From the stroke of midnight: EU judgments on access to environmental information — still relevant in a post-Brexit UK?

Isabella Buono, Barrister with Cornerstone Barristers, discusses the changes to the environmental information regime that kicked in upon the expiry of the Brexit transition period

When the clocks chimed at midnight on 31st December 2020 in Brussels — 11pm in the UK — the Brexit transition period ended, and a new era began. There's been no shortage of talk about Brexit during the last four and a half years, but it was only at that moment that the legal changes really started to take effect. Quite literally, from one second to the next, major elements of the UK's legal system were transformed.

For those interested in rights of access to information, it is the regime for access to environmental information that is affected by this change. The origins of that regime are multi-layered, deriving much of their shape — and teeth — from EU law.

For now, the rules themselves remain the same, though the way they take effect in UK law has changed. And disputes as to their meaning are no longer subject to ultimate determination by the EU Courts in Luxembourg.

The first judgment on access to environmental information delivered by the Court of Justice of the European Union after the end of the transition period — concerning a request for information about a controversial multi-billion pound railway project in Germany — provides an opportunity to think about what lies on the road ahead.

Origins of the right of access to environmental information

In the UK, the right of access to environmental information derives from three different, but overlapping, layers of law.

At the international level, the first layer is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters ('the Aarhus Convention'), adopted by the United Nations Economic Commission for Europe on 25th June 1998 in the Danish city of Aarhus. The Aarhus Convention requires its signatories to, amongst other things, "ensure that… public authorities, in response to a request for environmental information, make such information available to the public". The Preamble recognises that, "improved access to information… enhance[s] the quality and the implementation of decisions, contribute[s] to public awareness of environmental issues, give[s] the public the opportunity to express its concerns and enable[s] public authorities to take due account of such concerns".

The EU and the UK are each a signatory to the Aarhus Convention. As a matter of international law, the UK's obligations under the Aarhus Convention are unaffected by the UK's withdrawal from the EU.

The second layer, also sitting at the EU level, is Council Directive 2003/4/EC on public access to environmental information ('the Environmental Information Directive'). This requires Member States to "ensure that public authorities are required… to make available environmental information held by or for them to any applicant at his request and without his having to state an interest". As stated in its Recitals, the Environmental Information Directive is intended to ensure the consistency of EU law with the Aarhus Convention. The two instruments are not the same, but the wording and purpose of the Aarhus Convention is to be taken into account when interpreting the Environmental Information Directive.

The third and final layer, and sitting at the domestic level, is the secondary legislation adopted to implement the Environmental Information Directive: the Environmental Information Regulations 2004 ('the EIRs'). The EIRs, in large part, supplant the Freedom of Information Act 2000 ('FOIA') in the specific field of environmental information (as information to which a person has a right of access under the EIRs is exempt from disclosure under FOIA). This schism is not insignificant: the EIRs contain an express presumption in favour of disclosure, which finds no equivalent in FOIA; 'public authority' is defined more broadly under the EIRs than FOIA, so as to include private bodies and persons 'under

the control' of a public authority within their reach; and there are fewer exceptions to the duty to disclose under the EIRs, each of which, apart from that for personal data, is subject to a public interest test.

In the UK, the latter two of these three layers of law — the Environmental Information Directive and the EIRs — are tied to the UK's membership of the EU.

Now that the UK is no longer an EU Member State, the status of the Environmental Information Directive in the UK has changed fundamentally. The substance of the law, however, at least for the moment, remains much the same.

The domestic apparatus of Brexit: the EU (Withdrawal) Act 2018

The apparatus for effecting much of the change to the post-Brexit domestic legal landscape is contained in the EU (Withdrawal) Act 2018 ('Withdrawal Act'). Enacting the Withdrawal Act was a major undertaking; the product of a mammoth 272 hours of parliamentary debate (112 in the Commons, 160 in the Lords). Described in the White Paper Legislating for the United Kingdom's withdrawal from the European Union (2017) as 'the Great Repeal Bill', the Withdrawal Act was intended to 'put the UK back in control of its laws' and to 'maximise certainty'.

To fulfil the former of those two objectives, the Withdrawal Act cuts off the 'conduit pipe' through which EU law previously flowed into UK law. When the UK was a Member State of the EU (1st January 1973 — 31st January 2020), and during the transition period (1st February 2020 – 31st December 2020), certain provisions of EU law could be relied on directly before the UK courts, and would take priority in the event of conflict with UK law (by virtue of the EU doctrines of 'supremacy' and 'direct effect'). The EU law instruments that could be invoked, and take priority, in this way included the Environmental Information Directive.

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A particularly high-profile example of the former free-flow of EU law into UK law occurred in the case concerning Prince Charles' 'black spider memos' (so-dubbed on account of HRH's sprawling comments and spirally handwriting): *R. (Evans) v Attorney General* [2015] A.C. 1787.

Mr Evans, a journalist, made requests under FOIA and the EIRs for disclosure of communications passing between various government departments and Prince Charles. The government departments refused his requests on grounds that the information was exempt under sections 37 ('communications with the heir to the throne'), 40 ('personal information') and 41 ('confidentiality') of FOIA and the equivalent exceptions in the EIRs.

Mr Evans successfully challenged the refusal before the Upper Tribunal, which decided that most of the letters should be released. But shortly thereafter, the then Attorney General, Dominic Grieve, issued a ministerial certificate under section 53 of FOIA and Regulation 18(6) of the EIRs, stating that he had, on 'reasonable grounds', formed the opinion that the government departments had been entitled to refuse disclosure. "Disclosure of the correspondence", Grieve suggested, "could damage the Prince of Wales's ability to perform his duties when he becomes king." The purported effect of the certificate was to override the decision of the Tribunal.

The Supreme Court decided that the certificate issued by the Attorney General was invalid, and therefore that the Tribunal's decision in favour of disclosure was to stand. In respect of the environmental information (later revealed to include letters to the then Prime Minister Tony Blair on matters ranging from climate change to the spread of bovine TB by badgers), the Supreme Court considered the Attorney General's certificate to infringe Mr Evans' rights under the Environmental Information Directive. The Directive guaranteed him a right to challenge the government's refusal of his request before a judicial body, whose decision should be 'final' and 'binding'. The Attorney General's attempted circumvention of the Tribunal's decision was incompatible with that right. Mr Evans was able to make this argument — relying on his rights under the Environmental Information Directive directly before the UK courts — because of the EU doctrine of 'direct effect'.

By operation of the Withdrawal Act, at 11pm on 31st December 2020, that free flow of EU law into UK law came to an end. If the Withdrawal Act had stopped there, there would have been legal chaos on New Year's Day, with a significant proportion of the law in force in the UK changing overnight. To avoid that 'cliff edge', the Withdrawal Act took a 'snapshot' of EU law as it stood at 11pm on 31st December 2020 and turned a great deal of it into UK law. What's captured and converted by the Withdrawal Act is called 'retained EU law'. It includes the Environmental Information Directive and the EIRs. It can be changed by Parliament and, in some circumstances, #by Ministers.

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On that basis, unless and until the retained Environmental Information Directive is changed by Parliament or by Ministers, the approach taken to environmental information in the 'black spider memos' is still available and correct.

What about judgments of the Court of Justice of the European Union ('CJEU')?

In answering that question, the Withdrawal Act distinguishes between cases decided by the CJEU before 11pm on 31st December 2020, on the one hand, and cases decided by the CJEU after 11pm on 31st December 2020, on the other.

Decisions made by the CJEU before 11pm on 31st December 2020 continue to bind most UK courts and tribunals. So, for example, the landmark judgment of the CJEU on the meaning of 'public authority' under the Environmental Information Directive (C-279/12 *Fish Legal v Information Commissioner*) will remain in place — at least so far as the High Court and the information tribunals are concerned. Under the Withdrawal Act, the Supreme Court can depart from pre-Brexit judgments of the CJEU in the same way that it can depart from their own case law. The Lord Chancellor recently adopted regulations that give much the same freedom to the Court of Appeal. Other courts or tribunals could in the future be added to that list.

Decisions made by the CJEU after 11pm on 31st December 2020 are no longer binding on any UK court or tribunal. The Withdrawal Act permits, but does not require, UK courts and tribunals to have regard to new EU case law, so far as relevant to any matter before them. In that sense, they are now free to chart their own course.

Permitting UK courts and tribunals to draw assistance from foreign judgments in this way is not a novel phenomenon. In fact, when resolving new and difficult questions, UK judges often draw inspiration from the answers given by judges in other countries, particularly those with a similar legal system. For example, in *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73, Lord Reed — then a member of the Inner House of the Court of Session, now the President of the UK Supreme Court — referred to the approach taken by courts in Australia and New Zealand to the question of what counts as 'information', to assist with his interpretation of the Scottish FOIA (the Freedom of Information (Scotland) Act 2002). Post-Brexit, judgments of the CJEU can be referred to in much the same way.

The first post-Brexit judgment of the CJEU on access to environmental information

The first judgment of the CJEU on access to environmental information after the end of the Brexit transition period was delivered on 20th January 2021, in the case of C-619/19 *Land Baden-Württemberg v DR.*

A person (DR) had requested documents from a state government in Germany (the State Ministry of the Land of Baden-Württemberg) relating to tree felling in Stuttgart Castle Park, which took place in 2010 in the course of a major railway and urban development project (known as 'Stuttgart 21'). The state government refused to disclose the requested documents on the basis that they were 'internal communications'. An exception for 'internal communications' is provided in Article 4(1)(e) of the Environmental Information Directive — and, in the UK, in Regulation 12(4)(e) of the EIRs.

The state administrative court in Germany decided that the state government could not rely on the 'international communications' exception, as that exception no longer applies once the decision-making process to which the 'internal communications' relate has come to an end.

The CJEU disagreed. It decided that, as a matter of EU law, for information to constitute a 'communication', it must have been addressed by an author to someone, whether an abstract entity (for example, 'to the executive board') or a specific person (such as a member of staff or an official). To be 'internal', the information must not have 'le[ft] the internal sphere of a public authority', in particular by not having been disclosed to a third party or made available to the public. Provided those criteria are met, the exception will apply even if the decision-making process to which the information relates has come to an end. In that sense, the exception is not time-limited (although the passage of time might affect the application of the public interest test).

So far as UK courts and tribunals are concerned, the judgment in DR is not a binding statement of the law which must be followed. At most, it is a potentially useful or persuasive piece of judicial reasoning that might assist in resolving a similar dispute. But if a UK judge — whether sitting in the First-tier Tribunal or the Supreme Court — disagrees with it, they are free to take a different approach. That, in itself, is a significant change.

Admittedly, the CJEU's judgment in *DR* is unlikely to send shockwaves through the system governing access to information in the UK. The judgment largely accords with the Information Commissioner's guidance on the 'internal communications' exception in the EIRs, and with the approach taken by tribunals in the UK. There are some differences with, for example, the Information Tribunal deciding in *Secretary of State for Transport v Information Commissioner* (EA/2008/0052) that what counts as 'internal communications' for the purposes of the EIRs 'will depend on the context and facts in each situation' and not any 'standard test'. However, these are perhaps differences more of form than of substance.

So, we are left with something of a waiting game — waiting to see if a judgment of the CJEU signals a shift in established understanding of infor-

mation rights, and, if (or when) it does, waiting to see how the UK courts and tribunals respond. And, having averted a 'cliff edge' on New Year's Day, the Withdrawal Act leaves us with a further cliff-hanger: whether the government will exercise its new freedom to rip up all or part of the EIRs completely (subject only to the continued obligation to comply with the Aarhus Convention as a matter of international law).

It will be interesting to see what, if anything, 'taking back control' of the law means in this field in the months and years to come.

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