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## Ensuring compliance with environmental obligations through a future UK-EU relationship

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When the UK leaves the EU, it will lose an important element in the **enforcement of environmental legislation and standards**. The European Commission's monitoring of Member States' action to implement agreed legislation, backed up by the European Court of Justice's ability to impose effective sanctions, has been a key driver in delivering environmental improvements.

**Existing UK mechanisms for enforcement are much weaker**, in terms of monitoring, in terms of the role for public interest organisations, and in terms of the sanctions courts can impose for failure to implement standards.

This poses **problems both for the UK Government's commitment to ensure that environmental standards do not suffer** as a result of the UK's departure from the EU; and **for the EU 27, who have emphasised the importance of avoiding unfair competition as a result of weaker standards on the environment** and in other policy areas. There are a range of environmental standards (not just single market rules) which have an impact on competitiveness, including legislation on nature, water, air quality, and waste.

Tackling this governance gap requires **action on two fronts: new, independent institutions in the UK** with the responsibility and powers to ensure environmental standards are enforced; and **dispute resolution mechanisms in the agreement between the UK and the EU** which allow NGOs and members of the public a role in monitoring compliance and highlighting possible breaches.

## Table of contents

<b>Table of contents</b> .....	<b>5</b>
<b>Executive summary</b> .....	<b>6</b>
<b>1 Context</b> .....	<b>1</b>
1.1 Background .....	1
1.2 Potential outcomes of the negotiations .....	2
1.3 Why does compliance assurance matter?.....	3
<b>2 Key elements to ensure effective compliance with environmental law</b> .....	<b>7</b>
2.1 Transparency.....	7
2.2 Effective independent monitoring and enforcement mechanism .....	8
2.3 Access to justice for individuals and NGOs.....	9
2.4 Remedies for breaches of the agreement .....	10
<b>3 Constitutional limits set by the EU</b> .....	<b>12</b>
<b>4 Some existing models; and their performance against the criteria</b> .....	<b>14</b>
4.1 EEA model .....	14
4.2 International Environmental Law Model .....	18
4.3 Neighbouring countries model .....	20
4.4 European Energy Community .....	22
4.5 Comprehensive Economic and Trade Agreement (CETA) .....	25
<b>5 Conclusions and recommendations</b> .....	<b>29</b>
5.1 A possible approach: equivalent independent monitoring and enforcement mechanisms .....	29
5.2 Enforcing the agreement itself .....	31
5.3 Conclusions .....	33
<b>Annex 1 EU legislation incorporated in existing agreements</b> .....	<b>34</b>
i) EEA Agreement .....	34
ii) EU-Ukraine Association Agreement.....	35

## Executive summary

This paper addresses the question of the governance arrangements which would apply in future to any commitments on environment law and policy contained in the agreements between the UK and the EU 27 as part of the UK's departure from the EU, and the establishment of the basis for a future relationship.

The UK has emphasised its preference to avoid a future role for the Court of Justice of the European Union (CJEU), while the EU has emphasised the importance of avoiding unfair competition by undercutting EU environmental rules. We outline the importance of enforcement mechanisms, both in terms of judicial oversight, and in terms of monitoring by an independent body, as a key element in the effectiveness of any agreed environmental rules. The practical impact of any shared environmental standards agreed as part of the future arrangements between the EU and the UK will depend on effective enforcement mechanisms. It is therefore important to take account of enforcement when designing safeguards against the unfair competitive advantage that the EU 27 fears could arise from weaker implementation of environmental standards in the UK. However, there are a number of shortfalls in the UK's current system of judicial review, both in terms of access to justice for individuals and NGOs, and in terms of the legal remedies available. These shortfalls mean that reliance on recourse to the UK court systems, as they stand, as the only way of assuring compliance would be an inadequate solution.

We outline a number of key elements that effective compliance mechanisms need (transparency; independent monitoring and enforcement action; access to justice for individuals and NGOs; and effective remedies). The paper then examines the performance against those elements of a number of existing models for environmental enforcement in international agreements (the European Economic Area; international environmental law; existing EU agreements with neighbouring countries; the European Energy Community; and the EU/Canada Comprehensive Economic and Trade Agreement (CETA)).

Based on the lessons and the shortcomings identified, we recommend two elements of a potentially successful approach. Firstly, the development of independent institutions in the UK with responsibility for enforcement of the relevant environmental obligations under the agreement – replicating in UK law and practice some of the current benefits of the Commission and the European Court's roles. Secondly, that the dispute resolution mechanisms set up under the agreement to resolve differences between the UK and the EU should allow an effective role for citizens and NGOs in monitoring compliance and highlighting possible breaches, and provide for effective legally binding decisions to ensure compliance.

# 1 Context

## 1.1 Background

Following the UK's referendum on continued membership of the EU, and the UK Government's invocation of article 50 on 29 March 2017, the UK and the EU are engaged in a process of negotiation to determine the terms of the UK's departure, and, potentially, to identify possible options for a future relationship.

The EU 27 approach to the negotiations has been outlined formally in the European Council guidelines of 29 April<sup>1</sup>, and (in respect of the issues covered by the first phase of the negotiations) in the negotiating guidelines agreed by the Council on 22 May<sup>2</sup>. The environment is covered in the former document as an area where any future free trade agreement, to be concluded once the UK has left the EU, would “encompass safeguards against unfair competitive advantages [through, inter alia, tax, social, environmental and regulatory measures and practices]”. The EU will also wish to ensure that its approach to the negotiations integrates broader environmental concerns, in line with article 11 of the Treaty on the Functioning of the EU; particularly where less effective delivery of environmental outcomes in the UK has implications for environmental outcomes in the EU.

The UK's approach has been detailed in the White Paper published by the UK Government on 2 February<sup>3</sup>, although it includes mainly broad principles, and in many areas lacks the detail necessary to understand the specific objectives aimed at by the UK side in the negotiations. The White Paper also sets out the UK Government's intentions in terms of the legal regime to be applied to areas currently subject to EU legislation, with proposals for UK legislation which would incorporate the existing *acquis* into UK law. On environmental policy, it set out a number of statements of ambition, including:

“Leaving the EU offers the UK a significant opportunity to design new, better and more efficient policies for delivering sustainable and productive farming, land management and rural communities. This will enable us to deliver our vision for a world-leading food and farming industry and a cleaner, healthier environment, benefiting people and the economy” (p. 41)

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<sup>1</sup> European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU. Available: <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexite-guidelines/>. European Parliament resolutions are also relevant, given its role in approving or rejecting the outcome of negotiations. See in particular “European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union”, Texts adopted, P8 TA-PROV(2017)0102

<sup>2</sup> Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union. [Council document EUCO XT 20004/17](https://www.consilium.europa.eu/media/166644/main/attachment/data/file/166644/Council_document_EUCO_XT_20004/17.pdf).

<sup>3</sup> The United Kingdom's exit from, and new partnership with, the European Union. Policy Paper, 15 May 2017. Available: <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>

“Following EU exit, we will want to ensure a sustainable and profitable seafood sector and deliver a cleaner, healthier and more productive marine environment.” (p. 41)

and:

“The Government is committed to ensuring we become the first generation to leave the environment in a better state than we found it... We want to take this opportunity to develop over time a comprehensive approach to improving our environment in a way that is fit for our specific needs.” (p. 70)

Separately, the Government has now tabled draft legislation<sup>4</sup> setting out the arrangements for integrating the EU acquis into UK legislation, following the UK’s withdrawal from the EU. Environmental stakeholders in the UK have noted that the Bill does not address the governance gaps identified in section 1.3 below; and that the Bill does not transfer general treaty principles of EU law, including the precautionary principle and the polluter pays principle, into domestic UK law (except to the extent that they have already been relied on in existing case law).

Most recently, on 23 August 2017 the UK Government published a number of position papers, including one on “Enforcement and Dispute Resolution: A Future Partnership Paper”. This paper rules out direct jurisdiction in the UK of the CJEU and claims that this, “will not weaken the rights of individuals, nor call into question the UK’s commitment to complying with its obligations under international agreements.” It also outlines a number of existing models of dispute settlement which it suggests could be relied on to ensure compliance, without committing to a preference. It does not address the question of access to justice for individuals and NGOs.

## **1.2 Potential outcomes of the negotiations**

At this stage, and particularly given the relative flux and lack of clarity in the UK negotiating position, a range of possible outcomes are potentially available. The UK has stated that it wishes to leave the single market, and the customs union; but the UK Government now has only a slender working majority, and could be dependent on the votes of many MPs who want to secure the full range of benefits of single market membership for the UK. The Government has also stated that it will “bring an end to the jurisdiction of the Court of Justice of the European Union in the UK”; however, there may be areas where practical solutions require a continued CJEU role (for example, where the UK aims to participate in integrated EU licensing regimes on medicines, or chemicals). The approach necessary to delivering the EU-27 negotiating position of avoiding unfair competition through environmental deregulation in the UK will need to reflect the broader architecture of any deal.

Much speculation has been published on what the outcomes might be. We see a number of broad possibilities:

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<sup>4</sup> [European Union \(Withdrawal\) Bill 2017-19](#).



1. Agreement on withdrawal, followed swiftly by agreement on future access to the single market, with the UK adopting a position similar to that of the EFTA countries in the European Economic Area.
2. Agreement on withdrawal, followed by a long period of negotiation on future trading arrangements, with an interim arrangement governing relations in the meantime, requiring the UK to maintain single market and customs unions disciplines in order to maintain access to the single market.
3. Agreement on withdrawal, followed by a long period of negotiations on future trading arrangements, without an interim agreement (with the UK temporarily falling back on World Trade Organisation (WTO) rules with no preferential access to European markets beyond the most favoured nation (MFN) guaranteed tariff), or with an interim agreement which is significantly less ambitious than option 2 in terms of the commitments on either side.
4. A failure to reach either a withdrawal agreement or a future trade agreement, with the UK falling back on WTO rules.

Suggestions and proposals relevant to the EU negotiating position should focus primarily on potential outcomes 1 and 2, where the EU extracts clear commitments from the UK in return for a high degree of access to the EU market on preferential terms. However, the risks associated with outcomes 3 and 4 are also relevant to a consideration of the potential disadvantages of failing to reach an agreement.

There are two areas which would need to be covered by any agreement which delivers on the EU27's negotiating objective on avoiding unfair competition on environmental regulation. The first, and most obvious, is the question of the list of areas of legislation, or the list of environmental standards and processes, to which the UK commits. The second, and equally important, is the arrangement set in place for ensuring that the UK (and, in return the EU 27) abides by its commitments. This report focuses on this latter question of compliance assurance.

### **1.3 Why does compliance assurance matter?**

The EU's approach to environmental legislation, as with other areas of the *acquis*, is built on not just the agreement of the terms of the legislation itself, but on mechanisms to interpret it, and to ensure compliance with it. The Court of Justice has the role of ruling on actions brought before it (including those instigated by the Commission), and of interpreting EU law, or the validity of EU acts under it, in response to requests from the courts of the member states. In doing so, it ensures the consistent interpretation of EU law, and (as discussed below in section 3) has established the principle of its own exclusive role in order to do so. However, the CJEU's role is complemented by a significant compliance assurance role performed by the Commission.

The Commission's duties under the Treaty on European Union include the requirement that it "shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court

of Justice of the European Union.”<sup>5</sup> In practice, this role includes monitoring member state transposition of legislation (and taking action against them in the case of late or incorrect transposition); and the investigation of potential breaches of EU law, either brought to the Commission’s attention by complaints from citizens or affected parties, or on its own initiative. The Treaty on the Functioning of the EU sets out a process (article 258) under which the Commission issues a reasoned opinion, giving the member state an opportunity to comply or respond, and then, if it is not satisfied by the action taken in response to the reasoned opinion, brings a case before the CJEU. In practice, the Commission has a highly-developed process of discussion with member states on concerns before a file reaches the reasoned opinion stage, providing a number of opportunities to put pressure on the relevant government to ensure compliance. An incidental benefit of the process is that the Commission develops a good understanding, across the member states, of the varied approaches to implementation and of common problems in implementation.

The mechanism is not perfect. As the 7th Environment Action Programme, and a number of subsequent policy statements, make clear, there is a significant problem of under-implementation of the environmental acquis. However, while stakeholders occasionally complain that the Commission is too slow to take action, or too timid in bringing cases; and while political opinion in many member states shows high levels of dissatisfaction with changes forced on governments by Commission enforcement action, it is clear that the Commission’s role has been vitally important in ensuring relatively consistent implementation, providing an avenue for individuals and stakeholders to use to address member state failings on environmental implementation<sup>6</sup>, and, over time, obliging member states to put their legal commitments into effect<sup>7</sup>.

A number of UK environmental NGOs and lawyers have expressed concerns about the effectiveness of Government commitments on the environment, once the UK is no longer subject to the EU legal system; concerns echoed by UK Parliamentary committees<sup>8</sup>. These stem in part from concerns over general principles of EU environmental policy, and their role in informing the interpretation of legislation. But the most significant concern is over the compliance assurance régime.

Over the decades since the UK joined the EU, there have been a number of areas of legislation where full UK implementation was only achieved after a long process of Commission and CJEU action; these include the bathing water directive, the designation of sites under the Birds and Habitats directives, meeting air quality standards, and urban waste water treatment standards. The UK’s current institutions show significant gaps both in terms of the legal scope

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<sup>5</sup> Treaty on European Union, article 17 (1)

<sup>6</sup> It should be noted that the sponsors of this report, RSPB and WWF, are among the stakeholders who have made use of this mechanism on a range of issues.

<sup>7</sup> Over recent years, the Commission has experimented with new approaches to encouraging more rapid transposition and implementation of environmental legislation, including through the development of a pilot process allowing for more rapid communication between the Commission and member states on public complaints, and the recent introduction of the Environmental Implementation Review, a biennial cycle based on country reports and dialogue with member states. The 2017 report on the UK can be found at: [http://ec.europa.eu/environment/eir/pdf/report\\_uk\\_en.pdf](http://ec.europa.eu/environment/eir/pdf/report_uk_en.pdf)

<sup>8</sup> See in particular the Environmental Audit Committee’s report on “[The Future of the Natural Environment after the EU Referendum](#)”, and the House of Lords EU Committee report on “[Brexit: environment and climate change](#)”

for challenging government action (or inaction), and the administrative machinery for monitoring, enforcement, and for deciding on derogations.

### **1.3.1 Gaps in the legal options available to stakeholders in the UK**

While the UK Government's position paper on enforcement and dispute resolution insists that ending the direct jurisdiction of the CJEU in the UK will not weaken the rights of individuals, in fact the legal systems of England and Wales, Scotland and Northern Ireland provide weaker opportunities for redress where individuals or affected parties have concerns that legislation is not being complied with, when compared with those provided by the European Union system of enforcement through the Commission and the CJEU. Several problems have been identified by stakeholders:

- (i) The limited scope of judicial review. Administrative law and practice in all three UK jurisdictions (England and Wales; Scotland; and Northern Ireland) allows the Government significant discretion, and the bar for demonstrating the "unreasonableness" of decisions is set very high, particularly in the case of a failure to act; thus, in the absence of EU law and the ability to refer questions to the CJEU, it would be significantly more difficult to demonstrate that (for example) Government action to reduce air pollution in London was not adequate to the objectives it was required to achieve.
- (ii) Recent legislation has further reduced the scope of judicial review in England and Wales, and of the remedies that courts may impose, and reduced the scope of third parties to intervene.<sup>9</sup> In addition, changes introduced in February this year have increased uncertainty surrounding the costs individuals and NGOs have to bear when bringing judicial review procedures<sup>10</sup>. This reduced access for individuals and NGOs compounds the disadvantage of not having a body which monitors and assesses the conformity of Government action with environmental legislation, and bringing cases before the courts where necessary. The remedies available under judicial review in the UK are limited to setting aside an administrative decision and requiring the relevant authority to reconsider; prohibiting an authority from doing something it intended to do; or requiring it to fulfil its legal obligations. Fines (for example, to reflect past damage to a protected site) are not imposed; and damages can only be imposed in very narrowly defined cases, where a claimant's private law rights have been infringed.
- (iii) The UK parliamentary system makes it possible for a government, if it finds through court proceedings brought against it that it does not have the powers to take the action it wishes (or it is obliged to take action it does not wish to take), to legislate relatively swiftly to change its powers. There has been a pattern of this behaviour by Government in, for example, immigration law over recent years.

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<sup>9</sup> Part 4 of the Criminal Justice and Courts Act 2015.

<sup>10</sup> See the article in newspaper the Guardian of 28 February 2017:

<https://www.theguardian.com/law/2017/feb/28/environment-groups-risk-prohibitive-costs-for-legal-challenges>

Thus, if UK judicial review were the only constraint on Government decision-making about environmental matters following the UK's departure from the EU, there would be a likelihood that, regardless of the formal standards required to be achieved by any agreement on the future relationship with the EU, delivery in practice would depend on the enthusiasm of the Government of the day. This in turn creates the risk of contagion with enforcement within the EU and the EEA, with states able to point to the relative weakness of the constraints on the UK as a justification of the need for a more flexible approach to be taken by the Commission and EFTA authorities. Access to justice for individuals and NGOs is an essential element in the effectiveness of the current EU mechanisms for enforcement, as explained in section 2.3 below, and therefore must be addressed as part of ensuring equivalence in practice between UK and EU standards.

### ***1.3.2 Gaps in the UK administrative machinery for enforcement***

In addition to the question of legal remedies available to stakeholders and interested parties, there are a number of other elements that are necessary for effective compliance assurance. The European Commission's role as a monitor and watchdog for environmental enforcement would not be filled by domestic bodies under current Government plans; in addition to bringing cases under the formal Treaty mechanisms, the Commission is also able to apply softer influence on Member States in preparatory investigation and discussion of possible breaches of environmental standards. While the UK has some bodies created by primary legislation with a role of advising on, and implementing, environmental policy (for example the Environment Agency in England and Wales; Natural England in England; the Scottish Environmental Protection Agency), in practice these bodies are viewed as part of the government apparatus, rather than independent from it; and are subject to ministerial control, including in particular in respect of their financial resources. They would not, as currently instituted, be capable of taking on an independent role in monitoring implementation equivalent to that currently performed by the Commission.

EU environmental legislation also includes a wide range of reporting obligations on Member States, which enable the Commission and the European Environment Agency to produce analysis of member state progress in specific areas of policy, as well as broader analysis of the state of the environment across the EU, ensuring transparency and comparability of performance. It is unclear the extent to which the UK would continue to participate in reporting to the EEA.

Finally, there are a number of requirements to inform the Commission (or seek its formal consent) when a member state intends to apply specific permitted derogations from EU standards; a process of assessment which would clearly be less demanding if a country were simply self-approving its implementation of derogations. While these additional elements of compliance assurance are not the main focus of this report, their absence from the UK's institutional framework following its departure represents a further weakness identified by environmental stakeholders and by the UK parliamentary committees.

## 2 Key elements to ensure effective compliance with environmental law

The EU Council's negotiating directives state that any future trade relationship between the EU and the UK must 'ensure a level playing field' by establishing 'safeguards against unfair competitive advantages'. The Commission must be confident that the UK will not engage in environmental dumping by reneging on any commitments it makes regarding such matters under a potential agreement.

As discussed above, the loss of the European Commission's monitoring and enforcement function and the jurisdiction of the CJEU will leave an important gap in the current system of environmental law enforcement in the UK (as potentially will the loss of requirements to monitor and report, or the absence of an effective mechanism for approving the exercise of derogations). Addressing the gaps in compliance assurance that have caused concern for UK environmental stakeholders is also, therefore, essential to delivering the EU's negotiating objective of safeguards against unfair competitive advantages.

**To achieve the EU Council's objective of a level playing field, an agreement between the UK and EU on their future trading relationship must include mechanisms to achieve effective monitoring and enforcement in the UK.** Such measures should include the following key elements, (building on existing elements of EU environmental law and on international agreements such as the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)).

### 2.1 Transparency

Transparency is a pre-requisite for the effective implementation and enforcement of laws. The UK and the EU adhered to this principle when they became party to the Aarhus Convention<sup>11</sup>. Access to information allows the public to have a better understanding of environmental issues. This, in turn, leads to better scrutiny of public authorities' actions affecting the environment, enhances public participation in decision-making and supports the enforcement of laws through a complaint mechanism and/or the courts in direct actions.

The reporting obligations contained in EU environmental legislation provides one important avenue for accessing information on the state of transposition and implementation of EU environmental obligations. Specific rules on when public authorities must give access to documents that have not been actively published provides another.

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<sup>11</sup> The 9<sup>th</sup> and 10<sup>th</sup> recitals to Aarhus Convention state: "Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns. Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment."

Therefore, to ensure effective compliance, the UK should commit to a continued obligation to implement the Aarhus Convention and its EU implementing directive (Directive No. 2003/4/EC), particularly the following requirements:

- Refusals to grant access to documents are limited to defined exceptions that are interpreted restrictively, taking into account the public interest served by disclosure;
- The possibility to have access to review procedures to challenge a public authority's decision to refuse access to environmental information;
- Public authorities must collect and update the environmental information that is necessary to their function;
- Public authorities must provide information to the public on the type and scope of environmental information in their possession and the procedures for obtaining access;
- Public authorities must actively disseminate:
  - o Legislation and policy documents relating to the environment and progress reports on their implementation;
  - o International treaties, Environmental information should progressively become available in electronic databases;
  - o Facts and analyses of facts which are relevant in framing major environmental policy proposals.
  - o A national periodic report on the State of the environment, published every three or four years, including information on the quality of the environment and information on pressures on the environment, ideally in a format allowing for comparison with EU member states, and comparison across different time periods.

## **2.2 Effective independent monitoring and enforcement mechanism**

Monitoring and enforcement of the environmental law commitments the UK signs up to in any future agreement with the EU will require a mechanism that is at least equivalent in terms of its effectiveness to the functions currently performed by the Commission and EU agencies. As noted in section 1.1 above, these functions are a critically important component in the effectiveness and stringency of the EU environmental acquis. Without a similar level of compliance assurance, the UK would in practice be held to a lower standard of environmental delivery, even if in principle it was prepared to commit to equivalent legislative standards in a range of areas.

To be effective, we recommend that such a mechanism should consist of:

- A monitoring and enforcement authority (or authorities) that is independent and impartial, and adequately resourced, with the following functions and powers:
  - o Monitoring:
    - review UK implementation reports and plans;
    - publish evaluations of implementation, along the lines of the Environmental Implementation Review reports the Commission now publishes for EU member states;

- Where a commitment exists to comply with specific EU legislation or standards, check that they are correctly implemented in UK law;
  - Assess applications for derogations from such EU legislation or standards, where they are provided for under the relevant EU legislation;
  - Assess UK compliance with EU environmental laws, including practice;
- Complaints mechanism for individuals and NGOs:
    - Receive complaints from physical and moral individuals and NGOs, irrespective of nationality and/or country of residence regarding breaches or potential breaches of environmental law, and irrespective of whether the complainant has a formal interest in the breach/potential breach of environmental law;
    - Complaints are handled free of charge;
    - Rights for complainants to be informed on the progress of the complaint/investigation, including formal notice and right to submit comments regarding a decision not to open or to close a complaint procedure;
    - Right of complainant to complain to an Ombudsman if he/she considers there to have been maladministration in the handling of the complaint.
  - Enforcement mechanism
    - Powers to open own initiative inquiries into potential breaches of environmental law;
    - Powers to open inquiries into breaches highlighted in complaints from individuals;
    - If inquiry does not resolve the breach, powers to bring a legal action in a court with appropriate remedies and sanctions;
    - Obligation to publish the decision to initiate an inquiry and the decision to open legal proceedings against a public authority.

### **2.3 Access to justice for individuals and NGOs**

If the only way to enforce the UK's environmental commitments is through state-to-state dispute settlement, diplomatic relations and interests will dictate enforcement policy. This will weaken the smooth day-to-day functioning of the agreement, and allow environmental commitments to erode over time through persistent breaches. The EU's experience has shown that enforcement by individual and NGO action in national courts is essential to holding public bodies to account which, in turn, preserves an equal playing field throughout the internal market. Such enforcement by individuals and NGOs allows the CJEU to hear cases on infringements that the Commission does not act on due to political reasons or resource constraints. As the discussion of current UK arrangements for judicial review in section 1.3 makes clear, there are significant barriers to NGO participation, and constraints on the scope of cases that can be brought, or the remedies that can be imposed.

Both the UK and EU are parties to the Aarhus Convention, which provides a useful benchmark for access to justice that should be included in the EU-UK agreement.

- Standing for NGOs and individuals to challenge acts of UK public authorities that breach environmental laws.
  - o Standing rules should not prevent individuals and NGOs from accessing courts with the motive of environmental protection. Therefore, the rules should not link standing to infringement of individual/NGOs subjective rights.
- Scope of review that allows the Court to consider both the procedural and substantive legality of public authorities' acts.
  - o Review of procedural legality is generally unproblematic in the context of judicial review proceedings in the UK.
  - o Review of substantive legality, on the other hand, can be problematic in the UK. The Aarhus Convention Compliance Committee has expressed "concern as to the availability of appropriate judicial or administrative procedures, as required by Article 9, paragraphs 2 and 3, of the Convention, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review".<sup>12</sup>
- Access to procedures that are not prohibitively expensive.
- Proceedings that are fair and timely.
- Adequate and effective remedies: the very purpose of judicial review procedures is to correct erroneous acts and obtain a remedy for any harm suffered. Courts must be able to:
  - o make good harm caused by an unlawful decision, act or omission, including:
    - compensation for pecuniary damage;
    - addressing harm to the environment;
  - o take measures to address the lack of compliance with environmental law, including suspension, revocation or annulment of unlawful decisions or acts, and disapplication of legislation and regulatory acts;
  - o Instruct public authorities to adopt measures where they have omitted to do so;
  - o Order interim measures, where appropriate, e.g. if indispensable to avoid damage to the environment or to avoid a change to the factual basis of the legal proceedings.

## 2.4 Remedies for breaches of the agreement

Any legal system, such as that applying within the EU on application of EU law, needs to provide for effective redress in the event of a failure to comply with legal standards. The Court of Justice, for example, has comprehensive powers to require annulment of an illegal act, to require member states or EU institutions to bring themselves into conformity with the law,

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<sup>12</sup> Findings of the Aarhus Convention Compliance Committee of 18 October 2010 in case ACCC/C/2008/33, paragraph 127: [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33\\_Findings.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf)



and, in the event of a failure by a member state to do so, to impose fines. The principles of the direct effect, supremacy of EU law, and Member State liability, further amplify the impact of the CJEU.

By contrast, remedies under international law are generally quite crude; and this has resulted in a reluctance of states to use such remedies. Under international law, the agreement itself may set out what happens if a party considers that the other party has breached the agreement. Often, the agreement will provide for state to state dispute settlement, but specific remedies are not always spelled out. If specific rules on remedies are not provided, a party that does not comply with a decision of an international tribunal, in a case where another party has suffered damage as a consequence of the breach, can in principle be required to compensate the damage (although there are unlikely to be effective mechanisms to enforce the payment of the compensation). Alternatively, and also if the agreement does not prescribe specific remedies, a party to an international agreement is entitled to (partially) suspend or even terminate the agreement. Some agreements, notably trade agreements, provide more detailed rules on remedies in case of a breach by one of the parties. These rules generally prescribe more detailed procedures for partially suspending the trade agreement or for the payment of penalties. For instance, under the US - Central America FTA, penalties of up to 15 million dollars may be imposed<sup>13</sup>.

Replicating the effectiveness of the current EU legal system through a bilateral agreement, particularly if the UK insists on avoiding any (significant) role for the CJEU, is therefore challenging. In addition to the potential impact on environmental outcomes that has caused concern for UK stakeholder and legal experts, this makes it difficult to deliver the EU's negotiating objective of avoiding unfair competition based on weaker, or more weakly enforced, environmental standards.

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<sup>13</sup> Article 20.17 CAFTA

### 3 Constitutional limits set by the EU

A complicating factor in ensuring compliance with environmental law in the UK through an agreement with the EU are the constitutional constraints the EU faces. The EU Treaties give considerable and exclusive powers to the EU courts and these powers can stand in the way of creating additional courts in international agreements<sup>14</sup>. Therefore, while the EU in principle can submit itself to international courts and tribunals established by an international agreement, the EU's own legal system does not make this an easy task<sup>15</sup>. The CJEU has set out its rationale for this in successive judgements, as detailed in the following paragraph; but in essence it considers that the special characteristics of EU law (the EU's institutional framework, including its judicial system, direct effect, primacy of EU law over national law, and so on) need to be preserved; that EU law needs to be interpreted uniformly and consistently, and applied fully; and that individual's rights must be judicially protected. Establishing a new tribunal which was able to decide on the legality of decisions adopted by the EU institutions would, in its view, threaten uniformity and consistency in particular.

For instance, the CJEU has rejected the EU's accession to the European Court on Human Rights<sup>16</sup>, the establishment of the EEA Court<sup>17</sup>, and the creation of the European and Community Patents court<sup>18</sup>. One reason the CJEU rejected the accession of the EU to the ECHR was that the European Court of Human Rights would be able to rule on questions of EU law without the involvement of the CJEU. This would in its view affect the uniformity of application of EU law and undermine the CJEU's role as its interpreter.

In essence, while there are generally no problems creating courts for disputes between the EU and the UK or giving the European Court of Justice a role in an agreement, the situation would be different if individuals were to have access to such an international court or tribunal. The reason is that the EU Treaties have created a new legal order under international law, which not only creates rights and obligations for its Member States, *but also for individuals*<sup>19</sup>. Creating a separate structure for the enforcement of individual rights in relation to some aspects of EU law would threaten the uniformity of interpretation of EU law. The courts of the Member States and the EU courts play a key role in ensuring that those rights and obligations are uniformly interpreted and observed throughout the Union<sup>20</sup>.

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<sup>14</sup> The EU courts have inter alia exclusive jurisdiction to annul EU acts, to give a definitive interpretation of EU law, to rule on the non-contractual liability of the EU, and to hear disputes between Member States and the EU institutions on matters covered by EU law. See Part Six, Title 1, Section 5 of the Treaty on the Functioning of the European Union. See for a discussion of the powers of the EU courts in relation to Investor-State Dispute Settlement, L Ankersmit, 'The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System' *Journal for European Environmental & Planning Law* (2016), p. 46 – 63

<sup>15</sup> Opinion 2/13, *Accession to the ECtHR*, EU:C:2014:2454, paras. 182-183

<sup>16</sup> *Ibid.*

<sup>17</sup> Opinion 1/91, *EEA*, EU:C:1991:490

<sup>18</sup> Opinion 1/09, *European and Community Patents Court*, EU:C:2011:123

<sup>19</sup> Case 26/62, *Van Gend & Loos* [1963] ECR 12

<sup>20</sup> Opinion 2/13, *Accession to the ECtHR*, EU:C:2014:2454, para. 176

### **The autonomy of EU law: the powers of the Union courts**

The EU's own judicial system allows EU law to operate autonomously from national law. A UK NGO can for instance go to a British court if the organisation believes that UK authorities incorrectly apply the Birds Directive\*. The British court can (or must†) then ask questions about that provision to the European Court of Justice through the preliminary reference system. The ECJ then determines the meaning and effect of that provision and guides the British court in the application of that provision. In case of a conflict with UK law, for instance, the British court is required to set aside UK law and apply EU law.

The guidance of the ECJ is the 'keystone' to the EU's judicial system and all courts of the Member States are required to follow the guidance of the ECJ. It ensures that EU law operates the same way throughout the Union. An international agreement can therefore not upset this balance in responsibilities between the courts of the Member States to seek guidance of the ECJ and the ECJ's task to explain EU law.

\* See for example C-44/95, *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds* EU:C:1996:297

† Article 267 TFEU

This means that if an international court were to be able to hear cases brought by individuals the following conditions need to be met:

- The international court cannot invalidate EU legislation<sup>21</sup>;
- The international court cannot give a binding interpretation of EU law without the involvement of the European Court of Justice<sup>22</sup>;
- The international court does not affect the powers of the courts of the Member States to make a preliminary reference to the European Court of Justice<sup>23</sup>;
- The international court does not have the power to determine the division of powers between the EU and its Member States<sup>24</sup>;

These conditions are demanding and the exact scope of these conditions are uncertain due to the limited amount of case law of the CJEU on the issue. A straightforward solution to avoid complications is to ensure that such a court has no jurisdiction in the EU. In the second EEA Agreement, the EU and the EFTA states agreed that the EFTA states would create an EFTA Court that would not bind the EU in any way, in effect creating an imbalance between the EFTA countries and the EU<sup>25</sup>. Another option is to extend the jurisdiction of the CJEU by giving courts of third countries the power to make a preliminary reference to the CJEU<sup>26</sup>.

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<sup>21</sup> Article 267 TFEU

<sup>22</sup> Opinion 2/13, *Accession to the ECtHR*, EU:C:2014:2454, paras. 243-248

<sup>23</sup> Opinion 1/09, *European and Community Patents Court*, EU:C:2011:123, para. 77

<sup>24</sup> Opinion 2/13, *Accession to the ECtHR*, EU:C:2014:2454, para. 234

<sup>25</sup> Opinion 1/92, *EEA (II)* EU:C:1992:189

<sup>26</sup> See for instance the European Energy Community Agreement, discussed below in section 4.4

## 4 Some existing models; and their performance against the criteria

Having set out in section 2 above the key criteria against which an effective enforcement mechanism can be judged, we will now look at a range of existing agreements, where enforcing a level of shared environmental commitment is relevant. While the UK has made it clear that it wishes to negotiate a new agreement with the EU, not based on existing models, the models nevertheless provide some insight into what has been achievable in previous negotiations; the advantages of the mechanisms developed; and the downsides; and the UK draws on them in its own recent paper on enforcement and dispute resolution.

We will focus here on the mechanisms for ensuring compliance with the environmental commitments entered into under international agreements, rather than the commitments themselves. Annex 1 provides, for background information, a description of the EU legislation included under the agreements described here. A separate analysis would be needed to identify the areas of EU environmental legislation, and any future development of that legislation, which should, ideally, be incorporated into an agreement in order to deliver the EU's priority of avoiding unfair competition (and, we would argue, in order to deliver the wider environmental objectives which require cross-border cooperation). A logical starting point would be to use the EEA model, since this aims explicitly at ensuring fair competition within the EEA single market; although it should be noted that the rationale for the Birds and Habitats Directives not being included in the EEA Agreement is not strong, and was based primarily on negotiability with the then Norwegian government, rather than an analysis of its potential impact on cross-border competition. The fact that the existing environmental acquis was negotiated with input from the UK, and in nearly all cases adopted with the UK voting in favour, is a strong argument for its acceptability in principle by the UK.

It should also be noted that the models described here all apply to situations where there is a common intention to bring standards into closer alignment; the (arguably unique) situation created by the UK's decision to leave the EU is that a structure is needed which governs, and limits, the extent to which currently aligned structures of environmental legislation can diverge. None of the models can be applied directly to the current negotiations, given the UK's stated objectives; but each contains some elements which are relevant to the design of structures to govern the future relationship between the EU and the UK.

### 4.1 EEA model

The aim of the EEA Agreement is to extend the EU internal market to participating EFTA states, (Norway, Iceland and Lichtenstein)<sup>27</sup>. As such, the Agreement entails the free movement of goods, persons, services and capital across the territory of the EEA, as well as a system ensuring that competition is not distorted and closer cooperation in other fields, including the environment. Importantly, Article 73 of the Agreement incorporates the EU environmental

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<sup>27</sup> Switzerland is technically an EFTA state but is not party to the EEA Agreement. For the sake of simplicity, in this report EFTA states refers to those EFTA states that are party to the EEA Agreement, i.e. Norway, Iceland and Liechtenstein.

law principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. The EEA does not cover the common agricultural policy (CAP) or common fisheries policy (CFP); as noted above and in Annex 1 there are some exceptions to EU environmental legislation covered by the Agreement; and the EFTA countries are not in the Customs Union.

Under the Agreement, EU legislation, acts and decisions that are EEA relevant are incorporated into the EEA Agreement and become binding on the EFTA states. The EEA Joint Committee, consisting of the representatives of the EU Commission, ambassadors of the EFTA countries and a representative of the EFTA Surveillance Authority, meet regularly and are responsible for deciding, by unanimity, which EU rules should be incorporated into the EEA Agreement. Neither the EFTA Court nor the CJEU have jurisdiction in this matter. This has led to long and protracted negotiations within the Joint Committee, and on some occasions some acts of EU secondary legislation which are clearly EEA relevant have not been incorporated<sup>28</sup>.

As mentioned above, the CJEU rejected the initial proposal for a joint EU-EFTA EEA monitoring and enforcement mechanism on the basis that it would compromise the autonomy of EU law and the exclusive jurisdiction of the CJEU. Consequently, the EEA Agreement provides for a two-pillar structure, whereby the Commission and CJEU perform a monitoring and enforcement role for the EU parties to the EEA Agreement, and EFTA institutions mirroring those functions have been established for the EFTA states.

The two-pillar structure requires close cooperation on the part of the EU and EFTA institutions to ensure consistency of application of EEA law. In particular, Article 6 of the EEA Agreements requires EEA law, to the extent that it is identical to EU law, to be interpreted in conformity with the case law of the CJEU prior to the date of signature of the EEA Agreement. In practice, however, the EFTA Court consistently applies the CJEU case law even after the date of signature<sup>29</sup>. Differences in the case law of the EFTA and EU courts can trigger the dispute settlement procedure in Article 111, although this has never happened.

#### **4.1.1 Transparency**

The EFTA states are bound by the reporting obligations in the EU legislation that has been incorporated into EEA law. This serves as the basis of the EFTA Surveillance Authority's implementation status database, which provides a useful resource on the transposition of EEA law within the EFTA states.

The access to documents rules that apply to the EFTA Surveillance Authority are less detailed than Regulation 1049/2001/EC which apply to the EU institutions and there are no specific rules for access to environmental information which take account of the Aarhus Convention.

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<sup>28</sup> Haukeland Fredriksen, H. and Franklin, C.N.K., "Of Pragmatism and Principles: The EEA Agreement 20 years On", *Common Market Law Revue* 52: 629 – 684, 2015, p.653

<sup>29</sup> Haukeland Fredriksen, H. and Franklin, C.N.K., "Of Pragmatism and Principles: The EEA Agreement 20 years On", *Common Market Law Revue* 52: 629 – 684, 2015, p.633

#### **4.1.2 Effective independent monitoring and enforcement mechanism**

The EEA Agreement obliges the EFTA states to establish an independent surveillance authority (the EFTA Surveillance authority, or ESA for short) and an EFTA Court to carry out in relation to the EFTA states the functions carried out by the Commission and the CJEU in relation to the EU states.

- Reporting obligations:
  - The EEA Agreement works by incorporating EU legislation and other EU measures which become applicable to the EFTA countries. Therefore, the EFTA countries are bound by all of the reporting obligations contained in the incorporated EU legislation. They report to the EFTA Surveillance Authority.
- Monitoring:
  - Article 108 of the EEA Agreement obliges the EFTA countries to establish the EFTA Surveillance Authority and procedures similar to those existing in the EU to ensure the fulfilment of EEA. Article 109 states that the fulfilment of EEA obligations shall be monitored by the EFTA Surveillance Authority, on the one hand, and the EU Commission, on the other. In order to ensure a uniform surveillance throughout the EEA, the EFTA Surveillance Authority and the Commission are obliged to cooperate, exchange information and consult each other on surveillance policy and individual cases.
  - The EFTA Surveillance and Court Agreement<sup>30</sup> sets out the detailed rules regarding the EFTA Surveillance Authority's monitoring function. Broadly speaking, it functions in the same way as the Commission, including independence from national governments.
- Complaints mechanism: Article 109 of the EEA Agreement obliges the EFTA Surveillance Authority to receive complaints concerning the application of the Agreement in the EFTA countries and to inform the Commission of the complaints it receives. Individuals can submit complaints without having to show a formal interest or that they are concerned or affected by the breach of EEA law. Complainants enjoy a number of procedural guarantees, including:
  - An acknowledgement of complaint bearing an official reference number.
  - The Complainant can choose whether or not to remain anonymous in any correspondence between the EFTA Surveillance Authority and the national authority in question.
  - The Authority will endeavour to take a decision on the substance (either to open an infringement proceeding or to close the case) within a year of the registration of the complaint.
  - The Complainant is notified in advance if the Authority plans to close the case without issuing infringement proceedings. The Complainant will also be informed of the course of any infringement proceedings<sup>31</sup>.

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<sup>30</sup> <http://www.efta.int/sites/default/files/documents/legal-texts/the-surveillance-and-court-agreement/Surveillance-and-Court-Agreement-consolidated.pdf>

<sup>31</sup> [http://www.eftasurv.int/media/internal-market/Explanatory\\_note\\_to\\_Complaint\\_Form.pdf](http://www.eftasurv.int/media/internal-market/Explanatory_note_to_Complaint_Form.pdf)

- Enforcement mechanism: Articles 31 – 33 of ESA/EFTA Court Agreement provide for an infringement procedure which is comparable to that under Article 258 TFEU. It has both a pre-litigation stage designed to allow the EFTA Surveillance Authority and the EFTA state concerned to resolve the issue, and a judicial phase before the EFTA Court if the infringement has not been resolved. There is no equivalent to Article 260 TFEU to allow the EFTA Court to impose fines on EFTA states for unresolved infringements.

#### **4.1.3 Access to Justice for NGOs and Individuals**

The EEA Agreement envisages access to justice through the national courts of the EFTA states, with the possibility to refer questions concerning the interpretation of EEA law to the EFTA Court. In this way, effective access to justice depends on the procedural rules of the EFTA states and willingness on the part of national courts to refer questions to the EEA Court. In practice, the courts of both Norway and Iceland have shown reluctance to refer questions to the EFTA Court, but their national courts have shown commitment to applying EEA law, as interpreted by the CJEU<sup>32</sup>.

Effective access to justice for individuals and NGOs is hampered by the fact that the status of the EU legal principles of direct effect and primacy are far from clear in the EFTA states. With regards to primacy, Protocol 35 obliges the EFTA states to introduce a statutory provision to the effect that EEA has primacy over other statutory provisions, but not over the constitutions of the EFTA states.<sup>33</sup> In general, the EFTA states do not apply the principle of direct effect, except in the field of competition law. In principle, this should make it difficult for the courts in EFTA states to enforce EEA law when it has not been properly transposed into national legislation. However, in practice, the national courts have shown dedication to implementing EEA law. They have attempted to fill the gap left by the lack of direct effect and primacy by accepting the EU legal principles of effectiveness, consistent interpretation (which obliged national courts to interpret secondary legislation in conformity with EEA law) and state liability<sup>34</sup>. The willingness of UK courts to do the same is questionable.

#### **4.1.4 Remedies**

Except for the important lack of a power to impose fines on EFTA states, the EFTA court has similar powers to the CJEU in respect of the ability to enforce its decisions.,. In the event of a disagreement between the EU institutions and the EFTA institutions, the EEA Joint Committee can be convened in an attempt to settle the dispute; and, in the event of a failure to reach a decision, either side can introduce safeguard measures suspending rights under the relevant provisions of the EEA agreement. However, the dispute settlement procedure has never yet been used, suggesting that cooperation mechanisms are functioning smoothly (although, as with many state-to-state dispute settlement mechanisms, it is also likely that parties would

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<sup>32</sup> According to Haukeland Fredriksen, H. and Franklin, C.N.K., “Of Pragmatism and Principles: The EEA Agreement 20 years On”, *Common Market Law Review* 52: 629 – 684, 2015, the EFTA Court annually receives less than five referrals in total. See page 672.

<sup>33</sup> *IBID*, page 662.

<sup>34</sup> *IBID*, page 665.

be reluctant to trigger the procedure except in the event of severe and persistent non-compliance).

## **4.2 International Environmental Law Model**

The EU and the UK are currently jointly party to more than 30 international environmental agreements. These agreements are likely to remain applicable in relations between the UK and the EU post-Brexit<sup>35</sup>. While their content and aims vary widely, these agreements generally do not provide for strong compliance mechanisms as their design primarily encourages and facilitates compliance through non-judicial means. If these agreements contain dispute settlement, it is state-to-state dispute settlement and this form of adjudication is rarely used to ensure compliance with the substantive provisions of the agreement in question. Nonetheless, these agreements do contain some features that can be helpful in ensuring that governments comply with their obligations under these agreements. This report will not discuss these regimes in detail, but outline some of their features alongside the criteria identified above.

### **4.2.1 Transparency**

Many of these agreements include reporting obligations for the Parties. To the extent that these are made public, such reports do, to a certain extent, ensure positive disclosure of environmental information, although the quality of the information provided varies widely. Not all of these regimes couple these reporting obligations with independent verification mechanisms assessing the information provided. In addition, most of these regimes also do not give citizens or NGOs the legal right to request information from any secretariat or body set up under the regime.

The Paris Agreement, for instance, requires Parties to provide information and a report on their anthropogenic greenhouse gas emissions with the view of monitoring the achievement of the nationally determined contributions under the Agreement. The Agreement also provides for a technical expert review.

### **4.2.2 Effective independent monitoring**

International environmental agreements generally do not set up independent monitoring bodies that can actively police compliance of an agreement by the Parties, although in a few cases the possibility for NGOs to submit complaints allows such bodies to investigate issues independently of the Parties<sup>36</sup>. Nonetheless, many regimes have verification and monitoring mechanisms in place to assess the accuracy of information provided by the Parties. This more passive role makes the monitoring mechanisms weaker, which is further exacerbated by the fact that their role is often not to ensure compliance with environmental norms in the agreement, but simply to verify the accuracy of the information provided.

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<sup>35</sup> The Council negotiating directives for the withdrawal agreement with the United Kingdom state at paragraph 18 that 'the United Kingdom remains bound' by all international agreements it has jointly concluded with the EU.

<sup>36</sup> Bern Convention Aarhus Convention see below



The independence of monitoring and verification bodies varies. For instance, the CITES agreement relies on a private body, the Trade Records Analysis of Flora and Fauna in Commerce (TRAFFIC) monitoring network set up by the WWF and the IUCN. Under the Paris agreement, on the other hand, the technical expert review is carried out under the regime itself but is not fully independent as it is required to operate in a ‘facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid[s] placing undue burden on Parties’.

In addition to monitoring and verification bodies, international environmental agreements often feature compliance mechanisms. Compliance mechanisms allow for review of compliance with the agreement that is less confrontational, non-judicial and consultative in nature compared to dispute settlement mechanisms. They provide for a more diplomatic means to encourage compliance with the agreement, generally by making recommendations to a Party based on submissions made by other contracting Parties (this is rarely done), non-complying Parties themselves, the secretariat or another body established by the agreement<sup>37</sup>, or in the case of the Aarhus Convention by citizens or NGOs. They are, by the same token, less capable of ensuring compliance, and their outcomes can in practice often be ignored by the Party in breach of its obligations.

#### **4.2.3 Access to justice for citizens and NGOs**

International environmental agreements generally do not provide for any form of legal redress for citizens and NGOs. Access to justice for citizens and NGOs is thus dependent on the Parties determination of the effects of the agreement in their respective legal orders or, alternatively, the Parties’ willingness to bring matters forward under the international agreement based on complaints or public pressure by NGOs or citizens.

The only limited exceptions to this general lack of access to justice are the Aarhus Convention and the Bern Convention. The Aarhus Convention Compliance Committee can review citizens and NGO’s complaints on compliance of one of the Parties with the Convention. The findings of the Committee however require endorsement of the Meeting of the Parties before they become binding, underlining the more diplomatic and non-judicial nature of the proceedings. Similarly, the Bern Convention has introduced a so-called ‘case-file system’ which allows complaints to be filed by NGOs. Again, the system does not give NGOs access to an independent court and is merely a system that aids the effective monitoring of compliance with the convention.

#### **4.2.4 Remedies**

International environmental agreements lack the wide array of strong remedies available under EU law for breaches of the provisions in the agreements. As the agreements only provide for dispute settlement between states, no individual or NGO will be in the position to make any claims before these tribunals. States, on the other hand, will only be entitled to demand cessation and non-repetition of the breach and to reparation.

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<sup>37</sup> The Espoo Convention’s Implementation Committee can review compliance with the Espoo Convention on its own initiative. [http://www.unece.org/env/eia/implementation/implementation\\_committee.html](http://www.unece.org/env/eia/implementation/implementation_committee.html)

### 4.3 Neighbouring countries model

The EU has concluded several international agreements with neighbouring countries that in addition to trade liberalisation commit those countries to collaboration and integration in other areas, including the environment. They are different from regular trade agreements that the EU has concluded with for instance Korea or Mexico as they are ‘integration oriented’ and seek to introduce principles, concepts, and provisions of EU law into those countries, including EU environmental law, as a step towards closer integration and potentially eventual membership of the EU.

The most advanced of those agreements, the EEA Agreement, is discussed above in section 4.1, as it has its own institutional set-up with the EFTA court and surveillance authority. The other ‘integration oriented’ agreements are the string of agreements with Switzerland that ensures the Swiss partial integration into the internal market and the new generation of ‘deep and comprehensive’ free trade agreements with countries in Eastern Europe, notably Ukraine.

This section will primarily look at the EU-Ukraine Association Agreement as it establishes the most detailed and far-reaching environmental commitments of an EU neighbouring country. The environmental commitments entered into in the Agreement are effectively split into those commitments that are part of the Trade and Trade-related Matters title (Title IV) and those that are part of the Economic and Sector Cooperation title (Title V). The title on Trade and Trade-related Matters has its own governance arrangements that effectively duplicate those in other free trade agreements such as CETA and will therefore not be discussed here. It is, however, noteworthy that Article 290 (2) of the agreement requires Ukraine to approximate its laws, regulations and administrative practice to the EU *acquis* (details of the relevant legislation are included in Annex 1). Failure to do so may therefore lead to the (partial) suspension of the trade part of the agreement.<sup>38</sup>

The title on the Economic and Sector Cooperation has a dedicated chapter on the environment which sets out to develop and strengthen their cooperation on environmental issues. Article 363 TFEU requires Ukraine to gradually approximate Ukrainian legislation to EU law and policy on environment in accordance with Annex XXX<sup>39</sup> to the Agreement. That Annex sets out a detailed timetable as to how Ukraine will implement large parts of the EU environmental *acquis*. For instance, Ukraine is required to implement the major parts of the Habitats Directive according to a specified timeframe<sup>40</sup>. There is, however, no explicit obligation to follow the interpretation of the European Court of Justice on any of these

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<sup>38</sup> Opinion 2/15, para. 161

<sup>39</sup> *sic*

<sup>40</sup> It is noteworthy that the Habitats and Birds Directives are not included in the legislation covered by the European Economic Area Agreement, but are nevertheless included in the Ukraine agreement, suggesting that their inclusion or otherwise is largely a matter of negotiability with the relevant parties. Since the UK is already covered by the Habitats and Birds directives, and UK Ministers have asserted their intention of avoiding any weakening of environmental protection, there is a strong argument for including these directives in any list of EU legislation by which the UK commits to continue to abide, as part of any agreement on avoiding unfair competition on environmental standards.

provisions. The Agreement also provides for the possibility of updating the Annexes in the light of future developments of the EU environmental *acquis*<sup>41</sup>.

#### **4.3.1 Transparency**

Annex XXX also requires Ukraine to implement major parts of the Directive on public access to environmental information, although crucially the Annex does not mention that Ukraine would be required to implement the wide definition of environmental information in the Directive.

#### **4.3.2 Effective independent monitoring**

The Agreement does not set up an independent monitoring body that will oversee Ukraine's effective implementation of the EU environmental *acquis*. Nevertheless, the implementation will be continuously monitored jointly or individually by the Parties<sup>42</sup>. Ukraine is required to report on the progress of the implementation and monitoring may include on-the-spot missions, with the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed<sup>43</sup>. A body set up by the Association Committee discusses the results of the monitoring activities, which may adopt joint recommendations submitted to the Association Council.

#### **4.3.3 Access to justice for citizens and NGOs**

The Agreement does not give citizens and NGOs access to the specific dispute settlement procedures set up under the agreement. There is therefore only a limited role for civil society in the monitoring and enforcement of the environmental provisions in the agreement itself<sup>44</sup>.

However, the agreement does impose an obligation on the Parties to provide access to justice before its own national courts to defend their individual rights<sup>45</sup>. This is a double-edged sword as it might be beneficial to enforce environmental rights derived from the EU environmental *acquis*, but individuals can also use direct effect of the economic provisions to challenge environmental decision-making.

#### **4.3.4 Remedies**

The Agreement does not provide for any specific remedies for citizens and NGOs.

If Ukraine fails to implement the EU environmental *acquis*, the EU may discuss the matter within the Association Council. After a period of three months, the EU would then be entitled to take appropriate measures which least disturb the functioning of the agreement. Significantly, the Agreement provides that the Parties are not entitled to suspend any rights

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<sup>41</sup> Article 463

<sup>42</sup> 475 (1)

<sup>43</sup> 475 (2) and (3)

<sup>44</sup> There are only very limited monitoring possibilities under the Trade and Sustainable Development Chapter under the Trade Title. Article 299 of the Agreement sets up Advisory Groups and a Civil Society Forum that discuss the implementation of that chapter, which includes the implementation of the EU environmental *acquis*.

<sup>45</sup> Article 471

or obligations arising out of the Trade title of the agreement as this title has its own specific forms of dispute settlement.

However, in the light of the decision of the European Court of Justice in *Opinion 2/15* it is still conceivable that the trade part of the Agreement could be suspended in case of improper implementation of the EU environmental *acquis*. The Trade and Sustainable Development chapter in the Trade title includes an obligation on Ukraine to approximate its laws, regulations and administrative practice to the EU *acquis*. According to the CJEU a breach of such a provision entitles the EU to (partially) suspend or even terminate the Agreement.<sup>46</sup>

#### 4.4 European Energy Community

The Energy Community is an international organisation bringing together the European Union and nine of its neighbours (Albania, Bosnia and Herzegovina, Kosovo<sup>47</sup>, Former Yugoslav Republic of Macedonia, Georgia, Moldova, Montenegro, Serbia and Ukraine) to create an integrated pan-European energy market. The Treaty establishing the Energy Community<sup>48</sup> has been in force since July 2006. The key objective is to extend the EU internal energy market rules and principles to countries in South East Europe, the Black Sea region and beyond on the basis of a **legally binding framework**, which includes relevant environmental legislation.

The Energy Community has three major objectives: “the creation of a pre-accession mechanism with the implementation of the Community *acquis* in this field; the establishment of an effective regulatory framework; and the creation of an internal energy market between the countries in the region”<sup>49</sup>. The Treaty was concluded for a period of 10 years from the date of entry into force but has been extended for another period of 10 years<sup>50</sup>.

The Contracting Parties **have committed themselves to implement the relevant parts of the EU *acquis* on energy, environment, competition, and renewable energy**. Articles 24 and 25 of the Treaty allow the adaptation of the *acquis* and implementing of possible amendments. In terms of the “environment *acquis*” currently included as part of the Energy Community Treaty, the Contracting Parties made legally binding commitments to adopt (by a set timetable<sup>51</sup>) a broad range of EU environmental legislation, as detailed in Annex 1.

The main institutions established or being established to oversee the process are the Ministerial Council, the Permanent High Level Group, the Regulatory Board, the Fora

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<sup>46</sup> Opinion 2/15, para. 161

<sup>47</sup> The United Nations Interim Administration Mission in Kosovo pursuant to the United Nations Security Council Resolution 1244

<sup>48</sup> Council Decision 2006/500/EC of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty

<sup>49</sup> European Union External Action, Treaties Office Database: Summary of Treaty – Treaty establishing the Energy Community. Link:

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=3421>

<sup>50</sup> Decision Of The Ministerial Council Of The Energy Community D/2013/03/MC-EnC on extending the duration of the Energy Community Treaty

<sup>51</sup> Annex II of the Energy Community Treaty: Timetable for the implementation of the *Acquis* on Environment

(established to bring together stakeholders interested in a specific issue – oil, gas, regional electricity provision, etc), and the Secretariat.

The Ministerial Council represents the governments of the Parties to the Energy Community Treaty, and is its highest decision-making body. The Secretariat is the key administrative actor, working in close cooperation with the European Commission. It is also responsible for reviewing the proper implementation by the Contracting Parties of their obligations under the Treaty, and submits yearly progress reports to the Ministerial Council.

The Treaty establishes a state to state dispute settlement procedure by which a Party or Institution may bring a case of non-compliance by a Party. In the course of a three-step procedure<sup>52</sup>, the Party is given opportunity for making its arguments heard, to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position. In the event that the Ministerial Council is not satisfied with the solution provided by the Party, the Treaty establishes the possibility of imposing a series of remedies, such as a temporary suspension of rights, until the relevant Party rectifies the breach.

#### **4.4.1 Transparency**

The Treaty does not require Contracting Parties to implement the Directive on public access to environmental information. However, the rules of procedure for dispute settlement under the Treaty do provide assurances that any interested private or public body with a legitimate interest shall have access to the case file, subject to an eventual request by complainants to confidential treatment.

The Fora are composed of representatives of all interested stakeholders, including industry, regulators industry representative groups and consumers. Chaired by a representative of the European Community each Forum's mission is to advise the Energy Community on the subjects under its remit.

Contracting Parties are required to report on the implementation of their obligations to the Secretariat on a regular basis.

#### **4.4.2 Effective independent monitoring and enforcement mechanisms**

Pursuant to Article 67 of the Treaty **the Secretariat is to monitor the implementation and prepare an annual report on its findings.** The Implementation Report is every year the focal product of the Energy Community Secretariat and its monitoring role.

The Secretariat is charged with reviewing the implementation by the Parties of their obligations under the Energy Community Treaty. Every year, the Secretariat submits an Annual Implementation Report to the Ministerial Council, which outlines the progress achieved by the Parties in implementing the *acquis communautaire*. The Secretariat also – if a Party so requests - reviews compliance of draft legal acts prior to their adoption and conducts country missions to advise on the correct implementation of the *acquis*. The Commission has advised Parties that strong Energy Regulatory Authorities are needed, with enough powers, resources and independence to perform their duties and capable to ensure

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<sup>52</sup> Opening Letter to be followed, as the case may be, by a Reasoned Opinion and Reasoned Request

non-discrimination, effective competitions and efficient operation of the energy market<sup>53</sup>. The European Commission has also recently proposed a Recommendation to incorporate the Monitoring Mechanism Regulation (525/2013) into the Energy Community acquis<sup>54</sup>.

The Treaty<sup>55</sup> creates a dispute settlement mechanism which bears certain resemblance to the European Union's infringement procedure without, however, providing for a judicial decision. Under the Treaty state-state dispute settlement procedure, a Party/Institution may bring a case of non-compliance by a Party with Energy Community law to the attention of the Ministerial Council. The Ministerial Council may determine the existence of a breach by a Party of its obligations by way of a decision. In cases of serious and persistent breaches, the Ministerial Council may suspend certain rights deriving from the Treaty to the Party concerned.

Under the dispute settlement mechanism, the Secretariat, upon a complaint or on its own motion, may initiate a case of non-compliance by a Party with Energy Community law. Under such circumstances, the Secretariat issues an Opening Letter to be followed, as the case may be, by a Reasoned Opinion and Reasoned Request to the Ministerial Council<sup>56</sup>.

#### **4.4.3 Access to justice for citizens and NGOs**

The Treaty does not provide for any form of legal redress for citizens and NGOs. Access to justice for citizens and NGOs is then dependent on the Parties legal orders.

In 2015 the Ministerial Council adopted a Procedural Act<sup>57</sup> on strengthening the role of civil society. It allowed representatives of Civil Society Organisations to attend the meetings of Working Groups, Task Forces, and other institutional meetings upon invitation of the chairman of the meeting. It also approved the celebration of a Civil Society Day (CSD) to be convened once a year to increase the transparency of the activities of the Ministerial Council and the Permanent High Level Group towards Civil Society Organizations. The first CSD took place in June 2016 and brought together 24 non-governmental and civil society organisations from 11 countries<sup>58</sup>.

Although the original Agreement did not give citizens and NGOs access to the specific dispute settlement procedures, a Dispute Resolution and Negotiation (DRN) Centre was established in 2016<sup>59</sup> for negotiations and mediation of investor-state disputes, facilitation for the swift closure of dispute settlement cases under the Energy Community Treaty, and negotiation support to national authorities in their negotiations with private parties. The services

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<sup>53</sup> Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC (Energy Community Treaty)

<sup>54</sup> Energy Community News:

<https://www.energy-community.org/news/Energy-Community-News/2016/06/23.html>

<sup>55</sup> Articles 90-93

<sup>56</sup> For more information on the three-step-process, see:

<https://www.energy-community.org/legal/cases/dispute.html>

<sup>57</sup> Procedural Act PA/2015/03/MC-EnC: on strengthening the role of civil society

<sup>58</sup> Energy Community News:

<https://www.energy-community.org/news/Energy-Community-News/2016/06/23.html>

<sup>59</sup> Procedural Act Of The Energy Community Secretariat 2016/3/ECS on the Establishment of a Dispute Resolution and Negotiation Centre

provided by the DRN Centre are free of charge<sup>60</sup>. However, these arrangements are primarily of interest for foreign investors aiming to ensure fair treatment in comparison with domestic investors, and are likely to be of limited relevance to ensuring enforcement of the environmental acquis.

The EU has stressed the need of the Energy Community Institutions to empower and help national courts and tribunals interpret the Treaty and enforce the rules adopted<sup>61</sup>.

#### **4.4.4 Remedies**

Title VII of the Treaty deals with implementation of decisions and dispute settlements. Articles 91 and 92 describe the circumstances in which the Ministerial council may determine the existence of a breach by a Party of its obligations. As per Article 92, the Ministerial Council, acting by unanimity, may suspend certain of the rights deriving from application of the Treaty to the Party concerned. However, no clear rules on remedies are described.

Due to complaints concerning a lack of enforcement of the Energy Community Acquis among the parties to the Energy Community, the European Commission has outlined further actions in order to ensure furthering implementation and active enforcement of the Energy Community Rules. Some of these actions include enforcement (or lack of enforcement) of the acquis as a decisive factor in the negotiations for accession to the European Union. The Commission will also examine how to better link bilateral financial assistance to the respect of commitments under the Treaty<sup>62</sup>. While the Energy Community mechanisms for compliance assurance are more developed than in many multilateral agreements, in practice they rely on states (or the Commission acting for the EU, or the Secretariat) being willing to take action. A key test for assessing whether the Energy Community arrangements provide a good model for an agreement with the UK is whether the relevant acquis is implemented more strictly in the EU member states than in the other parties; and it is clear that there has been significantly more Commission action against member states than action initiated under the Energy Community against other parties.

### **4.5 Comprehensive Economic and Trade Agreement (CETA)**

The Comprehensive Economic and Trade Agreement (CETA) is a broad trade agreement between the EU and Canada. Although the European Parliament has given its consent to a future ratification decision by the Council, CETA will not take full effect until it is ratified by both Canada, the EU, and the EU Member States (including approval by national parliaments where relevant).

CETA goes beyond measures related to traditional trade liberalisation such as cutting tariffs, to include areas such as investment protection and regulatory cooperation. The Agreement's

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<sup>60</sup> DRN Centre – Energy Community Website:

<https://www.energy-community.org/aboutus/disputeresolution.html>

<sup>61</sup> Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC (Energy Community Treaty)

<sup>62</sup> Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC (Energy Community Treaty)

environment chapter recognises the right of each Party to set and amend its environmental laws and policies. Although Article 24.5 on upholding levels of protection determines that a party should not lower its environmental standards in order to increase trade advantages, this provision has been criticised for being weak and lacking the necessary level of ambition. The environment chapter also contains a number of commitments to reaffirm existing international obligations, and to cooperate in a number of areas of environmental policy; a few more substantive obligations on access to justice in environmental matters; and a weakly worded provision against environmental dumping.

The environmental protection chapter is not subject to regular state-to-state dispute settlement but has a mechanism based on consultations and the possibility to request a report from a Panel of Experts to resolve disputes. That report can issue recommendations that the Parties are obliged to discuss. In stark contrast to this relatively weak mechanism of enforcement, CETA also contains an investment chapter with its own dedicated system of dispute settlement. This Investment Court System is open to individuals (foreign investors) for any breach of their rights contained in the chapter by the host government. The investment tribunals can issue monetary awards against host governments on the basis of these proceedings.

It should be noted, in addition to the relatively weak mechanisms for enforcing the delivery of environmental commitments, that CETA lacks specific features ensuring the parties have clear systems in place for monitoring and enforcement of their obligations under the Agreement.

#### **4.5.1 Transparency**

CETA does not include reporting obligations or independent verification mechanisms assessing the information provided by the Parties.

Each chapter from CETA includes specific provisions highlighting the importance of both parties ensuring transparency in the implementation of the Agreement, particularly relating to the need to promote public participation and making information public. The environment chapter prompts the Committee on Trade and Sustainable Development to abide by these principles as part of its mission to ensure implementation of the chapter.

The Sustainable Development chapter also includes the obligation of the parties to facilitate a joint “Civil Society Forum” composed of representatives of civil society organisations. The Forum shall meet annually to discuss sustainable development aspects of the Agreement. This action has been considered by many stakeholders to be insufficient to provide civil society with the necessary platform and level of engagement a broad agreement of this nature requires.

#### **4.5.2 Effective independent monitoring**

CETA establishes a Committee on Trade and Sustainable Development (CTSD) to oversee and review the implementation of the environment chapter. As with the other Committees established within the Agreement, the CTSD is composed of high level representatives of both parties and co-chaired by representatives of Canada and the European Union and report to



the CETA Joint Committee who will ultimately take decisions. However, day to day monitoring to ensure active compliance of the Parties' obligations is left to each Party's authorities competent to enforce environmental law.

This loose level of commitment contrasts with the sort of precision that would be necessary to deliver the EU's negotiating objective with the UK of avoiding unfair competition on environmental standards.

#### **4.5.3 Access to justice for citizens and NGOs**

The few environmental obligations in CETA are not enforceable before either domestic courts or before any of the tribunals available under CETA<sup>63</sup>. The dedicated and weaker form of dispute settlement in the environmental chapter is only accessible to the Parties. However, a feature from Canadian trade agreements has been added to the environment chapter. Article 24.7 (3) CETA allows submissions from the public to each of the Parties concerning the compliance with the Agreement and Parties are required to give those submissions 'due consideration'.

CETA does have a relatively strong article on ensuring access to justice in environmental matters, requiring Parties to ensure that the authorities competent to enforce environmental law respond to the claims brought by any interested person residing in its territory, and that the administrative and judicial proceedings are not unnecessarily complicated or prohibitively costly. However, monitoring the implementation of these obligations is difficult to realise without having an independent authority NGOs and citizens can go to in the event of a breach in the Agreement.

#### **4.5.4 Remedies**

The environmental obligations in CETA are not accessible to individuals or NGOs. The enforcement mechanism available in the environmental chapter for the Parties does not provide for any remedies. Parties may only request consultations with each other over matters relating to the implementation of the chapter, and may ultimately request a report from a Panel of Experts. Such a Panel of Experts may issue recommendations if it finds that the Party has not complied with its obligations under the Chapter. The Parties are then required to discuss the report and establish an action plan in order to ensure compliance.

Despite the fact that CETA does not explicitly allow Parties to suspend part of the liberalisation of trade as a result of a breach of the environmental chapter, it is nonetheless possible for the EU to suspend trade liberalisation commitments if the EU considers that Canada has breached its obligations under the chapter. In an innovative recent ruling, the European Court of Justice has maintained that the EU is, on the basis of customary international law, entitled to do so<sup>64</sup>. However, it is hard to imagine the EU doing so. First of all, it would require a Commission proposal and a Council decision by qualified majority to resort to such a suspension, an endeavour the EU has only resorted to once in relation to non-economic

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<sup>63</sup> Article 30.7 CETA

<sup>64</sup> Opinion 2/15, EU-Singapore Free Trade Agreement, para. 161

aspects of a trade agreement<sup>65</sup>. Second, the Commission itself has never even commenced consultations under sustainable development chapters in free trade agreements even in situations where breaches of these chapters were evident.

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<sup>65</sup> Article 218 (9) TFEU. The EU has suspended the operation of the trade agreement with Syria as a result of the civil war and the violations of human rights by the Syrian government.

## 5 Conclusions and recommendations

The analysis of existing models outlined above demonstrates that there are a number of challenges facing EU negotiators in delivering the commitment to avoid unfair regulatory competition from the UK, whilst at the same time avoiding the disruption to EU 27 economic activity that would result from the UK falling back on WTO terms. The current system, which relies on the Commission and the CJEU to ensure compliance with EU legislation, has not secured full implementation among Member States, but is clearly significantly more effective than any alternative international model. We identify below one possible approach, based in part on the EEA mechanism; while the UK has signalled that it is unwilling to accept the loss of control over legislation that would be implied by membership of the EEA, the governance mechanisms provide a model which could be applied to a future UK-EU agreement including environmental (or other) standards. The future agreement not only needs substantive rules on governance (section 5.1 below), but also needs to be enforced by both parties subject to an adequate dispute settlement mechanism (section 5.2 below).

### **5.1 A possible approach: equivalent independent monitoring and enforcement mechanisms**

A key challenge in the development of an enforcement mechanism is ensuring its effectiveness without suffering the disadvantages associated with creating a new international body. Among the disadvantages, as evidenced by parts of the foregoing analysis, are:

- legal uncertainty over the feasibility of creating bodies in an agreement that affect the powers of EU institutions such as the European Court of Justice;
- the difficult choice between either creating parity between the EU and the UK's representation on any new body, or accepting an imbalance, with the EU having the right to nominate more arbitrators/judges. The former would give the UK greater influence than it would have had over EU enforcement mechanisms had it remained in the EU, and greater influence than (for example) existing EFTA countries have, despite their having agreed to comply with a wide range of the EU acquis. The latter would create an unbalanced institution, which risks not being seen by (or in) the UK as impartial;
- incompatibility with the UK Government's stated preference for UK courts and institutions to decide on the law applying in the UK.

However, in the absence of such an international body, reliance on existing UK institutions to monitor and enforce UK compliance would be a weak and unsatisfactory solution. As noted in section 1.3 above, the UK lacks a fully independent and adequately resourced monitoring agency with enforcement powers (or equivalent bodies at the level of the UK's constituent nations). The UK system of judicial review provides insufficient access to justice for individuals and NGOs, including effective remedies. While it is fairly straightforward for individuals and NGOs to have standing to challenge the acts and omissions of UK public bodies, the scope of the courts' review is limited. Historically, UK courts review the procedural legality of their actions or inactions, but are reluctant to encroach on the government's discretion with regard

to substantive legality. Costs and effective remedies are also problematic, as we outline in section 1.3.1 above. It should also be noted that the UK has a dualist legal system, which means that individuals cannot invoke international law directly in the courts if the relevant provisions have not been transposed in national legislation. The application by UK courts of the EU legal principles of supremacy, direct effect, proportionality, effectiveness, state liability, and conformity of interpretation have overcome these deficiencies to some extent. But if the courts can no longer rely on these principles post-Brexit, it will be very difficult for individuals and NGOs to hold UK bodies to account for breaching environmental obligations, particularly when they have not been correctly transposed in UK legislation.

Moreover, assuming that a deal were backed up by some form of state-to-state dispute settlement mechanism, the Commission would need to monitor the quality of UK adherence to its environmental obligations, and initiate action by the Council, including in extreme cases suspension of the agreement, in the event of persistent failures. In practice, effective enforcement action (including the threat of suspension of the trade agreement in the event of persistent non-compliance) would be likely to take second place to the diplomatic and economic convenience of continued operation of the trade agreement.

One approach to this problem would be to require the UK to commit to strong, independent domestic institutions with responsibility for the enforcement of the relevant environmental (and, potentially, other) elements of the *acquis* under the agreement.

For the EU, independent monitoring and enforcement mechanisms already exist: the Commission, assisted in some respects by the European Environment Agency, monitors Member State compliance with the *acquis*, responds to complaints addressed to it by citizens, and itself brings cases to the CJEU. Equally, the EU ensures a system of access to justice that involves the EU courts and the national courts with sufficient remedies for NGOs and individuals.

For the UK, establishing an independent monitoring and enforcement mechanism would have a number of advantages, in addition to its potential role in ensuring enforcement of UK commitments under a trade agreement. Environmental NGOs, legal experts, and UK Parliament select committees have expressed concern about the impact of removal of the Commission and CJEU role in monitoring and enforcing environmental legislation, consequent on the UK's departure from the EU, and have asked for UK domestic legislation to incorporate an effective monitoring and enforcement mechanism. While the UK government has not yet expressed enthusiasm on this question, simply noting that the UK courts are themselves independent, a system based on UK monitoring and enforcement mechanisms, rather than supranational ones, could be relatively attractive. Moreover, it potentially creates a shared UK mechanism to address the potential conflicts between an increased degree of autonomy over environmental legislation and policy on the one hand, and the UK's internal devolution settlement, on the other hand, which grants Scotland, Wales, and (assuming the Northern Ireland Assembly is in operation) Northern Ireland significant autonomy over a number of areas which are currently subject to the EU *acquis* (although this is clearly a matter requiring negotiation and agreement between the UK government and the devolved administrations, respecting the existing devolution settlement). Finally, it could provide for an adequate level of access to justice for individuals and NGOs; which is valuable not just for its impact on the

effectiveness of enforcement of environmental obligations, but also (in the context of avoiding weaker implementation in the UK) in replicating the access to justice rights of individuals and NGOs in the EU judicial system.

The agreement between the UK and the EU could provide for:

- a commitment by both parties to establish (or, in the case of the EU, maintain) institutions, whose independence is guaranteed in law, and which have adequate resources, powers and expertise to monitor and enforce environmental law;
- a commitment by both parties to guarantee access to justice for individuals and NGOs to challenge the acts and failures to act by UK bodies which breach the environmental obligations signed up to, including adequate and effective remedies. This will require detailed thinking on how to ensure that UK courts review the substantive legality of acts, including when environmental commitments have not been adequately transposed in UK legislation;
- continued participation by the UK in relevant monitoring work by the European Environment Agency, including the provision of reports and other information required under relevant EU legislation ;
- mutual, public, and transparent, annual reporting on the operation of the monitoring and enforcement mechanisms.

In essence, the approach outlined here is not dissimilar to the EFTA court and EFTA Surveillance Authority established under the EEA Agreement, with the key difference being that it would apply to one party rather than to a grouping of parties. While making use of the EFTA institutions has been suggested by some commentators, particularly for any transitional period, a UK domestic approach such as this has the advantage of greater political legitimacy within the UK, and of not disrupting the existing EEA arrangements. While the approach we suggest has been developed with the environmental acquis in mind, it has the potential to be applied to other areas of legislation and policy where the EU27 negotiating position identifies a risk of competitive deregulation. It does not, it should be noted, guarantee full implementation by the UK of environmental legislation or environmental commitments specified in an agreement; but it does at least increase the chances that the level of UK implementation will be similar to that applying across the current EU member states (where, as the 7<sup>th</sup> Environmental Action Plan identifies, achieving full implementation continues to be problematic).

## **5.2 Enforcing the agreement itself**

In case any of the substantive provisions of the agreement are breached, including those relating to governance, the parties would have access to a state-to-state dispute settlement mechanism with the possibility of suspending or even terminating the agreement in case of a breach being established. This would usually imply the establishment of an international tribunal to adjudicate disputes. In order to tackle the weaknesses highlighted in section 2.4 of this report of the state-to-state dispute settlement provisions in existing international agreements, the dispute settlement provisions in a future agreement between the EU and UK must be reinforced by the key criteria set out above, particularly transparency and a

meaningful role for NGOs and individuals. This means reinforcing traditional state-to-state dispute settlement that is usually part of EU international agreements with two key elements:

- An effective role for citizens and NGOs in monitoring compliance;
- Legally binding decisions from tribunals set up under the agreement with effective tools to ensure compliance with those decisions.

### **5.2.1 *An effective role for citizens and NGOs in monitoring compliance***

State parties tend, as we note above, to be reluctant to use state-to-state dispute settlement, partly because of the weakness that most existing mechanisms do not provide for remedies that are proportional to the damage caused by a breach, and partly because it can be inconvenient in both diplomatic and economic terms. One way to deal with this problem is to give citizens and NGOs a greater role in monitoring compliance with the governance obligations of the agreement.

To this end, the complaints mechanism contained in Article 24.7(3) CETA (discussed in section 4.5.3 above) goes in the right direction by allowing NGOs and individuals to signal breaches of the environmental provisions. This approach could be complemented by a clause obliging the Parties to review and investigate substantiated complaints, with a view to triggering the state-to-state dispute mechanism. In order to ensure that such complaints were investigated seriously, the agreement could further provide that individuals would have access to domestic judicial review of any decision by either the EU institutions or the UK authorities not to initiate dispute settlement. Such a clause will therefore contribute to the likelihood of substantiated complaints being taken seriously.

If third parties had such a clear route available by which they could bring breaches of the agreement to the attention of either the Commission (for the EU) or the UK authorities, with a clear standard for the treatment of such complaints, and resources available for their investigation, it could provide some pressure for more rigorous and effective enforcement (and in turn encourage better implementation). An advantage of such a complaints mechanism is that it is fully compatible with the EU Treaties, and at the same time guarantees citizens' access to justice for breaches of the environmental and governance aspects of the agreement.

### **5.2.3 *Legally binding decisions from tribunals set up under the agreement with effective tools to ensure compliance with those decisions***

A second important aspect of international dispute settlement under a future UK-EU international agreement is that the tribunals in question should be vested with adequate powers that ensure compliance with its rulings. To date, the EU has given little real power to international bodies that oversee the correct implementation of environmental obligations in EU trade agreements. Generally, such bodies can only issue recommendations that will be discussed by the Parties.

It would therefore be key to ensure that these tribunals have the power to take legally binding decisions. Furthermore, these decisions should have sufficiently dissuasive consequences, for instance by permitting Parties to suspend the agreements in the case of non-compliance with the decision, or even the imposition of penalties that are proportionate to the breach in case.

#### **5.2.4 *The path to an agreement***

The hurdles to establishing a tribunal with these characteristics are significant; and in particular they do not address all of the disadvantages we note at the beginning of section 5, particularly by conflicting with the UK's stated preference for UK courts to decide on the law as applied in the UK, but also by giving the UK an arguably enhanced status in terms of the judicial oversight of its environmental law relationship with the EU than it currently enjoys as one of 28 member states of the EU. It is difficult to envisage the hurdles being overcome under the current negotiating process leading to the end of the Article 50 process in March 2019. However, in the event of an interim agreement with the UK, allowing for a transitional regime (potentially incorporating the domestic mechanisms described in section 5.1) while more detailed arrangements for future cooperation are negotiated, it would be possible to work towards an ambitious approach along these lines.

### **5.3 Conclusions**

Effective enforcement of environmental commitments is vital to ensuring equivalent standards of environmental protection between the EU and the UK, and thereby delivering the EU's negotiating objective of avoiding unfair regulatory competition. It also helps to ensure that the long-term environmental and societal benefits voted for by electorates, and enacted by legislators, are not undermined in practice by short-term reluctance to implement on the part of administrations. To work well, an enforcement mechanism needs to meet the tests of transparency, an effective and independent monitoring mechanism, access to justice for individuals and NGOs, and the availability of effective and dissuasive remedies. Given the stated concerns of the parties to the negotiation, and the need to avoid conflict with the European Court of Justice's role in interpreting EU law, a potentially fruitful avenue for consideration is the inclusion in the agreement with the UK of requirements for it to introduce an independent mechanism, capable of replicating many of the benefits of the current enforcement system in the EU. To ensure compliance with the substantive terms of the agreement, including those on governance and enforcement, a mechanism for dispute resolution between the parties should be developed, including innovative solutions to some of the problems usually associated with such mechanisms, in particular a role for civil society and individuals.

## Annex 1 EU legislation incorporated in existing agreements

Our report focuses primarily on monitoring and enforcement mechanisms which could be applied to any level of environmental standards incorporated into an agreement with the UK. We have not considered in detail the standards which should be applied; these will be a matter for negotiation with the UK, and will depend significantly on the potential trade-off between UK flexibility, and the commitments it needs to provide to secure a high level of “frictionless” trade with the EU.

This Annex identifies the legislation incorporated into three specific existing agreements, and which might be regarded as a model for a list of legislation which the UK would be expected to continue to apply. In general, agreements have required implementation of the legislation itself (with specified omission of some articles in some cases), rather than equivalent standards. This has the advantage of avoiding ambiguity, and avoiding a detailed negotiation on the way in which the equivalent standards are expressed. Particularly in the case of an agreement with a country such as the UK, which is currently a Member State and therefore in principle applying the relevant legislation in full already, this would seem a particularly straightforward and appropriate choice.

### i) EEA Agreement

EFTA EEA countries are expected to adopt the full body of EU law (the *acquis communautaire*) relating to the internal market in their national law. The objectives relating to the environment in the EEA Agreement (Article 73) mirror those set out in the Treaty (with the exception of objectives relating to measures at the international level which are included in Article 191 of the EU Treaty (TFEU)). Specific measures relating to the environment are set out in Annex XX of the EEA Agreement (EFTA, 2016) and include cross-cutting EU legislation. However, a smaller number of extremely important EU environmental measures are not incorporated in the EEA Agreement, eg the Birds, Habitats, and Bathing Water Directives. The following list sets out the key elements of EU environmental legislation included in the EEA Agreement:

- Urban Waste Water Directive
- Treatment Directive
- Nitrates Directive
- Groundwater Directive
- Strategic Environmental Assessment Directive
- Environmental Impact Assessment Directive
- Priority Substances Directive
- Air Framework Directive (and daughters)
- Industrial Emissions Directive
- Emissions Trading Directive
- Directive on Carbon Capture and Storage Seveso Directive
- Directives on contained use and deliberate release of GMOs
- Waste Framework Directive
- Sewage Sludge Directive
- Waste Shipment Regulation Landfill Directive



- End of Life Vehicles Directive WEEE Directive
- Mining Waste Directive
- REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals)
- Ambient Noise Directive
- Water Framework Directive

The list of EEA relevant legislation is not fixed. When new EU legislation classified as “EEA relevant” has been formally adopted, the EEA Joint Commission starts the process of incorporation into the EEA Agreement "with a view to permitting a simultaneous application" of legislation in the two pillars (EFTA, 2016).

## ii) EU-Ukraine Association Agreement

Ukraine undertakes to gradually approximate its legislation to the following EU legislation within the stipulated timeframes<sup>66</sup>:

### **Environmental governance and integration of environment into other policy areas:**

- Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
- Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment
- Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC
- Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 85/337/EEC and 96/61/EC

### **Air Quality**

- Directive 2008/50/EC on ambient air quality and cleaner air for Europe
- Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air
- Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 93/12/EEC as amended by Directives 2000/71/EC, 2003/17/EC and 2009/30/EC and Regulation (EC) 1882/2003
- Directive 1999/32/EC on reduction of sulphur content of certain liquid fuels and amending Directive 93/12/EC as amended by Regulation (EC) 1882/2003 and Directive 2005/33/EC
- Directive 94/63/EC on the control of volatile organic compound (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations as amended by Regulation (EC) 1882/2003
- Directive 2004/42/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain paints and varnishes and vehicle refinishing products and amending Directive 1999/13/EC

### **Waste and Resource Management**

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<sup>66</sup> EU-Ukraine Association Agreement Annex XXX

- Directive 2008/98/EC on waste
- Directive 1999/31/EC on the landfill of waste as amended by Regulation (EC) 1882/2003
- Directive 2006/21/EC on the management of waste from extractive industries and amending Directive 2004/35/EC

#### **Water Quality and water resource management, including marine environment**

- Directive 2000/60/EC establishing a framework for Community action in the field of water policy as amended by Decision No 2455/2001/EC and Directive 2009/31/EC
- Directive 2007/60/EC on the assessment and management of flood risks
- Directive 2008/56/EC Directive establishing a framework for Community action in the field of marine environmental policy
- Directive 91/271/EEC on urban waste water treatment as amended by Directive 98/15/EC and Regulation (EC) 1882/2003 and Regulation (EC) No 1137/2008
- Directive 98/83/EC on quality of water intended for human consumption as amended by Regulation (EC) 1882/2003 and Regulation (EC) 596/2009
- Directive 91/676/EC concerning the protection of waters against pollution caused by nitrates from agricultural sources as amended by Regulation (EC) 1882/2003

#### **Nature protection**

- Directive 2009/147/EC on the conservation of wild birds
- Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora as amended by Directive 97/62/EC, 2006/105/EC and Regulation (EC) 1882/2003

#### **Industrial pollution and industrial hazards**

- Directive 2010/75/EU on industrial emission (integrated pollution prevention and control) (recast)
- Directive 96/82/EC on the control of major accident hazards involving dangerous substances as amended by Directive 2003/105/EC and Regulation (EC) 1882/2003

#### **Climate change and protection of the ozone layer**

- Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61/EC as amended by Directive 2004/101/EC
- Regulation (EC) 842/2006 on certain fluorinated greenhouse gases
- Regulation (EC) 2037/2000 on substances that deplete the ozone layer as amended by Regulations (EC) 2038/2000, (EC) 2039/2000, (EC) 1804/2003, (EC) 2077/2004, (EC) 29/2006, (EC) 1366/2006, (EC) 1784/2006, (EC) 1791/2006 and (EC) 2007/899 and Decisions 2003/160/EC, 2004/232/EC and 2007/54/EC

#### **Genetically modified organisms**

- Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC as amended by Decisions 2002/623/EC and 2002/811/EC, Regulations (EC) 1829/2003 and (EC) 1830/2003 and Directive 2008/27/EC

- Regulation (EC) No 1946/2003 of the European Parliament and of the Council of 15 July 2003 on transboundary movements of genetically modified organisms
- Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the contained use of genetically modified micro-organisms#

In addition, Annex XXXI to Chapter 6 (Environment) commits Ukraine to:

- Implementation by Ukraine of the Kyoto Protocol, including all eligibility criteria for fully using the Kyoto mechanisms
- Development of an action plan for long-term (i.e., post-2012) mitigation of and adaptation to climate change
- Development and implementation of long-term measures to reduce emissions of greenhouse gases

### iii) European Energy Community

The Contracting Parties **have committed themselves to implement the relevant parts of the EU acquis on energy, environment, competition, and renewable energy**. Articles 24 and 25 of the Treaty allow the adaptation of the acquis and implementing of possible amendments. In terms of the “environment acquis” currently included as part of the Energy Community Treaty, the Contracting Parties made legally binding commitments to adopt (by a set timetable<sup>67</sup>) the following nine pieces of EU environment legislation:

Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
Directive (EU) 2016/802 relating to a reduction in the sulphur content of certain liquid fuels
Commission Implementing Decision (EU) 2015/253 laying down the rules concerning the sampling and reporting under Council Directive 1999/32/EC as regards the sulphur content of marine fuels
Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants
Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control)
Directive 79/409/EEC on the conservation of wild birds
Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, as amended by Directive 2006/21/EC
Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, as amended by Directive 2006/21/EC
Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment

In addition to the above parts of the EU environment acquis, contracting parties of the Energy Community made legally binding commitments to adopt (by a set timetable) the following energy legislation with impacts on the environment:

<sup>67</sup> Annex II of the Energy Community Treaty: Timetable for the implementation of the Acquis on Environment

- Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources
- Directive 2010/31/EU of 19 May 2010 on the energy performance of buildings
- Several Delegated Regulations with regard to energy labelling of different products.