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Gove's 'Green Brexit' will not 'magically facilitate' environmental ambitions

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Environment secretary Michael Gove has said that significant 'legislative underpinning' will be needed to realise the government's green ambitions, adding that Brexit can 'enhance our natural environment'. Lawyers at Allen & Overy LLP, Bircham Dyson Bell LLP, Osborne Clarke LLP and Womble Bond Dickinson welcome the recognition of these environmental goals, but agree that there are 'still more questions than answers', warning that Brexit will not 'magically facilitate' Gove's environmental ambitions.

Gove outlined the government's continued commitment to environmental enhancement in a speech organised by Prosperity UK on 15 March 2018. Key points discussed include:

- common agricultural policy (CAP) reform—developing a domestic farming policy that promotes investment in a shared future
- fisheries—developing a marine environment approach with conservation and sustainability at its core
- agritech—continuing to support a technology and data-driven transformation for UK farmers, land managers and those who work on or with the environment
- global leadership—ensuring that natural capital is protected, the natural world is respected and that the highest ethical and environmental standards are upheld in any future agreements

Not a 'radically different approach' to the EU

Associate at Allen & Overy, Emily Turnbull, says that although the speech provided some helpful guidance on the government's position on environment and the climate change agenda post-Brexit, there does not seem to be any suggestion of a radically different approach to that endorsed by the European Commission:

'Clearly it is important that the UK honours the commitments it has made at treaty level, and there are no signs as yet that the current government will take a different path from the EU on climate change policies.'

Senior associate barrister at Bircham Dyson Bell, Rahul Bijlani, agrees, adding that Gove is building on existing EU law while 'potentially adding layers of complexity'. Bijlani also points out the 'fair amount of political spin':

'Gove talks of Brexit enhancing our natural environment, but in many cases the ambitions he sets out could have been implemented within the EU.'

'There's nothing about Brexit which magically facilitates them. Indeed, a number of key UK environmental obligations are under international treaties, such as the Paris agreement, which will be unaffected by Brexit.'

Bijlani adds that the credibility of the speech can also be questioned, given that the government's own record 'stands at odds' with Gove's ambitions: 'It has lost in the courts three times over its failure to implement the Air Quality Directive, but Gove's proposals would have us believe that the UK government will voluntarily go further.'

'Although the government's position is that EU-derived environmental standards will essentially remain in place post-Brexit, the European Union (Withdrawal) Bill contains extensive delegated powers which would allow ministers to modify retained EU environmental legislation which could even include revocation.'

However, legal director at Osborne Clarke, Matthew Germain, says that a notable difference is the linking of economic growth and environmental protection, instead of 'setting them off against each other':

'Placing environmental issues at the heart of our industrial strategy is good news, but it remains to be seen if the government will go as far as really embedding the 25-year environment plan in these policies. If they do, then that would be a significant step change.'

'More questions than answers'

Turnbull says that great clarity is needed so that businesses can 'plan strategically for a post-Brexit world': 'Certainty is needed on the approach to compliance with European technical standards which underpin much of the UK permitting regime.'

'Any divergence from EU standards would require a new set of UK rules to be developed to support regulators in making decisions.

'In short, there are still more questions than answers and this looks to continue to be the case for some time. At the moment, the key issue is clarity from the government on the timing of the legislative package announced, and the extent to which this will align with the EU position.'

Legal director at Womble Bond Dickinson, Sarah Holmes, adds that a 'Green Brexit' cannot be achieved by DEFRA alone, noting that instruments such as the WTO procedural disapproval resolution and WTO agreement on technical barriers of trade will 'almost certainly' be used to challenge elements of Green Brexit:

'A Green Brexit is impossible unless DEFRA and the Department of Trade work closely together now and ensure each has a detailed understanding of international trade law. Just as multiple interacting factors determine the sustainability of an eco-system, so multiple interacting factors will determine whether or not the UK can deliver a Green Brexit.

'A clear vision and commitment to Green Brexit, shared across government and with cross party support, must be the next step for Gove if a Green Brexit is to be secured.'

'A significant legislative task'

Bijlani says: 'To give effect to all this and to give teeth to the new higher standards is significant legislative task.'

Germain agrees that while it is 'encouraging' that the government is looking beyond 2019 and signposting 'ambitious changes', a significant challenge remains: 'The EU will not be slowing down its legislative programme on environment, so it's key the UK can keep up.'

Turnbull adds: 'The integration of environmental concerns into trade deals will help the UK to retain its reputation as a world leader on issues of sustainability and resource management.'

Bijlani concludes: 'For these ambitions to be meaningful they will need legislative backing, as Gove acknowledges, and as yet there are no concrete legal proposals.

'Gove talks about leaving the statute book in better state—if his ambitions are to be realised in a meaningful way the statute book will certainly have to look very different.'

Source: Speech: Green Brexit—A new era for farming, fishing and the environment

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