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)


• So Great Repeal Bill will maintain the EIR for now …


• 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 …
QUEEN BACKS BREXIT
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))

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;
