

Legal Implications of Brexit

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Topics

- Current environmental law in the UK
- Future environmental law in the UK
- Issues affecting all EU-derived environmental law

Current environmental law in the UK

■ Common law

- Scots common (civil) law differs from the rest of the UK
- Eg, tort law versus delict in Scotland, *Rylands v Fletcher*
- No change

■ Legislation

- Primary legislation (statutes), secondary legislation (including regulations)
 - International conventions
 - Purely domestic legislation
 - EU legislation

Current environmental law in the UK

■ International conventions

- UK is a party to nearly 40 international environmental conventions either as a party or a Member State of EU
 - UK and/or EU membership depends on exclusive or mixed competencies
 - UK / EU / UK and EU
 - Difficult to determine division of competencies in conventions ratified by UK and EU
- UK would no longer be bound if only EU is a party
- BUT would need to ratify convention if wished to continue being a party

Current environmental law in the UK

- Purely domestic legislation

- Examples include *some* of each of the following
 - Contaminated land, water pollution, environmental permitting, nature conservation, water quality, air quality, climate change and energy law (some emissions trading, energy efficiency, etc.) and planning
- No change
- BUT much purely domestic and EU legislation are interrelated

Current environmental law in the UK

- EU legislation

- Examples including *some* of each of the following
 - Contaminated land, water pollution, environmental permitting, nature conservation, water quality, air quality, climate change and energy law (some emissions trading, energy efficiency, etc.) plus environmental impact assessment but not other planning law

Current environmental law in the UK

■ EU legislation

- European Commission proposes legislation
- Council and European Parliament debate, agree and adopt legislation (or not)
 - European Commission is carrying out REFIT (Regulatory Fitness and Performance) programme on EU legislation as part of its Better Regulation programme
 - REFIT is resulting in withdrawal of proposed legislation, and codification (single piece of legislation instead of multiple), recasting (consolidated text including amendments), other revisions and repeal of existing legislation

Current environmental law in the UK

- **EU legislation – main types**
 - Regulations
 - Directly applicable; no domestic legislation needed (European Communities Act s 2)
 - Directives
 - Flexible, Member States must transpose (ie, enact into domestic law) within a specified time period; transposing legislation must be at least as strict
 - Some have direct effect
 - Usually transposed into law in the UK under ECA s 2(2)
 - Increasingly diverse law and policies in England, Wales, Scotland and Northern Ireland following devolution

Current environmental law in the UK

- Application and enforcement of environmental law in the UK
 - International conventions / purely domestic law / EU legislation
 - Authorities in England, Wales, Scotland and Northern Ireland
- No equivalent of the US Environmental Protection Agency (EPA) in the EU
- Environmental authorities in devolved governments differ, eg. Natural Resources Wales versus Environment Agency, Natural England and Forestry Commission in England

Current environmental law in the UK

- Final decision-makers on law in the UK
 - International conventions
 - Depends; UK Supreme Court, Convention courts / authorities
 - Purely domestic law
 - UK Supreme Court; note difference in courts in Scotland
 - EU law
 - Court of Justice of the European Union (CJEU) but many final decisions by courts in the UK
 - Eg, Welsh 2016 Environmental Liability Directive case

Current environmental law in the UK

■ Environmental principles

- All EU law (not just environmental law) is based on the following principles
 - Polluter pays principle
 - Preventive principle
 - Precautionary principle
 - Subsidiarity principle
 - Aim: ‘a high level of protection taking into account the diversity of situations in the various regions of the Union’ (TFEU, art 191(2))

Future environmental law in the UK

■ Environmental principles after Brexit

- “We should start by shelving the EU’s ‘precautionary principle’”
 - Alan Mak, MP
- "A U.K. agreement will be a good opportunity for us to actually base trade on science rather than just a precautionary principle and undue fear. U.K. has been under the blanket EU restrictions where they will only take non-hormone, non-antibiotic treated beef."
 - Colin Woodall, vice president of government affairs for National Cattlemen's Beef Association, a U.S. trade group representing more than 200,000 cattle ranchers and feeders

Future environmental law in the UK

- **Environmental principles after Brexit (continued)**

“The polluter pays principle suggests that the polluter should generally meet the costs of remedying damage which is attributable to its actions. However, in the normal working of markets in property, responsibility for land, and for the effects of that land on others and the surrounding environment, shifts with the transfer of ownership. ... Provided that residual liability is properly reflected in price, liability based on current ownership may still be consistent with the polluter pays principle”

Response to the Communication from the Commission of the European Communities (COM(93) 47 final) Green Paper on remedying environmental damage; Memorandum by the Government of the United Kingdom of Great Britain and Northern Ireland (8 October 1993) s 3.14

Future environmental law in the UK

- Water
- Environmental impact assessment / strategic environmental assessment
- Habitats and Birds Directives
- Waste
- Industrial Emissions Directive
- Other

Water

- Key EU legislation includes the following
 - Water Framework Directive (2000/60/EC)
 - Marine Strategy Framework Directive (2008/56/EC)
 - Council Directive on drinking water (98/83/EC)
(consolidated)
 - Nitrates Directive (91/676/EEC)
 - Urban Waste Water Treatment Directive (91/271/EEC)
 - Bathing Water Directive (2006/7/EC)
 - Not included in EEA Agreement

Water

- **Key EU legislation (continued)**
 - Groundwater Directive (2006/118/EC)
 - Also Environmental Liability Directive (2004/35/CE) for water damage
 - Different regulations in England, Wales, Scotland, Northern Ireland and Gibraltar
 - All Annex III legislation is EU legislation (Directives and Regulations)

Water

- Many water Directives have been transposed with different regulations in England and Wales, Scotland and Northern Ireland
- Domestic legislation in the UK frequently refers to EU legislation
 - Eg, Water Environment (Water Framework Directive) (England and Wales) Regulations 2017/407, s 2(1)
 - “water intended for human consumption” has the same meaning as in Council Directive 98/83/EC on the quality of water intended for human consumption”

Environmental impact assessment

- **Environmental impact assessment Directive (2011/92/EU; recast), as amended**
 - Different regulations for England, Wales, Scotland and Northern Ireland
 - Many CJEU cases on the meaning of the Directive
 - UK is a party to the UN Espoo Convention on environmental impact assessment of transboundary pollution
 - February 2017: United Nations Espoo Convention Compliance Committee called for suspension of development of Hinkley Point C nuclear power plant due to inadequate consultation by UK with neighbouring countries

Strategic environmental assessment

- Strategic environmental assessment Directive (2001/42/EC)
 - Different regulations for England, Wales, Scotland and Northern Ireland

Habitats and Birds Directives

- Habitats Directive (2009/147/EC) and Birds Directive (92/43/EEC consolidated)
 - Not EEA relevant
 - International nature conventions to which UK is a party would still apply
 - E.g., Convention on Biological Diversity, Berne Convention, Ramsar Convention
 - Different legislation in England and Wales, Scotland and Northern Ireland (amendments to UK legislation in both jurisdictions)

Habitats and Birds Directives

- Habitats and Birds Directives (continued)
 - Many CJEU and UK cases on the meaning of the Directive
 - Also Environmental Liability Directive (2004/35/CE) for damage to species protected under both Directives, and sites / areas of special scientific interest in England, Wales and Northern Ireland

Future environmental law in the UK

- Key EU legislation on waste
 - Waste Framework Directive (2008/98/EC)*
 - Definition of ‘waste’ shaped by CJEU legislation
 - See following examples

* = European Commission has recently proposed amendments

Future environmental law in the UK

- Defra, Welsh Government, Northern Ireland Environment Agency and Environment Agency, Guidance on the legal definition of waste and its application (August 2012)

“The definition of waste has been in use in its current wording for over three decades and it is now embedded in the 2008 Waste Framework Directive (Directive 2008/98/EC). This set of guidance provides a legal analysis of Article 3(1) which defines “waste” as:-

“...any substance or object which the holder discards or intends or is required to discard...”

Future environmental law in the UK

- Hazardous Waste (England and Wales) Regulations 2005/894, as amended, article 2(1)(b)
 - “waste” means anything that—
 - (i) is waste within the meaning of Article 3(1) of the Waste Directive; and
 - (ii) subject to regulation 15, is not excluded from the scope of that Directive by Article 2(1), (2) or (3)”

Future environmental law in the UK

- Hazardous Waste (England and Wales) Regulations 2005/894, as amended, article 2(2)
 - “In these Regulations, a reference to the Waste Directive conditions is a reference to the conditions set out in Article 13 of that Directive, that is to say, to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular—
 - (a) without risk to water, air, soil, plants or animals;
 - (b) without causing a nuisance through noise or odours; and
 - (c) without adversely affecting the countryside or places of special interest”

Future environmental law in the UK

- **Key EU legislation on waste (continued)**
 - European List of Waste (Council Decision 2000/532/EC)
 - Council Directive on the Landfill of Waste (1999/31/EC)*
 - Regulation (EU) No 1257/2013 on ship recycling
 - Mining Waste Directive (2006/21/EC)
 - Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators (consolidated)*
 - Directive 2000/53/EC on end-of-life vehicles*

Future environmental law in the UK

■ Key EU legislation on waste (continued)

- Directive 94/62/EC on packaging and packaging waste
- Directive 2012/19/EU on waste electrical and electronic equipment (recast)*
- Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment (recast)
 - prohibits the use of lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls and polybrominated diphenyl ethers in electrical and electronic equipment imported into the EU

Waste

- Key EU legislation on waste (continued)
 - Regulation (EU) No 1013/2006 on shipments of waste
 - Implements, in part, Basel Convention (ratified by the EU and the UK and other Member States)
 - Requires liaison between Member States
 - Regulation applies to non-hazardous and hazardous waste; Basel Convention applies only to hazardous waste
 - Would Member States continue to liaise with the UK beyond Basel Convention requirements?

Waste

- Key EU legislation on waste (continued)
 - 17 March 2016: Proposed Regulation on fertilisers
 - Creation of a single market for fertilisers from secondary raw materials including recovered nutrients

Waste

- **Key EU legislation on waste (continued)**
 - Nearly all waste law in the UK is based on EU law
 - Most aspects of waste law have been devolved in the UK
 - Many aspects of waste involve product compliance
 - Eg, UK exported 0 tons of refuse derived fuel (shredded, dried and baled combustible municipal solid waste for burning to produce electricity) in 2010, 2.37 million in 2014, 2.82 million in 2015
 - Supply chain considerations

Waste

- Key EU legislation on waste (continued)
 - Would England, Wales, Scotland and/or Northern Ireland continue to implement the EU Circular Economy Plan?
 - Aim: close the loop of product life cycles by more recycling and re-use of products
 - Includes targets for reducing waste, promotion of re-use, incentives for production of greener products, etc.

Industrial Emissions Directive

- **Industrial Emissions Directive (2010/75/EU)**
 - Pollution Prevention and Control regime is broader than IED
 - Different regulations in England and Wales, Scotland and Northern Ireland
 - Over 250 provisions of environmental permitting law in the UK refer to Directives by reference, eg, requiring the competent authority to have regard to specified Directives or to follow them
 - Other provisions require the competent authority to consult with other Member States

Industrial Emissions Directive

- **Industrial Emissions Directive (2010/75/EU)**
 - Status of Best Available Techniques Reference documents (BREFs)?
 - BREFs for large combustion plants and food, drink and milk sectors currently being revised

Other areas of EU law

- Climate change
- Chemicals
- Renewable energy

Other areas of EU law

- **Climate change**

- UK and the EU have ratified the Paris Agreement
- Different legislation and targets in England, Wales, Scotland and Northern Ireland

Other areas of EU law

- **Climate change (continued)**
 - EU Emissions Trading Scheme
 - 2015: 780 installations in UK were subject to EU ETS
 - Accounted for
 - Approx 50% of UK greenhouse gas emissions
 - 10.5% of total verified greenhouse gas emissions (1.6 billion tonnes) in EU ETS
 - Domestic legislation would remain in force
 - BUT future participation in EU ETS would depend on EEA/EFTA membership or would require linking arrangements
 - Ian Duncan, British MEP, leads European Parliament's work on reforming the EU ETS for its fourth phase (2021-2030)

Other areas of EU law

- **Climate change (continued)**
 - Directive on the Energy Performance of Buildings (2010/31/EU) (recast)
 - Proposal for a Directive on the energy performance of buildings (30 November 2016) (will amend 2010/31/EU)
 - Directive 2009/31/EC on the geological storage of carbon dioxide
 - Proposal for a Directive on energy efficiency (30 November 2016)

Other areas of EU law

■ Chemicals

- Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation (EC) No 1907/2006 (REACH)
 - Would no longer apply
 - BUT companies that import chemicals into the EU in quantities of one tonne or more must register the chemicals with the European Chemicals Agency (ECHA) and tested for safe use according to REACH ('no data no market')
 - Over 30,000 chemicals used in excess of one tonne/year in EU market
 - UK exports over £17 billion in chemicals annually to the EU
 - UK has 5,488 registrations for 2,249 substances (second only to Germany)

Other areas of EU law

■ Chemicals (continued)

- Most REACH legislation has not been transposed into law in the UK
- Plus 38 amendments to REACH since it was adopted
- National organisation to take the place of ECHA?
- Should chemicals that are restricted in the EU be restricted in the UK?

Other areas of EU law

■ Chemicals (continued)

- *Fédération des entreprises du commerce et de la distribution and Fédération des magasins de bricolage et de l'aménagement de la maison v Ministre de l'Écologie, du Développement durable et de l'Énergie* (CJEU, C-106/14, 2015)
 - CJEU adopted “once an ‘article’ always an article” approach instead of “whole article” approach
 - ‘Articles’ that are components of a complex product must be notified to ECHA and supply chain if they contain a Substance of Very High Concern (SVHC; carcinogens, mutagens, toxic, etc.) in a concentration above 0.1% threshold
 - Eg, if seat covers in a bus contain SVHC over 0.1%, threshold applies to seats as a component part of the bus, not entire bus
 - Ruling applies to chemicals imported into the EU

Other areas of EU law

■ Chemicals (continued)

- Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures (CLP Regulation) (consolidated)
 - Reflects UN Global Harmonisation System but broader
- Regulation (EU) No 528/2012 concerning the making available on the market and use of biocidal products (consolidated)
- Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market

Other areas of EU law

- **Renewable Energy Directive (2009/28/EC)**
 - Sets binding targets for each Member State with the following overall aim
 - Making renewable energy sources account by 2020 for
 - 20% of total energy in the EU from all sources including renewables
 - 10% of such energy in the transport sector
- **Effect on UK renewable energy industry of changes?**
- **Northern Ireland is part of the single energy market for Ireland**

Issues affecting all EU-derived environmental law

- Future of environmental principles
- Status of former CJEU case law
- Status of future CJEU case law
- Cross boundary issues (Northern Ireland / Ireland)
- Divergence of law in England and devolved jurisdictions
- Effect on product / waste law, and exports of chemicals and goods to the EU
- Effect on supply chains
- Status of BREFs
- Separate emissions trading system