

The future of the Environmental Information Regulations 2004 post Brexit

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Introduction (1)

- The Great Repeal Bill:
 - (1) Repeal the European Communities Act 1972 (“the EC ACT 1972”), which provides legal authority for EU law to have effect as national law in the UK;
 - (2) Transfer all EU laws currently in force onto the UK statute book
- By carrying EU laws over into UK law, the Government plans what David Davis, Secretary of State for Exiting the EU, has called ‘*a calm and orderly exit*’ from the EU, while giving time to review, amend or scrap these laws in future



Introduction (2)



- Environmental Information Regulations 2004 (SI 2004/3391) made under para 2(2) of Sched 2 of the EC Act 1972.
- So Great Repeal Bill will maintain the EIR for now ...
- *“These Regulations implement Council Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC (OJ No. L 41, 14.2.2003, p.26) ...”*
- But with Hard Brexit – UK not part of single market etc. – may well be no requirement to keep EU environmental laws in place (see e.g. Canada trade agreement)

What difference do EIR make? (1)



- If no EIR, then environmental information covered by FOIA 2000 but the EIR regime confers greater access:
 - (1) applies to any “*public authority*”; very wide see ***Fish Legal***;
 - (2) different, and somewhat narrower, exceptions than the FOIA exemptions, and all save personal data subject to public interest test;
 - (3) request need not be in writing;
 - (4) there is no equivalent to the FOIA exemption for requests that will involve costs in excess of the “*appropriate limit*” within the meaning of the Fees Regulations. Environmental information, then, must be provided whatever the cost, though the amount of the charge which may be levied under reg. 8 may be a deterrent;

What difference do EIR make? (2)



- (5) by reg. 3(2) of the EIR, and unlike the situation provided for under s.3(2)(a) FOIA, a public authority is deemed to hold environmental information even where it holds it on behalf of another person;
- (6) FOIA contains (at s.14) a specific provision to refuse requests if they are repeated or vexatious. There is no directly equivalent provision under EIR, but a request can be refused if it is “*manifestly unreasonable*” under reg. 12(4)(b);
- (7) EIR reg. 12(2) “*A public authority shall apply a presumption in favour of disclosure.*”; that not in FOIA;
- (8) Being transposing legislation it is interpreted purposively and in light of objectives of the EI Directive and the general principles of EC law see e.g. ***R. (Evans) v Attorney General*** [2015] A.C. 1787 – Prince Charles letters case - and influence of EU law on conclusions that Government cannot override Tribunal decision on disclosure via Ministerial certificate – no such EU law wider influence though post the Repeal Bill ...



So why get rid of the EIR?



- (1) Because they are wider;
- (2) Because having two regimes raises difficult issues e.g. as to which applies to particular information;
- (3) Because but for the EI Directive, there would have been no EIR and environmental information would have been dealt with by FOIA like all other information?
- (4) Red tape challenge ...
- (5) EIR led to removal of right to charge for personal LLC register searches and CON29, and impacted on ability to charge: see Case C-71-14 ***East Sussex County Council v Information Commissioner*** [2016] P.T.S.R. 179. Massive impact LA budgets and also restitution claims.

And why not?



- (1) Politically difficult;
- (2) Aarhus: The EI Directive itself was made because (see Recital (5))

“On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘the Aarhus Convention’). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.”

Aarhus (1)



- Post Brexit the UK will remain a party to the Aarhus Convention
- So need to keep EIR to comply with that Convention?
- See Article 4 of the Aarhus Convention
- And of course there is a compliance mechanism: the Aarhus Convention Compliance Committee in Geneva
- This has considered information complaints vs the UK already see e.g. ACCC/C/2010/53
- Concerning the Edinburgh Tram
- Lord Carnwath in **Walton** views of ACCC must be given great respect

Aarhus (2)



- But:
 - (1) Is real driver for Aarhus, EU implementation and EU enforcement e.g. infraction? That will be gone;
 - (2) If repeal EIR: an alleged failure to comply with an unincorporated treaty is not justiciable in the domestic courts: see e.g. ***JH Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*** [1990] A.C. 418, recently reiterated by the majority of the Supreme Court in ***R (JS) v. Secretary of State for Work and Pensions*** [2015] 1 W.L.R. 1449. So were the EIR repealed following Brexit a legal action in the domestic courts complaining about this being a breach of the Convention itself would be bound to fail. See failure of latest ***Venn*** case on Aarhus costs: CO/2996/2016.

Aarhus (3)



- (3) The UK would, of course, be subject to the Aarhus compliance mechanisms in Geneva if it remained a party to the Convention but these have no direct effect in domestic law.
- (4) Moreover is there any guarantee that the UK would even stay a party to the Convention? If the Aarhus Convention were a new Convention made today would the UK be likely to sign up to it?
 - Ireland for a long time was not a signatory but was effectively pressurised through various mechanisms including the EU institutions to join which it eventually did. No pressure for the UK to remain a party to the Convention may come from EU law once Brexit takes place. Politically acceptable to leave?
 - International mood?

Other issues



- (1) Charter of Fundamental Rights - rights to privacy, the protection of personal data and access to information
- (2) Impact on data protection?
 - The new General Data Protection Regulation (“GDPR”) to be in force 25 May 2018;
 - GDPR may continue apply to business offering goods and services to EU or monitoring those in the EU;
- (3) Infrastructure for Spatial Information in the European Community Regulations 2009 (INSPIRE)? implementing Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) 26/04
- (4) The Re-use of Public Sector Information Regulations 2015? implementing Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 on the re-use of public sector information.