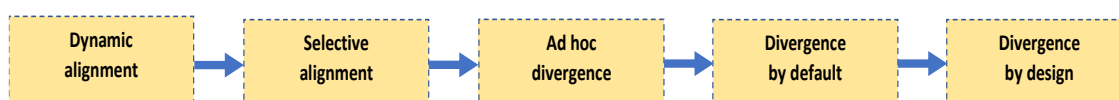
Separating out the various, sometimes overlapping, facets and layers of divergence is a way to reveal the moving parts and to reduce the temptation only to compare the detailed provisions of legislation addressing the same concern. The picture is wider than this.

On the other hand, the wheat still needs to be separated from the chaff. Only a portion of divergence will be *significant*, while many differences will be *minor or inconsequential*. For most purposes the focus needs to be on the more significant and more *consequential* elements of divergence. Not everyone has the same interests or shares the same perception of what is significant of course but level of impact on the environment, implications for key actors, impacts on the economy and level playing field, perhaps individual businesses, accountability and transparency and administrative burdens will all be relevant.

## 4. THE PATHWAYS TO DIVERGENCE

If divergence does consist of the different facets and layers sketched above, then it is clear that while it could arise from an active choice to diverge, there are several other pathways that could lead to differences, especially the UK departing from the legislative common ground that it largely shares with the EU at present.

These pathways can be arranged into a continuum stretching from dynamic alignment at one end to active and deliberate divergence at the other.



*Dynamic alignment* by the UK would consist of the Government choosing to adopt the same environmental measures as the EU, on broadly the same timetable. This includes a constant updating process, making the same modifications to current legislation as the EU (with exceptions where essential, for example in relation to aspects of reporting). This is the position for those environmental measures falling within the compass of the Northern Ireland Protocol.<sup>18</sup> Purely *temporary divergence* could occur on this (and other) models.

*Selective alignment, covering specific areas of policy*, (which hypothetically could include REACH, the Emissions Trading Scheme, the Industrial Emissions Directive and other legislation with a heavy technical content) could be another deliberate choice. This could be accompanied by alternative approaches in other areas of policy.

*Ad hoc divergence*, eschewing any particular strategic choice on alignment in general but actively adopting a more pragmatic approach, electing to follow EU law where this seemed in the UK interest or simply more convenient or cost effective at the time. Arguably, current policy in England shows signs of this approach.

This is distinct from, but could be combined with, a more passive approach in relation to the EU legislative locomotive. This could be termed *divergence by default*, whereby some or all of the UK nations simply fail to adopt the modifications that are made to EU law on a regular basis and do not follow the entirely new legislation either, so the gap between the two sides enlarges over time. This could occur for a number of reasons other than political antipathy.

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<sup>18</sup> Dr. Viviane Gravey, Why Dynamic Alignment is Alive and Well: The story of lead shot and wetlands, 22.01.21, <https://www.brexitenvironment.co.uk/2021/01/22/why-dynamic-alignment-is-alive-lead-shots-and-wetlands/> accessed 31.05.22



These might include limitations in technical capacity in the UK, particularly in technical agencies such as Health & Safety Executive, or lack of parliamentary time, or a choice to prioritise other initiatives.

A more active approach would be *divergence by design*. This could in principle be prompted by a desire to build a distinctively different approach for its own sake, for example in England, or to avoid coming within the jurisdiction of the CJEU in any respect. Equally, it could derive from a conviction that an indigenous policy is more likely to meet domestic priorities and conditions than one derived from the EU, where the UK now has no voice. These priorities could be economic or social and would not necessarily be environmental. This is the approach that was advanced in the report from the Taskforce on Innovation, Growth and Regulatory Reform under the chairmanship of Sir Iain Duncan Smith, published in summer 2021.<sup>19</sup> As noted above, accelerating active divergence in this vein also seems to be a motivating force for the Government's forthcoming Bill on Retained EU law (more commonly known as Brexit Opportunities Bill).

### **Box 3: Industrial emissions: Best available techniques**

Whether the UK diverges from the text of EU law is one aspect of divergence. However, even with the same text, there is the potential for divergence due to the complexities of institutions and processes that support Member States in their implementation of EU law. This is illustrated by the IED.

The IED requires that industrial plants are authorised only if they use best available techniques (BAT) to reduce their environmental impact. BAT reference documents (BREFs) are developed and issued for guidance by an EU funded body - the European IPPC Bureau in Seville. The UK is no longer part of this process, though information and views from UK industry are likely to continue to feed into it through European-level industry associations. The concept of "available" techniques in BAT is not limited to the EU, so relevant developments in the UK ought to be taken account of at the IPPC Bureau.

Once the BREFs are published, the European Commission uses them to develop "BAT Conclusions", adopted as Commission Implementing Decisions, i.e., as law. They set out the ranges of emission limits expected in operating permits. The IED allows a little flexibility in how these are

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<sup>19</sup> Independent report: Taskforce on Innovation, Growth and Regulatory Reform independent report, <https://www.gov.uk/government/publications/taskforce-on-innovation-growth-and-regulatory-reform-independent-report>, accessed 26.05.22

interpreted. The UK intends to replicate the EU structure and processes, bringing together regulators and consulting stakeholders to develop conclusions on what is defined as BAT. Clearly it can draw on anything developed by the EU. Given Scotland's aim to match future EU standards on emissions, it will be interesting to see whether this will result in tensions within the UK BAT process.

The replication of the development of conclusions on BAT at UK level is an additional administrative cost to the UK. Many submissions to Seville are publicly available and so could be used by the UK in a cost-effective way. However, the working groups in Seville do discuss a considerable amount of confidential information (especially on commercially sensitive cost issues) and this would presumably not be available to the UK.

#### Box 4: Commodity driven deforestation: A case of active divergence in the making?

At the last Conference of the Parties in Glasgow (COP26) in November 2021 there was an eye-catching promise by world leaders to end deforestation by 2030.<sup>20</sup> Unfortunately, the track record on reducing, halting and then eliminating deforestation is unimpressive.<sup>21</sup> There was 25.8Mha of tree cover loss alone in 2020<sup>22</sup>, and from 2001 to 2020 there was an estimated 411Mha of tree cover loss globally - equivalent to a 10% decrease since 2000. Commodity driven deforestation, for example land clearance for soya production, is a significant problem<sup>23</sup> and the UK and EU's part in that is substantial.

The UK's 2021 Environment Act includes provisions to tackle the commodity driven aspects of deforestation<sup>24</sup> and, at the time of writing, a public consultation has concluded, but Statutory Instruments to implement these provisions are not yet in place. Similarly, the EU has a widely supported proposal for a new Regulation<sup>25</sup> currently making its way through the legislative process which covers many of the same areas of concern<sup>26</sup> but is yet to be finalised.

Both the EU and the UK's legislative initiatives aim to introduce a due diligence system so that consumers can be confident that the products they buy and the commodities they are based on are not associated with damaging deforestation. There are significant differences in approach, however.

In essence, the EU's preference is to move towards a 'deforestation-free' approach whereas the UK will focus on preventing illegally felled timber from being imported. The EU has, through the proposed regulation, opted to try to reduce all deforestation, whether legal or illegal, from its supply chains. It is a

<sup>20</sup> UN Climate Change Conference UK 2021, *The Global Forest Finance Pledge*, <https://ukcop26.org/the-global-forest-finance-pledge/>

<sup>21</sup> The COP26 pledge follows similar declarations such as the 2014 New York Declaration on Forests committed to halving deforestation by 2020 and eliminating it by 2030 and the Amsterdam Declaration in 2015.

<sup>22</sup> Global Forest Watch, dashboard: <https://www.globalforestwatch.org/dashboards/global/>

<sup>23</sup> World Resources Institute, *Just 7 Commodities Replaced an Area of Forest Twice the Size of Germany Between 2001 and 2015*, <https://www.wri.org/insights/just-7-commodities-replaced-area-forest-twice-size-germany-between-2001-and-2015>

<sup>24</sup> Note that Article 116 and Schedule 17 of the Environment Act regarding the *Use of forest risk commodities in commercial activity* extend to all of the UK and not just England.

<sup>25</sup> European Commission, *Proposal for a regulation on deforestation-free products*, [https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products\\_en](https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en)

<sup>26</sup> For example, how a 'forest risk commodity' is defined; which businesses are included within the scope of the legislation; the design, implementation and reporting aspects of the due diligence system and the enforcement of the regime are all covered by the UK and EU's legislative proposals.

marked change to earlier approaches, such as under the EU Timber Regulation, which focussed only on illegal deforestation. In contrast, the UK's approach would require businesses that are trading in forest risk commodities to ensure that the products being traded have been produced in compliance with local laws. This puts the responsibility for defining the legality of deforestation on the producer country.<sup>27</sup> There is however the inherent assumption that producer countries have sufficiently robust governance and enforcement systems to permit this approach to work.

Differences in policy design are one aspect of divergence, in this case affecting third countries as well the UK and EU. However, there also will be the question of how the EU and the UK will implement and enforce their approaches, including the reporting and data regimes required.

Within the UK, the drivers influencing the choice over environmental divergence will vary case by case but also will be affected by the form of the legislation involved. Perhaps the clearest illustration of this is the important category of environmental product standards which apply to products traded within the Single Market. These are numerous in EU environmental law and can be distinguished from other measures, such as process standards and procedural standards. All differences in environmental standards have the potential to raise level playing field as well as environmental concerns. However, differing product standards are potentially the most sensitive in trade and economic terms because they can cause barriers to trade since the products concerned may have to be checked at the frontiers of the EU Single Market, with the potential for additional costs and delay. For this reason, while EU Member States are permitted to set higher product standards than those agreed at the EU level, they cannot protect their domestic markets from products that meet only the EU requirements. Their inability to exclude such imports is a strong deterrent to diverging by setting higher standards.

The same applies to the four nations of the UK under the UK Internal Market Act. If Wales sets higher standards for motorcycle noise than England it cannot prevent imports of machines complying with English standards.<sup>28</sup> In these circumstances there are potential advantages to UK industry of continued alignment with EU environmental product standards to facilitate trade and avoid

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<sup>27</sup> Closing the Gap, *COMPARING DIFFERENT POLICIES AND APPROACHES*, accessed 07.04.22 <https://rightsanddeforestation.org/policy-papers/comparing-different-policies-and-approaches/>

<sup>28</sup> See Haigh, N. [What are the lessons from the EU for the UK's own internal market? – Inside track \(greenallianceblog.org.uk\)](https://greenallianceblog.org.uk)

having to meet two different sets of requirements. This is in contrast to certain other environmental policy areas, such as EIA rules or limits on emissions from industrial plants, where there may be real or perceived economic benefits from adopting lower standards

However, product standards in the UK may not keep pace with those in the EU, (divergence by default) for example if HSE falls behind the restrictions adopted by ECHA, its counterpart in the EU. If the EU bans PFAS (as is proposed) and the UK does not, there is the risk that surplus PFAS manufactured in the EU or elsewhere will be dumped on the UK market. If there are a growing number of divergences in environmental product standards this will also add to the potential burden of checking goods from Great Britain bound for Northern Ireland, entering the Internal Market via the North Sea.

## 5. ASSESSING DIVERGENCE

Some forms of divergence will be highly visible and others less so. Many will emerge gradually over time rather than in an initial burst. Some might be reversed. Environmental law and policy, including climate change, is a wide field to follow, with much detailed and technical content. Consequently, the tracking of divergence is not a simple task. It becomes more challenging if sectoral policies with a major influence on environmental outcomes, such as agriculture, fisheries and aspects of energy policy, are included in the mix.

At present there is no sign of the UK government or the authorities in the four nations being ready to publish legislative and other material that would allow the public to track and scrutinise divergence.

Nonetheless, it is possible and desirable to track and assess divergence for the reasons noted earlier. Assessments will involve interpretation and judgements and some consideration of the counterfactual i.e. what would have occurred in the absence of a particular decision. Over time assessments will be enriched by accumulating evidence. However, it has started to occur already and it is not clear how it will be documented or how the Government will answer questions in Parliament on the subject for example. The temptation to serve up a clearly politicised assessment will be great.

## 6. IN CONCLUSION

The full consequences of Brexit for environmental policy and law, particularly but not solely in the different parts of the UK, are too early to judge but unquestionably the first signs of divergence are occurring. They merit close attention, as does the wider issue of divergence in its multiple forms.

Divergence is occurring in many areas, some at a technical, others at a more strategic level, as illustrated by a range of examples from energy conservation to the environmental dimension of trade policy. In some areas the UK seems to be lagging behind, for example in relation to chemicals policy although there are examples of moving forward faster, such as the intended greening of agricultural policy. The outlook for England appears more deregulatory following the Queen's Speech but this tone has not been adopted in other parts of the UK.

Given the tensions over the Northern Ireland Protocol and trade across the North Sea, any divergence in relation to environmental product standards has the potential to be particularly sensitive.

The Government should recognise the public interest in this topic and the value of accurate information, given the implications for the environment, human health, elements of the economy and good environmental governance. This requires the creation of a more transparent approach, including the publication of a user-friendly tracking system. Its absence makes it all the more important for independent actors to play a role in both the tracking and assessment of divergence. Academics, independent institutions, including the OEP and ESS, journalists and civil society organisations all fall within this circle.

Now is the time for them to take up the opportunity!



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