

Brexit - What will happen to Environmental & Climate Change Law?

The UK is holding a referendum on whether to remain in or leave the European Union on 23 June. This is one of a series of briefings on the areas where a Brexit – a British exit from the EU – may have an impact.

Introduction

A great deal of current UK environmental law derives from EU legislation put in place over several decades. The immediate legal impact of Brexit would depend on the how the split is achieved legally, and the model put in its place governing the UK's ongoing relationship with the EU. These issues are considered in general terms in our briefing "[The day after Brexit: what will happen if Britain votes to leave the EU?](#)".

This current briefing considers laws relating to environmental protection and climate change, and gives some thoughts on possibilities for changes in approach following a Brexit. We look only briefly at the possibility of the UK adopting the EEA model (the Norwegian model) since this model largely requires continuing formal compliance with most EU environmental law. The remainder of the briefing focuses on the possibilities for the UK outside of the EEA (either under a bilateral agreement with the EU or simple reliance on WTO rules, customs union or free trade association). The implications for environmental and climate change legislation appear to be similar under these models and the comments made in the briefing in the sections of this briefing under the heading "Bilateral Agreement model" should be treated as also applying to all types relationships outside of the EEA.

Norwegian model

Under the Norwegian model, the UK would have to retain or re-enact most EU environmental legislation to ensure full access to the EU market. This would include areas such as integrated environmental permitting, water and air quality, waste management and REACH.

However, the UK would not have to comply with the Habitats and Birds Directives which provide protection at European level for designated species and habitats. While these Directives have proved politically controversial, particularly in relation to the costs of compliance, it seems unlikely that the Government would seek to significantly reduce protection of existing protected sites given its continuing commitments under various international agreements¹. The UK would be subject to certain climate change legislation and, like Norway, would be able to take part in the EU Emissions Trading System. Incentives for renewable energy generation would still be governed by State Aid rules.

The Norwegian model would subject the UK to most EU environmental laws without giving it the same influence over their creation. This is significant in particular since the UK has often been at the forefront of efforts to reduce the impact of EU legislation or avoid it altogether. An example was the UK's success in preventing the Soil Directive moving forward. The possibility therefore exists of the UK becoming subject to stronger environmental legislation directly as a result of leaving the EU and losing its ability to formally influence legislation.

¹ Including the Bern Convention on the Conservation of European Wildlife and Natural Habitats (1979), Ramsar Convention on Wetlands (1971), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973).

Bilateral Agreement model

If the UK embarks on a relationship with the EU based on a bilateral agreement, the position on retention of EU laws is likely to vary according to the types of controls concerned. In general, the UK would still have to comply with all rules relating to standards of safety and environmental sustainability of products being put on the EU market. However, the UK might be able to relax some laws relating to operational environmental protection controls within UK borders. Environmental and safety standards might not be significantly lowered in many cases for a number of reasons:

- The presence of international agreements which the UK will still have to comply with (e.g. the Kyoto Protocol on carbon emission reductions, the OSPAR Convention on marine pollution, and the Bern Convention).
- The UK has been a driver for stronger EU policy in some areas (e.g. integrated permitting, climate change policy and emissions reporting) where the EU has largely adopted UK practices; or where the UK has pursued its own environmental framework, e.g. in relation to contaminated land remediation.
- While attempts to roll back environmental protections might find favour with some business sectors, these would be subject to close scrutiny by NGOs and be likely to be resisted by NGOs and the public alike.

Irrespective of whether standards would be significantly lowered, it is possible that environmental policy driven purely by domestic politics would be more changeable than the longstanding and gradually evolving policy framework that currently applies across the EU.

If the UK decides to reduce any particular environmental standards or regulatory requirements, it seems likely that any change would be done through a process of gradual reform rather than a very rapid change in environmental laws.

Operational controls: Water, Air and Soil quality, Pollution Control, Environmental Permitting and Waste

Permitting

The UK has an integrated Environmental Permitting regime which regulates the environmental impacts of industrial processes (and in particular impacts on air, water and energy use). This partly derives from the EU Integrated Pollution Prevention and Control (IPPC) regime, now found in the EU Industrial Emissions Directive. It is likely that the structure of the environmental permitting regime would not change greatly following Brexit, not least because the EU IPPC regime was largely adopted on the basis of the UK model. In addition, integrated permitting is generally seen as an efficient administrative mechanism for which new elements of permitting are being added on a regular basis (the Government recently published a consultation to add water abstraction to the regime).

However the Government could look to roll back some environmental standards which apply to permits. Over the last 15 years, the EU has published a series of detailed environmental standards (BREFs²) which set out how the IPPC standard of "Best Available Techniques (BAT)" to protect the environment can be achieved. Adopting BAT standards can add significant expense for business and it is possible that the Government would look at reverting to a model based more closely on cost-benefit analysis (as used by the UK's pre-existing integrated permitting regime). Given that the BREFs would no longer formally apply, the UK might also have to design a whole new set of technical guidance in order to implement such an approach.

Water and Air Quality

Air quality and water quality legislation are other areas where the UK could decide to relax standards and reduce controls. Frequent criticism for non-compliance with EU environmental standards, and in particular recent legal challenges about failure to achieve air quality standards, could lead to consideration of relaxation of the most challenging standards.

² Best Available Techniques (BAT) Reference Documents

Waste

UK waste policy and legislation has been predominantly driven at EU level, particularly in relation to policies surrounding recycling, hazardous waste and prohibitions on landfilling. EU waste policy is continually evolving, most recently with its Circular Economy Package which, among other things, seeks to increase waste recycling targets along with looking at all aspects of the waste chain including product design. Even if the UK decided not to lower current waste targets, it might decide to step back from further tightening them in line with the EU direction. However, the UK would also have to continue to comply with waste rules associated with export of products to the EU – this would include, for example, rules on the content of refuse-derived fuel, or any new product design standards introduced under the Circular Economy Package, for the reasons discussed below under the heading "Environmental and Safety Standards for Products").

Contaminated land

The UK's contaminated land regime does not derive from EU legislation. Contaminated land is generally dealt with upon redevelopment within the planning system, and the Contaminated Land regime provides a regulatory back up for problematic contaminated land based on the polluter pays principle. It seems unlikely that Brexit would lead to major change in these areas. However the EU Environmental Liability Directive as implemented in UK legislation provides an enhanced liability regime for environmental damage caused by regulated industrial processes, or to protected species and habitats. It remains to be seen whether the UK would seek to remove or water down these provisions.

Environmental and Safety Standards for Products

There is a vast array of environmental and safety standards which apply to products sold in the EU. Under the bilateral agreement model, the UK would still need to ensure UK manufactured products comply with these standards in order to retain access to the EU market. It is possible that the UK would be allowed to perform a regulatory role in EU conformity assessment certification (as Canada has negotiated under its proposed bilateral agreement with the EU).

There are also a number of international agreements that will continue to have an impact on product standards such as the Stockholm Convention on Persistent Organic Pollutants (2001) to which the UK is independently a party.

Chemicals and REACH

The 2006 REACH Regulation (Registration, Evaluation, Authorisation and Restriction of Chemicals) places various requirements upon EU Manufacturers and importers to analyse and register the substances contained in chemicals and products for their safety and environmental impact. Additional obligations are placed down the supply chain to pass on relevant substance information. The regulation has been described as one of the most complex pieces of European legislation and is one of the most likely areas where manufacturing companies would like to see administrative burdens reduced. In particular, SMEs have complained consistently about the overwhelming costs of the regime. REACH registration of existing chemical substances is being phased with a final deadline for registration of small volumes of substances in May 2018. On an assumed two year track towards completion of Brexit, it is likely that the major initial burden for registration of existing chemicals will be completed before Brexit is finalised. However, there are ongoing obligations to register new substances and supply chain and authorisation obligations, which will continue to apply.

Under the bilateral agreement model, it is worth noting that REACH already impacts upon non-EU manufacturers since its requirements apply at the point of entry of products into the EU. It is likely that the UK would be subject to the same requirements under this model. In many cases, non-EU countries use local subsidiaries or EU-based third party representatives to assist with compliance. Similarly, UK manufacturers may well have to restructure their supply chains to enable compliance, and they will have to supply all relevant information and documentation needed for registration and in the supply chain.

REACH involves EU member states in the process of evaluating whether substances need to be authorised or restricted. This allows Member States influence which may be useful for domestic environmental or economic reasons. While the Norwegian model would allow the UK a formal role in evaluation, under the bilateral treaty model the UK is likely to have no such role or influence.

As mentioned above, either Brexit model is likely to impose most other EU regulations on chemical product standards on the UK post-Brexit. The UK is also subject to detailed classification, labelling and packaging rules which are based on the UN GHS system³. This is currently implemented in the UK through an EU Regulation. It is likely that the UK would retain the GHS system not least because a number of international agreements to which the UK is already a party have adopted it, or are in the process of adopting it. These include in particular the international agreements on transport of dangerous goods (by air, road, rail, sea and waterways). It is also worth noting that the export of UK chemical products into the EU would continue to be subject to EU labelling and packaging rules in any event, and it would not seem to make sense to adopt a different regime purely for the UK internal market.

Climate Change and Renewable Energy

It is difficult to second-guess how climate-change related laws might change under this model. On one level, the UK has been instrumental in pushing for strong European and international carbon reduction commitments and enacted the first of a kind Climate Change Act with binding requirements to reduce emissions domestically by 80% by 2050. The Government remains subject to its Kyoto Protocol commitments and it is assumed that it will remain committed to the Paris Climate Agreement (signed by the Government a few days ago). On the other hand, the Government has in the last few years sought increasingly to limit financial support for renewable energy projects and has rejected stronger binding targets for renewable energy generation and energy efficiency.

Any proposal to remove or water down specific targets for achieving emissions reductions (e.g. through renewables or energy efficiency) could give the Government more flexibility to pursue its own policies to incentivise these areas but it would need to be careful not to put obstacles in the way of achieving the over-arching targets under the Climate Change Act. In particular, the Government might want to adopt more flexibility in relation to renewable energy incentives which are currently governed by EU State Aid rules. While these rules would no longer apply, the UK would still have to comply with World Trade Organisation rules on subsidies.

One area the Government would have to look at would be loss of access to the EU Emissions Trading System (EU ETS) which would occur following Brexit. In order to be effective and to help meet its climate commitments, any replacement trading scheme would need to be linked to the EU ETS and this is likely to involve complex and lengthy negotiations with the EU.

Development Projects

The structure of town & country planning is largely a UK domestic matter except in one particular area: EU law impact on the UK planning system is most evident through EU environmental protection legislation. The requirement for an Environmental Impact Assessment (EIA) on major developments has often been criticised by the development industry on cost and administrative grounds. However, developers are now largely used to its requirements and the regime does create an ordered way for the industry to assess and mitigate environmental problems. The Government has limited room for manoeuvre on EIA since various international commitments already expect some form of EIA to be undertaken in a development context⁴. There could be some scope for the Government to reduce the number of cases in which EIA is required (e.g. by increasing development size thresholds), an area in which it has recently sought to mitigate the burden of EIA on developers.

These international commitments also provide for freedom of environmental information and access to justice requirements in environmental litigation (e.g. costs protection orders) in the development context. Withdrawal from these agreements would be needed to make any real changes to these areas.

³ Globally Harmonized System of Classification and Labelling of Chemicals

⁴ These include the Ramsar Convention on Wetlands (1971), the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) (1991) and other sectoral conventions, the European Convention on Human Rights and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) (1998) as well as recent International Court of Justice caselaw.

The points made earlier about international commitments and current Habitats and Birds Directive protection (under the heading "Norwegian model") apply equally here.

This briefing is intended to contain an analysis of the implications of a possible British exit from the EU, and not an assessment on whether the UK should leave or remain. Companies intervening in the debate should bear in mind that interventions that are intended to promote a particular outcome may be subject to regulation under the Companies Acts, UK election law, or equivalent foreign legislation to which they are subject.

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68069-6-7027

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