

Environmental law divergence within the UK post-Brexit



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Introduction (1)

- Agriculture, fisheries, the environment and some aspects of energy - devolved matters.
- So to *some extent* the devolved administrations have been able to go their own way on such matters even pre-Brexit, e.g.:
 - the details of agricultural payments (see ***Horvarth*** below) and;
 - the structure and scope of the environmental regulatory agencies.



Introduction (2)

- But the scope for divergence was limited by EU membership: (i) EU law - the Treaties, Regulations and Directives, (ii) EU general principles and (iii) the control exercised by regulatory institutions of the EU e.g. the Commission and the CJEU.
- Brexit removes such constraints.
- Brexit = clear risk of far greater divergence of environmental laws within the UK.



Horvath (1)

- Case C 428/07 *Horvath v Secretary of State for Environment, Food and Rural Affairs* decision of CJEU 16 July 2009:
- What was it about?:
 - Reference from High Court [2006] EWHC 1833 (Admin) (affd. [2007] EWCA Civ 620);
 - Minimum requirements for good agricultural and environmental condition ('GAEC') referred to in Article 5 of and Annex IV to Regulation No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy ("CAP");
 - A breach of a GAEC can reduce or remove entitlement to CAP support payments;
 - Article 5 provides that "*Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework set up in Annex IV, taking into account the specific characteristics of the areas concerned ...*"

Horvath (2)

- Issue arose because: in England GAEC standards included protection of public rights of way. Wales, Scotland and NI did not.
- Question referred to CJEU: “*Where a Member State’s internal constitutional arrangements provide that different devolved administrations shall have legislative competence in relation to different constituent parts of that Member State, can it give rise to impermissible discrimination for constituent parts to have different standards of [GAEC] under Article 5 of and Annex IV to [Regulation No 1782/2003]?*”
- CJEU held: “*Where the constitutional system of a Member State provides that devolved administrations are to have legislative competence, the mere adoption by those administrations of different standards for good agricultural and environmental condition under Article 5 of and Annex IV to Regulation No 1782/2003 does not constitute discrimination contrary to Community law.*”

Divergence within EU law parameters (1)

- So always been some areas of environmental law where it was possible consistent with EU law for there to be divergence. *Horvarth* an example.
- Another example = implementation of Directives which also allow some divergence between the jurisdictions, see e.g. *Department of the Environment for Northern Ireland v Seaport (NI) Ltd* [2012] Env. L.R. 21 at [40] – re: implementation of consultation requirements under SEA Directive.
- Moreover, nothing to stop jurisdictions going further outside of EU law: see e.g. Environment (Wales) Act 2016 setting out the principles of sustainable management of natural resources in Wales.
- But in many areas of environmental law – because of dominance of EU law – difficult to discern Scottish, Welsh, English or NI approach to these matters.

Divergence within EU law parameters (2)

- What have been some of the advantages of England and the devolved administrations operating within a common legal EU framework for environmental law and the oversight of EU institutions?
 - (i) environmental issues do not respect borders (NB also further issues for NI) so allows for coherent and consistent approaches e.g. on habitats – Natura 2000;
 - (ii) supports the integrity of the UK's own internal market – same minimum standards across the jurisdictions;
 - (iii) supports compliance with UK's international environmental obligations.
- All of these considerations *remain* important post-Brexit; support a continued common set of environmental standards etc.

What are the risks following Brexit?

- Without EU membership – risks clear:
 - (i) Environmental law derived from Treaties – including environmental principles (e.g. precautionary principle, polluter pays etc.) no longer binding and applicable via EU law, so the applicable overarching principles may differ between jurisdictions;
 - (ii) Devolved administrations can legislate to depart from pre-exit EU environmental legislation, and are not required to transpose and adhere to post-exit amendments to existing EU legislation or any new EU legislation;
 - (iii) No role for the EU Commission in overall enforcement of EU environmental law; and
 - (iv) No role for CJEU in determining the law, domestic courts not bound by post-exit case-law, and at least some ability to depart from pre-exit case-law.
- **Result:** less environmental protection, break down of UK internal market e.g. been discussion of risk of things like waste tourism.

Does it work to have 5 different environmental law systems in these islands?



The Environment Bill (1)

- Does the Environment Bill provide the solution? **No!**
- What is now Cl. 134, previously C.130, of the Bill and the Explanatory Notes (“EN”) on “*Extent*” shows us the sheer scale of the issues we face;
- There is a 9 page annex to the EN (!) including a table that seeks to explain the extent and application of the Bill (NB: “*The extent of a Bill can be different from its application. Application refers to where it has practical effect*” at [56]).
- “*Subject to a small number of exceptions, the Bill forms part of the law of England and Wales and applies to England. Around half of the Bill's provisions extend and apply to Wales with a significant number of provisions having Great Britain, UK or England, Wales and Northern Ireland extent. Clauses 45, 56, 58, 62, 64, 68, 83 and Schedule 2 form part of the law of Northern Ireland and apply to Northern Ireland only. Clauses 82 and 87 apply to Wales only*” [57].

The Environment Bill (2)

Environmental Principles

1. England: Provisions on a policy statement by the Secretary of State (“S/S”) on environmental principles and provision for environmental improvement plans extends to England and Wales but applies only in England;

2. Ni: The Bill Part 2 makes separate but similar provision for such a statement in Northern Ireland but to be made by the Department, not the S/S;

3. Scotland: The Scottish Government conducted its own consultation on environmental principles in 2019, and is expected to include provisions on this in the forthcoming Continuity Bill;

4. Wales: also plans for a Welsh Government Bill on environmental principles.

Content of any policy statements, and indeed the statutory provisions for these, could thus be different ...

The Environment Bill (3)

The OEP

1. The OEP is intended to be for the UK;
2. But role outside England limited given that as Explanatory Notes say “*Where a person is undertaking a devolved or parliamentary function, they will not fall within this definition. This means that any public authorities implementing devolved functions under environmental law in Scotland, Wales and Northern Ireland will not be covered by the remit of the OEP in respect of devolved matters. Bodies exercising such functions would typically include devolved public bodies such as Scottish Natural Heritage, the Scottish Environment Protection Agency, Natural Resources Wales and the Northern Ireland Environment Agency*” [258];
3. Governance in Wales and Scotland to be subject of devolved legislation;
4. But role of OEP in relation to NI extended under Part 2 of the Bill.

The Environment Bill (4)

Some other examples:

1. Environmental targets and monitoring provisions: England only;
2. Waste and resource efficiency: huge variation on extent and application of these provisions, some apply all of the UK, some to only some of the jurisdictions;
3. Air quality: mostly just England, or England and Wales, but some also apply to NI;
4. Water: mostly England or England and Wales, but NB specific provision on cross-border management of the Solway Tweed River Basin District which straddles Scotland and England!
5. Nature and biodiversity and conservation covenants: England and Wales;
6. Schedules on amendments to REACH: overlapping jurisdictions ...

Divergence

- So even looking at the Bill alone growing divergence;
 - (1) Different environmental principles;
 - (2) Different environmental governance;
 - (3) Different approaches to revising/amending pre-exit EU legislation;
 - (4) Different approaches as to whether to follow post exit EU legislation;
 - (5) Different higher or lower environmental standards;
 - (6) Different technical standards and guidance;
 - (7) Different Court decisions in different jurisdictions: England & Wales, Scotland and NI.

What are the limits to divergence (1)

1. **Clear on some issues need to be coordinated approach:** waste and REACH good examples – otherwise UK not a single market: how?
 - The Joint Ministerial Committee – see *Devolution after Brexit: Managing the environment, agriculture and fisheries*
<https://www.instituteforgovernment.org.uk/sites/default/files/publications/FGJ6070-Devoution-After-Brexit-180406-FINAL-WEB-FINAL.pdf>
 - Need for four-nation agreements (*ibid.*) - the UK and devolved governments have agreed in principle to work together to develop common frameworks in some areas which are currently governed by EU law and which are within the competence of the devolved administrations or legislature;
 - Continued co-operation environmental bodies? Joint guidance?
 - The Joint Nature Conservation Committee? Increased importance?

What are the limits to divergence (2)

2. International conventions:

- Power to enter for UK Government only;
- If unincorporated justiciable? Not in England but ...
 - The Scottish executive may not take any action, or fail to act, in way that is "*incompatible with international obligations*": Scotland Act 1998, Sch. 58
 - The Government of Wales Act 2006 gives the Secretary of State the power to direct Welsh Ministers both to desist from any action incompatible with international obligations
 - Increased importance post-Brexit? Inc. in England - the **Plan B** case?

3. The UK Supreme Court:

- Same Judges but applying different laws ...
- Not like CJEU applying the same law.

What are the limits to divergence (3)

4. NI position:

- Important to consider obligation to avoid transboundary environmental damage, which is widely recognised as a principle of customary international law and/or the Espoo Convention principles;
- NI unique position re border issues, and possible need to more closely align to EU law;
- Difficult cross border issues already e.g. waste repatriation.



What are the limits to divergence (4)

- How far will NI be forced to tie its environmental laws more closely to EU;
- The Scottish Government has expressed its ambition to maintain close ties with the EU, and to continue to "*keep pace*" with EU law after exit.
- Wales also?
- How does this fit with England and UK internal market?



Thank you for listening
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