

Welcome to Landmark Chambers and Womble

Bond Dickinson (UK) LLP's

**'What's happening? Environmental law in the
UK from 31 December 2020' webinar**

The recording may be accessed [here](#).

Your speakers today are...



Claire Brook (Chair)

Partner, Womble Bond Dickinson (UK) LLP



David Elvin QC

Landmark Chambers

Topic:
The Environment
Bill (2020)



James Maurici QC

Landmark Chambers

Topic:
Environmental
law divergence
within the UK
post-Brexit

Your speakers today are...



Topic:
Chemicals
Post-Brexit

Stuart Wardlaw

Partner, Womble Bond Dickinson (UK) LLP



Topic:
What's happening?
Waste management
in the UK after 31
December 2020

Sarah Holmes

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The Environment Bill (2020)



David Elvin QC

Landmark Chambers

“... the government has introduced the landmark Environment Bill to enhance and protect our natural environment by making sure that we leave the environment in a better state than we inherited it - and that future governments continue to do so.”

(Defra, 16.10.19)

- Draft Environment (Principles and Governance) Bill 19.12.18, to comply with s.16 of the European Union (Withdrawal) Act 2018 followed by consultation
- Full Environment Bill first published before 2019 General Election
- See also
 - *A Green Future: Our 25 Year Plan to Improve the Environment* (HMG, January 2018)
 - *Environmental Principles and Governance after the United Kingdom leaves the European Union* Consultation (May 2018)
 - Summary of responses and government response (19.12.18)
 - *Scrutiny of the Draft Environment (Principles and Governance) Bill* (Environmental Audit Committee) 25.4.19 (HC 1951) (**Eighteenth Report** of Session 2017–19)
 - *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill* (Environmental, Food and Rural Affairs Committee) 30.4.19 (HC 1893) (**Fourteenth Report** of Session 2017–19)
- NB the scrutiny reports summarise representations received and make recommendations regarding a number of concerns, many of which remain applicable to the present Bill e.g. over environmental principles the the OEP

Timeline cont.

- Latest version of the Bill introduced in HoC on 30.1.20 (a comparison version is available at <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf>)
- Second Reading – 26.2.20 - when it was committed to a Public Bill Committee
- Public Bill Committee has sat so far from 10.3.20 to 19.3.20
- As of 23.6.20 “the sittings of the Committee have been suspended until further notice. The Committee is now scheduled to report by Tuesday 29 September 2020.”
- See
 - Explanatory Notes to the Bill
<https://publications.parliament.uk/pa/bills/cbill/58-01/0009/en/20009en.pdf>
 - Environment Bill Policy Statement 30.1.20
<https://www.gov.uk/government/publications/environment-bill-2020/30-january-2020-environment-bill-2020-policy-statement>
 - Environmental Governance Factsheets (5 in total) covering the various aspects of the Bill 10.3.20
<https://www.gov.uk/government/publications/environment-bill-2020>

Bill structure

- **Chapter 1** – environmental targets. Improvement plans, monitoring, environmental principles (EPs) (Sched 2)
- **Chapter 2** – Office for Environmental Protection (OEP) (Sched 1)
- **Chapter 3** –
 - Part 1 interpretation
 - Part 2 environmental governance in Northern Ireland (Sched 3) including modification to OEP functions)
 - Part 3 Waste and resources supply (Sched 4 to 10)
 - Part 4 air quality (Sched 11 and 12)
 - Part 5 water (Sched 13)
 - Part 6 nature and biodiversity (Sched 14 and 15)
 - Part 7 conservation covenants (Sched 16)
 - Part 8 miscellaneous and general (Sched 17-19, including Crown application)
- Commencement and transitionals – clauses 131-132.

Bill objectives

- Part of regulatory changes to replace EU environmental law on Brexit (Expl. Notes)
 - “The Bill sets out the measures needed to ensure that there is **no environmental governance gap on withdrawal from the EU**. The Bill will require the setting of long-term, legally binding and joined-up targets tailored to England, embed consideration of environmental principles in future policy making and establish the independent Office for Environmental Protection.” (§17)
 - “The Bill legislates for environmental principles to protect the environment from damage by making environmental considerations central to the policy development process across government. The principles work together to legally oblige policy-makers to consider choosing policy options which cause the least environmental harm. The Statement on Environmental Principles will set out how the principles should be interpreted and applied by policy makers.” (§19)
 - “The Bill also creates a new public body – the Office for Environmental Protection (OEP) – as a domestic independent watchdog who will be responsible for taking action in relation to breaches of environmental law....” (§20)
- However, “across government” does not mean across all branches of government, at least directly and no direct equivalent to art. 191 TFEU.

Bill objectives cont.

- Under the earlier Withdrawal Agreement the principle of “non-regression” was applied by the draft Protocol i.e. that environmental controls post-Brexit would be at least as rigorous as those applicable in the EU, but this was removed from the final Withdrawal Agreement and Protocol. The 2018 Consultation Paper must therefore be read in the light of its production prior to the final WA.
- There nonetheless remains a firm commitment to a high level of environmental protection. See the Explanatory Notes and the January 2020 policy statement which includes –
 - “The Environment Bill will help deliver the government’s manifesto commitment to delivering the most ambitious environmental programme of any country on earth. It is part of the wider government response to the clear and scientific case, and growing public demand, for a step-change in environmental protection and recovery.”

Chapter 1 – environmental principles

Environmental principles

- EPs are listed in s. 16(5) but are not further defined by reference to EU law or in the policy guidance but are explained further at §178 of the Expl. Notes
 - *“The meaning of the individual environmental principles is as follows” -*
 - *The principle that environmental protection must be integrated into the making of policy: environmental protection must be **embedded in the making of policies**.*
 - *The principle of **preventative action** to avert environmental damage: preventive action should be taken to avert environmental damage.*
 - *The **precautionary principle** so far as relating to the environment: where there are threats of serious irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. This applies to issues regarding the natural environment and includes where human changes to the natural environment impacts upon human health, such as air quality.*

Environmental principles cont.

- *The principle that **environmental damage should as a priority be rectified at source**: environmental damage should as a priority be rectified by targeting its original cause and taking preventive action at source.*
- *The ‘**polluter pays**’ principle: the costs of pollution control and remediation should be borne by those who cause pollution rather than the community at large.” (§178)*
- These principles play an important role in EU environmental law and their application runs through the case law, e.g. **Waddenzee** (C-127/02) [2005] 2 C.M.L.R. 31). In the 2018 Consultation Paper –
 - *“4. Environmental principles are a specific set of principles which have been used to guide and shape modern environmental law. They are reflected in international instruments such as Agenda 21, a non-binding action plan of the United Nations with regard to sustainable development, and the Convention on Biological Diversity. Environmental principles are also set out in the EU Treaties as the basis for EU environmental law.”*

Environmental principles cont.

- 2018 Consultation Paper –
 - *“5. Whilst these principles are central to government policy, at a national level we do not currently set them down in one place, or define their role in policy-making or delivery. So, as we leave the EU, we will create a new statutory statement of the environmental principles which will guide us, drawing on the current international and EU environmental principles. **It will remain government’s responsibility to set policy within the framework of these principles.**”*
- The Bill does not regulate the extent to which Ministers can depart from EU concepts and what the reference points would be for the application of the EPs given the lack of specific direction in the Bill
- Reference to creating a *“new system which is tailored specifically to a UK context”* in the January 2020 policy statement does not guarantee consistency or even equivalence with the EU principles other than in general statements of intent.
- NB the Bill focuses the role of EPs only in the making of Government policy and issuing a policy statement – cls. 16(1), (2), (3), 18(1)

Environmental principles cont.

- The **Environmental Governance Factsheet** (10.3.20) Parts 1 & 2 makes general statements about embedding the EPs “*into domestic law*” (specifically into law for policy making), “*innovative solutions*” which will allow the meeting of “*wider government objectives while supporting our environmental ambitions*”. EPs not to be generally overriding/determinative.
- Limited control - the SoS will have to consult on, then lay the draft policy statement before Parliament and will have to “produce a response” if a resolution is passed in Parliament, or a Committee makes recommendations, in respect of the draft (cl. 17(4)) but then must lay the final statement before Parliament which takes effect when it is laid (cl. 17(6)).
- Parliamentary control over the statement appears largely political. No requirement for an affirmative resolution (compare NPS process in s. 9 of the Planning Act 2008).
- Ministers will formulate the policy statement that explains “**how** the environmental principles **should be interpreted** and **proportionately applied** by Ministers of the Crown **when making policy**” – wide discretion to Ministers with regard to the interpretation and application of EPs in making policy
- cl. 18(1) duty is only to “**have due regard**” to the statement in any event

Does the Bill provisions on EPs achieve equivalence?

- The EP provisions are limited in scope -
 - no corresponding general duty as in Art. 191 TFEU
 - apply only to the formulation of the policy statement under s. 17 and to due regard being had to that statement in formulating other policy. No direct application as a matter of law otherwise, e.g. to decision-making
 - no direct application to regulators, operators, developers or other parties
 - not directly provide guidance to the Courts for the interpretation of environmental law, though presumably, through the prism of the Withdrawal Act, the Courts may still be applying CJEU jurisprudence to the legal provisions of environmental law
- The provisions do not accept the pre-legislative scrutiny recommendations in EAC 18th Report §§23-25; 32-33; EFRAC 14th Report §§24-26; 34-36

Equivalence? cont.

- While the interim preservation of EU law and principles through the provisions of the Withdrawal Act (as amended) will preserve the application of EU EPs at least to some extent and in the short term, this is subject to change introduced into future legislation and the ability to depart from CJEU decisions
- The key cl. 18(1) duty on Ministers is to “have due regard” to the policy statement when making policy - far removed from any duty to give primacy to the EPs in any specific case and leaves open a potentially wide gap between the policy making and actual application of the EPs in specific cases. The Expl. Notes say (§190) –
 - *“This means that, when making policy, Ministers of the Crown **must have the correct level of regard** to the content of the environmental principles policy statement.”*
- Described by the 14th Report at §34 as “too weak a duty ... risks a possible regression on current standards of environmental protection”

Equivalence? cont.

- Cl. 18(2) – Ministers are not required
 - “to do anything (or refrain from doing anything) if doing it (or refraining from doing it) -
 - (a) would have no significant environmental benefit, or
 - (b) would be in any other way disproportionate to the environmental benefit.”
- The Expl Notes (§192) suggests “significant” means “*not negligible*” and that “disproportionate” means

”situations in which action would not be reflective of the benefit or costs, environmental or otherwise. ... For example, there is no need for a Minister to change a policy in light of the principles policy statement if the cost of this change would be very high and the benefit to the environment would be very low. Equally, if the potential environmental benefit is high, then it is proportionate to take a more significant action based on the policy statement.”
- Very wide areas of judgment therefore proposed
- Is the OEP power in cl. 26 to monitor implementation and to report on “any matter” concerned with environmental law sufficient? Its advisory role under cl. 27 is by request.

Government Response 19.12.18

- Government's response rejected the criticism of its approach on 19.12.18 paper and sidesteps the point that EPs form part of the EU law they are to replace:

"We want the principles to underpin the policy and law-making process, incorporating the consideration of these principles alongside other matters. ...

The government does not currently consider it appropriate to extend application of the policy statement beyond central government. While we recognise the points made by respondents with regards to this issue, central government has primary responsibility for developing the majority of high-level and strategic environmental policies and legislation. Central government also sets the strategy and approach for policies developed by other public bodies. For example, the National Policy Planning Framework sets out a clear framework for all planning authorities' local development plans. Therefore the application of the policy statement to ministers should ensure that the principles are also embedded in the strategic frameworks set for other public bodies."

- The Government's position has not moved on this.

Chapter 2 – Office for Environmental Protection

- HMG's 2018 **25 Year Plan** acknowledges concerns over loss of role of European Commission, CJEU and European Environment Agency, and commits to “setting up a new body to hold Government to account” as well as the new provisions in Chapter 1
- The OEP proposals in Chapter 2 of the 2020 Bill resemble the 2018 Draft Bill model but embody a number of changes (also in the 2019 version) especially with regard to “environmental review” and judicial review
- Wide-ranging report on the 2018 Draft Bill by the **Environmental Audit Committee: Scrutiny of the Draft (Environmental (Principles and Governance) Bill**, 18th Report of Session 2017-19 which sets out the views of consultees, including some prominent environmental commentators and makes recommendations
- See **Environmental Factsheet Parts 1 & 2** which states *“the OEP will provide scrutiny and advice on the implementation of environmental law. It will also monitor and report on progress against Environmental Improvement Plans and targets. The OEP can receive and investigate complaints on alleged serious breaches of environmental law by public authorities. It can also take legal action if necessary as a last resort.”*

The OEP

- Chapter 2 of the Bill (with modifications for NI in Chapter 3 Part 2 and Sched 3)
- Cl. 21 establishes the OEP as a body corporate, with further provision in Schedule 1
- Cl. 22 provides that the “principal objective of the OEP” is “to contribute to”:
 - “environmental protection”, and
 - “the improvement of the natural environment”
- The OEP must act “objectively”, “impartially”, “proportionately” and “transparently”. It must set out a strategy to achieve its aims, and avoid overlap with the Committee on Climate Change
- Two main sets of functions:
 - “Scrutiny and advice functions” (cls. 25-27)
 - “Enforcement Functions” (cls. 28-38)
- The OEP is not a “regulator” and its role differs from that of the Environment Agency. OEP is to oversee conduct by public authorities, including but not limited to the Environment Agency itself

The OEP cont.

- Although the creation of the OEP is partly to replace the oversight and enforcement role of the EU Commission, the OEP will not be the Commission and will lack its powers. Its focus is inevitably on compliance with domestic environmental law by sub-national bodies not compliance with environmental principles/standards by the UK as a whole.
- The conclusions of the Environmental Audit Committee remains relevant:
 - *“Under the accountability framework set out in the Bill, local authorities or arm’s-length bodies, who may have limited control over their budgets, could be held to account for failings outside their control. **The whole of Government should be accountable for the achievement of environmental standards and targets, rather than individual public authorities, unless the OEP deems that a specific body is at fault. This would ensure collective accountability and cross-Government working to resolve environmental failures.**”*
 - *“Another departure from the Commission’s approach is that the Bill makes individual public authorities responsible, rather than the Government as a whole. Professor Scotford said, since environmental problems are often collective with multiple causes and multiple agencies needed to remedy breaches, it was “strange” to make individual public authorities accountable.”*

The OEP cont.

- Under cls. 25-27, the OEP has three **scrutiny and advice** functions:
 - Monitoring and reporting on environmental improvement plans and targets (cl. 25)
 - Monitoring and reporting on environmental law (cl. 26)
 - Advising on changes to environmental law, where requested by Minister (cl. 27)
- Reports under cls. 25-26 must be laid before Parliament, and “advice” under cl. 27 may be laid before Parliament if the OEP thinks fit
- **Enforcement powers:**
 - Cls. 28-38 makes provision about functions of the OEP “in relation to failures by public authorities to comply with environmental law” (cl. 28(1))
 - Broadly two sets of functions and powers given to OEP to enforce against “*failure of public authorities to comply with environmental law*”:
 - Investigation followed by environmental review (clauses 29-35)
 - Judicial review by OEP itself

OEP – “failure to comply with environmental law”

- “Failure to comply with environment law” means (cl. 28(2)):
 - **“unlawfully failing to take proper account of environmental law when exercising its functions”**
 - or
 - **“unlawfully exercising, or failing to exercise, any functions it has under environmental law”**
- Formulated as a type of *Wednesbury* test, whether public body has acted within its powers in a public law sense and not applying its own judgment to the facts. This is supported by the Government’s response to the Environmental Audit Committee:
 - *“It is our assessment, however, that it is not necessary or appropriate in this context to go beyond the *Wednesbury* test in relation to the review of discretionary decisions as the Committee has recommended”*
- This could represent a watering down of the “manifest error of assessment” level of scrutiny provided by the Commission which has appeared at least in some instances to have conducted a very detailed analysis of the facts and the national assessment. See e.g. ***Commission v Poland (Białowieża Forest)*** (Case C-441/17) EU:C:2018:255. See §§8-9 of Professor Richard Macrory’s written evidence to the Environmental Audit Committee

OEP – complaints against “public authorities”

- “Public authority” who the OEP can investigate and oversee includes a person carrying out any function of a public nature but *excludes* a function “that is not a devolved function, a parliamentary function or a function of any of the following persons” –
 - “(a) the OEP;
 - (b) a court or tribunal;
 - (c) either House of Parliament;
 - (d) a devolved legislature;
 - (e) the Scottish Ministers, the Welsh Ministers, a Northern Ireland department or a Minister within the meaning of the Northern Ireland Act 1998.”
- Focus is on individual actions by individual public bodies, not on conduct of government as a whole
- Under cl. 29, anyone may complain to the OEP of a failure by a public authority to comply with environmental law.

OEP – procedure

- Under cl. 30, the OEP may investigate a failure to comply with environmental law on the making of a complaint or of its own motion, provided that it thinks the failure may be “serious”.
- Duties to keep complainants informed (cl. 32), to require information (cl. 33)
- uncertain whether OEP has a fact-finding role beyond one equivalent to the admin court
- Cl.33 provides for “decision notices”, where the OEP is satisfied “on the balance of probabilities” that there has been a “serious” failure to comply with environmental law
- Decision notice must (cl. 33(2)):
 - Describe the failure and
 - Set out “the steps the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy, mitigate or prevent reoccurrence ...”)
- NB:
 - Decision notice is not *binding* on public authority, either as to breach or remedy;
 - Remedy cannot include taking steps which authority has no power to take – i.e. cannot undo a decision in respect of which it is *functus officio*

OEP – review procedure

- Where OEP has given a decision notice under cl. 33, it may apply to the Upper Tribunal for an **environmental review** (NB no need for authority to have refused to comply with remedy)
- The subject matter of an environmental review is “a review of” -
 - “alleged conduct ... described in the decision notice” as failure to comply with environmental law; or
 - Similar conduct occurring after the notice was given.
- The review is not about a failure to accept remedy or take the steps set out in a (non-binding) decision notice
- UT will:
 - Apply ordinary judicial review principles to consider whether alleged unlawful act is unlawful, and
 - If so, grant ordinary JR remedies, subject to considering hardship/prejudice to third parties (cl. 35(8)). Prejudice may not be hard to show especially if the review comes a longer time after the decision complained about, having regard to normal JR time limits

OEP – power to bring JR

- Separate to env. review, OEP is empowered to bring its own claim for judicial review under cl. 36, in respect of a “serious” failure to comply with environmental law.
- It should only do so where OEP thinks it is “necessary ... to prevent, or mitigate, serious damage to the natural environment or human health”
- The case proceeds as ordinary claim for JR in all respects, with OEP as claimant, save that the court cannot refuse relief on basis that outcome would be “highly likely” to be the same (sections 31(2A), (3C) and (3D) of Senior Courts Act 1981).
- Court can grant ordinary relief (quashing etc.), but in addition, where a claim succeeds, the defendant public authority must within 2 months publish a statement that sets out the steps it intends to make in the light of the finding.
- Unlike investigation/environmental review, there is no direct role for OEP/court in that statement or later review, though presumably the statement or review could themselves be challenged in due course

OEP: summary of issues

- Concerns have been expressed on the basis that the scheme of OEP's enforcement functions still seems to lack coherence and there is a mismatch between scope and remedies of OEP investigation and the UT review –
 - While OEP to investigate failure to comply with environmental law. Issue over scope of investigation and report, whether limited to JR principles, but in practice and intent seems to be wider than JR but UT env. review is on JR basis and not more intensive scrutiny
 - On remedies, OEP cannot recommend or require authority to undo acts where the authority is *functus officio*, but can make wide-ranging recommendations for the future. On the other hand, UT can quash decisions though the body is *functus officio*, but has no power to make recommendations
- Important to note that environmental review does not provide a means of enforcing OEP's recommendations and conclusions at the investigation stage.
- Ironically, if OEP dissatisfied with the response to its recommendations, it may be more appropriate to bring JR rather than environmental review under cl. 35
- Unclear relationship between (a) investigation/environmental review and (b) JR under cl. 36
- The EU Commission's key powers of scrutiny/enforcement are not replicated by the Bill any more than the general legal duties found in TFEU are replicated.

Environmental law divergence within the UK post-Brexit



James Maurici Q.C.
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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?



- 5 minute interval -

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Chemicals Post-Brexit

Stuart Wardlaw, Partner, Womble Bond Dickinson

24 June 2020



The Chemicals Reg-scape

- Registration, Evaluation Authorisation and Restriction of Chemicals Regulation - **REACH**
 - Classification Labelling & Packaging Regulation - **CLP**
 - Biocidal Products Regulation – **BPR**
-
- Industrial Emissions Directive - **IED**
 - European Union Emissions Trading Scheme - **ETS**

Deal or no deal – spot the difference

- **No deal:** UK establishes a standalone chemicals regime. On exit, new regime based on the existing one to provide continuity, with amendments to enable Health and Safety Executive (**HSE**) to fulfil European Chemicals Agency (**ECHA**) functions.
- **Deal:** now ruling out inclusion in EU systems to avoid oversight by ECJ. But again, establishing a parallel regime, with *perhaps* some greater alignment with EU bodies, data sharing, etc.
- Guidance is limited and what there's been now largely withdrawn or no longer accessible (e.g. HMG technical notices on the various regimes and HSE guidance on chemical regulation).



REACH

- Strong industry preference (Chemical Industry Association and CEFIC) for UK to stay in REACH and European Chemicals Agency (**ECHA**).
- Joint February paper by CIA & CEFIC:
 - On no-deal, UK would adopt a separate REACH-like regime. Risks “*triggering substantial disruption costs, complexity and burden for business on both sides*”.
 - Immediate cost expected to be over £1bn “*with no environmental benefit and potentially forcing duplicate testing including animal studies*”.
- Partial clarity on detailed outcomes, four years on



REACH - Latest

- Minister letter to Environmental Audit Committee, 22 May:
- UK will retain the fundamental approach of the EU REACH system.
- UK will not seek associate membership of the EU's system, to avoid ECJ oversight.
- An annex to the UK's proposed trade agreement states both sides should agree to develop a memorandum of understanding between the HSE and ECHA.
- Work on a new Chemicals Strategy has been temporarily paused due to the pandemic.

<https://committees.parliament.uk/publications/1277/documents/11202/default/>



REACH – Database Access is Key

- Article 120 of REACH permits ECHA to share information with a third country government, or national authority, providing its purpose is cooperation on chemicals management and the third party protects the confidential information.
- This *"could be used as one of the elements that form the basis of an agreement"* in the trade talks (CIA).
- The CIA is *"currently focusing on developing some ideas on how a data-sharing mechanism could work in practice in order to help inform negotiations"*.



Classification Labelling & Packaging Regulation - CLP

- Will have an independent regime, based on CLP, with HSE performing ECHA's functions.
- Most CLP requirements continuing:
 - Manufacturers, importers and downstream users to classify, label and package the substances and mixtures they place on the UK market.
 - Suppliers to identify, examine and evaluate available scientific and information on substances and mixtures to ensure all the requirements of classification are fulfilled.
 - Testing arrangements, including the prohibition of testing on humans or non-human primates for the purposes of CLP.
 - Manufacturers and importers to notify details of self-classifications for the substances they place on the market, to HSE.



Biocidal Products Regulation - BPR

- On no-deal, UK establishes BPR-like framework.

[UK Government Technical Notice \(withdrawn March 2020\)](#)

- HSE remains competent authority for the UK, but takes on ECHA's role for active substance approvals and product authorisations.
- Current approvals and authorisations to remain valid in the UK until the normal expiry. Authorisation holders would need to be established in the UK, with a phase-in period to give businesses time to make arrangements.
- Query, biocidal product applications still being processed by HSE or another EU country after transition.
- *HSE guidance no longer available.*



Industrial Emissions Directive - IED

- Continue with ‘**integrated pollution control**’ for industrial emissions:
 - integrated pollution prevention and control
 - large combustion plants
 - waste incineration
 - solvents emissions
 - titanium dioxide
- For now, existing EU law will continue to have effect, including the IED and BAT Conclusion Implementing Decision.
- But UK will no longer be part of the Seville process for setting BAT (best available techniques) Conclusions via BREF notes from 1 Jan 2021.



IED

- Secondary legislation to:
 - implement the IED - amend legislative references, transfer powers and meet international obligations
 - ensure the existing BAT Conclusions have effect in UK law
 - provide powers to adopt future BAT Conclusions in the UK and empower the devolved administrations to determine BAT
- [Clean Air Strategy for England](#) sets out actions for determining future UK BAT for industrial emissions.
- Aim to ensure that the future UK BAT regime adopts the collaborative approach between government, regulatory authorities and industry.
- Will also *consider* the effects of the EU approach.



EU ETS

- BEIS proposes a UK ETS to replace EU ETS (1 June).

<https://www.gov.uk/government/consultations/the-future-of-uk-carbon-pricing>

- UK ETS will apply to energy-intensive industries, power generation and aviation – involving combustion in installations with a total rated thermal input of 20MW plus.
- Proposals set the overall cap 5% below the UK's notional share for Phase IV of the EU ETS.
- The government then intends to “*further amend the cap again in line with its net-zero target*”.



EU ETS

- Participants to surrender enough allowances (per tonne) to cover all emissions, with penalties up to £100 per allowance.
- A proportion of allowances will be allocated for free.
- Free allowances will also be made available for new entrants to the UK ETS as well as existing operators who increase their activity.
- UK *“would be open to considering a link between a UK ETS and the EU ETS, if it suits both sides’ interests..”*



Chemicals post-Brexit - Where are we going?

- [The Environment \(Amendment etc.\) \(EU Exit\) \(Amendment\) \(E&W\) Regs 2020](#), implements as UK law another 32 directives adding to last year's regs, to include industrial emissions, energy efficiency, urban waste water treatment, nitrate pollution, landfill and the waste and water framework directives.
- EU report on status of talks calls for the UK to remain “*dynamically aligned*” to chemicals safety legislation and to REACH, while emphasising that “*even with dynamic alignment, UK companies would be subject to the same obligations that apply to non-EU companies outside the [EEA]*”.
- Deal or no deal, UK government largely adopting EU standards by mirror systems.
- Parallel systems likely to be, at best, a significant administrative burden.
- But at least they avoid system divergence, for now



What's happening? Waste management in the UK after 31 December 2020

Sarah Holmes, Legal Director, Womble Bond Dickinson

24 June 2020



“United wishes and goodwill cannot overcome brute facts”

Winston Churchill

- Where were we?
- Where will we be on 1 January 2021?
 - Great Britain
 - Northern Ireland
- Where can we go?
- How can we get there?
- How to prepare



Where were we?

- EU competence in environment
 - Not in the Treaties in 1973
 - Added in 1987 to improve the functioning of the Single Market
 - Then 1999 - Article 193(2) of TFEU – EU environmental law & policy based on 4 principles:
 - Precautionary
 - Prevention is better than cure
 - Rectification at source
 - Polluter pays

Environment & Climate Change, Review of the Balance of Competences between the UK & the EU: final report

- *“The evidence showed that a large number of organisations representing all sectors considered that it is in the UK’s national interest for the EU to have a degree of competence in the broad areas of environment and climate change because of the advantages that this brings for the Single Market and environmental protection.”*
- *Whilst there can be tensions between environmental standards and competitiveness, the evidence paints a more nuanced picture in which some sectors of business welcome some degree of cross-EU environmental regulation. For example, EU targets on waste and on climate change were seen by many as providing greater certainty for investors and an important spur for growth in the rapidly expanding environmental and low carbon services and products sector. In addition, EU regulation on chemicals and other environmental standards was also seen by many businesses as important in providing a level playing field across the Single Market.*



Pros and Cons of shared EU competence in waste management

- EU minimum standards protect & enhance environment e.g. Landfill Directive & Waste Framework Directive
 - >40% household & >50% commercial/industrial waste now recycled
 - c65% reduction in methane gas emissions from landfill
- EU is largest single market in world, stable policy framework & level playing field spurs financial investment & innovation in waste & environmental services sectors and reduces trade barriers
- SMEs have fewer resources to enable keeping up-to-date with environmental regulations (*Smarter Environmental Regulation Review*)
- Extent and complexity of regulatory requirements for waste a burden esp for SMEs
- Changes in EU law can impose costs that affect competitiveness & cause carbon/waste leakage
- Some actions go beyond those needed under subsidiarity and proportionality principles



Where will we be on 1 January 2021?

- England, Wales & Scotland

- on paper - business as usual for waste management within England, Scotland and Wales with removal of references to EU institutions, obligations, targets etc in domestic legislation
- Will we have an Environment Bill or an Environment Act?
- Movement of wastes between GB and EU will be subject to Basel Convention on the control of transboundary movement of hazardous wastes and their disposal (1989) rather than EU Regulation (1013/2006) on shipments of waste and will need to go through customs clearance

- Northern Ireland:

- Under the Protocol on Ireland/Northern Ireland the EU and the UK have committed, inter alia, to maintain the necessary conditions for continued North-South cooperation inc in environment
- The Irish Sea will become the de facto EU/GB external border
- The following EU law will continue to apply in NI:
 - Regulation 1013/2006 on shipments of waste
 - Directive 94/62/EC on packaging and packaging waste
 - Regulation 1257/2013 on ship recycling
 - Directive 2006/117 on shipments of radioactive waste
 - Directive 2006/66/EC on batteries and accumulators & waste batteries & accumulators



Shipments of waste between UK & EU from 31 December 2020

- Shipments of waste from UK to EU - Basel Convention & OECD re recovery
 - Decisions of competent authorities
 - Notification document
 - Movement document
 - Contract provisions
- Impact of economic factors
 - Exchange rates
 - Domestic taxes - Landfill tax
 - Tariffs (if movements of goods rather than services)
 - Costs of conformity assessments (if required)
- Shipments of waste from EU to UK:
 - Prohibition of export of waste for disposal and mixed municipal waste for recovery operations
 - Recovery of WEEE, batteries, packaging, end-of-life vehicles & municipal waste in UK can count towards EU waste targets if UK treatment equivalent to Directive reqs



Waste streams

- Different waste streams will be impacted in different ways, e.g.
 - *Refuse derived fuel*
 - *Air pollution control residue*



What's the Plan?



- We will minimise waste, reuse materials as much as we can and manage materials at the end of their life to minimise the impact on the environment. We will do this by:
 - Working towards our ambition of zero avoidable waste by 2050
 - Working to a target of eliminating avoidable plastic waste by end of 2042
 - Meeting all existing waste targets – including those on landfill, reuse and recycling – and developing ambitious new future targets and milestones
 - Seeking to eliminate waste crime and illegal waste sites over the lifetime of this Plan, prioritising those of highest risk. Delivering a substantial reduction in litter and littering behaviour.
 - Significantly reducing and where possible preventing all kinds of marine plastic pollution – in particular material that came originally from land

What's the Plan?



“We will preserve our stock of material resources by minimising waste, promoting resource efficiency and moving towards a circular economy. At the same time we will minimise the damage caused to our natural environment by reducing and managing waste safely and carefully, and by tackling waste crime. It combines actions we will take now with firm commitments for the coming years and gives a clear longer-term policy direction in line with our 25 Year Environment Plan. This is our blueprint for eliminating avoidable plastic waste over the lifetime of the 25 Year Plan, doubling resource productivity, and eliminating avoidable waste of all kinds by 2050.”



Demand for waste management in UK/GB post 31/12/2020

- Short term:

- goods could be rejected at pre GB departure customs & SPS checks = > waste
- reduction in wastes exported to EU owing to £ and customs/regulatory barriers could put pressure on existing UK landfill and EfW capacity = > waste
- loss of some waste imports for treatment in UK facilities
- capacity constraints in haulage sector
- increase in fly tipping/illegal waste disposal

- Short – long term:

- contraction in economy esp from reduction in manufacturing, food and construction activity = < waste but > waste crime

- Middle – long term:

- potential for circular economy, innovation and investment will depend on direction of Government policy and regulatory regimes not only in terms of waste management & resourcing of regulators but in respect of product, energy and efficiency standards, green infrastructure, the relationship between import standards and domestic standards, divergence in regulatory regimes within the UK, foreign direct investment and the values that are promoted



Where can we go?

- Less complexity in bureaucracy for waste handling (NB impact on environmental objective?):
 - Definition of waste
 - Duty of care for waste
 - Hazardous waste classification – e.g. utility waste
- Approach to targets
 - To have or not to have?
 - Shift from weight based targets for recycling
- Waste minimisation
 - More effective waste hierarchy
- End of waste and the chain of utility
 - Approach to definition of ‘by products’
 - Waste Protocols Project
 - Retain resources within UK/GB rather than exporting for recycling



How do we get there?

- Delivery of greater self-sufficiency in waste management needs simultaneous focus on waste supply (driving down waste generation) and increase in capacity for waste treatment
- Requires stable, coherent, evidence based policy framework

“half of our recycling is exported overseas, depriving the economy of valuable assets and jobs. Britain landfills at least £3.8 billion’s worth of resources annually and sends plenty more to incineration. A lack of government support for remanufacturing means it contributes only £2.4 billion to the economy, less than half of its potential £5.6 billion” Green Alliance



“But five years isn't long. Indeed it barely takes you into the next Conservative government! It means that business needs to prepare itself quickly. Starting right now.” Margaret Thatcher (1992)

- Brute fact: changes take time whether consumer & commercial practices, contracts & supply chains, market adaptation, building new infrastructure, getting innovations to market etc
- Many UK based businesses have taken steps to mitigate impacts (NB Covid-19) but many haven't/can't/don't know how to as future EU/UK relationship still unclear
- There will be opportunities – “awareness is the start of the battle”
- Preparing for 31 December:
 - Good housekeeping – tidy premises, minimise waste on site, if a landlord/agent then check tenants aren't stockpiling waste (early sign of £ distress)
 - If producer of waste that is exported to EU contact carrier to check robustness of chain, understand new costs & bureaucracy, incoterms etc & consider alternatives
 - For those with cash to spend...



How to prepare – longer term

- Challenge for Government: to provide the robust and coherent legal frameworks and economic conditions required to encourage the significant investment necessary to deliver a circular economy, innovation and infrastructure BUT the Government has committed the UK to legal instruments and policies the consequences of which will be to deliver smaller domestic markets, high new trade barriers & bureaucracy esp for UK located entities, disruption of UK/EU/RoW supply chains, less food & energy security and instabilities/fractures in the UK/GB internal market
- Businesses can step up, too!
 - SWOT analyses – know the new market places, spot the opportunities, mitigate the risks and have a plan
 - Get involved with trade and business organisations to ensure your voice is heard
 - Innovating businesses need creative minds in the team and wide engagement
 - Laws define all formal relationships – understand the impacts of changes and always read the small print inc in contracts



Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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