



New Environmental Watchdogs in the post-Brexit UK

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UCC webinar

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Brexit

- UK left EU on 31 January 2020
 - Currently in transition/implementation period until 31 December 2020, with little change
 - Then - ??????
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- Devolution dimension
 - Environmental law a heavily devolved area
 - But interplay with notion of UK internal market and obligations under international trade agreements



Environmental Law post-Brexit

- Existing EU law, and domestic law based on it, rolled-over
 - Includes case-law of CJEU
- Becomes “retained EU law”
 - European Union (Withdrawal) Act 2018
 - European Union (Withdrawal Agreement) Act 2020
- Many detailed amendments to remove role of EU bodies and references to EU and its processes



Future changes to retained EU law

- 2018 Act gives Ministers wide power
 - deal with “any failure of EU retained law to operate efficiently or any other deficiency”
- Also can be changed by ordinary legislation
 - (subject to any “level playing field” agreement)
- CJEU case-law remains binding, but can be departed from
 - Under 2018 Act could be overridden only by Supreme Court, on same basis as their own decisions
 - Under 2020 Act, regulations being made to allow Appeal Courts to do so as well



Accountability

- Loss of European Commission's oversight
- Ultimately CJEU's power to compel compliance and impose sanctions

- In addition to formal processes
 - Routine overview through reporting requirements
 - Cost-free route for complaints
 - Lots of cases dealt with informally

- UK administrative law system not accustomed to duties placed on Government to meet targets etc.
 - Climate Change Acts
 - If target not met, who can sue, when, with what remedy?



Plans for future watchdogs

- England will have Office for Environmental Protection
 - Environment Bill
 - Bill also has substantive measures on principles and air, water, waste, resource efficiency, biodiversity net gain and conservation covenants
- Northern Ireland will also be covered by OEP
 - Environment Bill
- Scotland will have Environmental Standards Scotland
 - UK Withdrawal from the European Union (Continuity) (Scotland) Bill
 - Bill also provides for principles and wide power to keep in step with EU law
- Wales appointing Interim Environmental Protection Assessor
 - Legislative measures deferred until after May 2021 elections
 - “a platform whereby possible instances of failure to implement or non-compliance with environmental law in Wales may be reported”



Oversight issues

- Independence
 - Impossible to match the independence of an external, powerful body as within EU
- Resources and capacity
- Role
 - Complaints or review; advisory
 - Non-compliance or wider issues
- Scope
- Accessibility
 - Easy and free to complain to Commission - very different from cost of legal actions
- Remedies
 - Need to be effective, whether formal or informal
- Links with EU and other international bodies
 - Continuation within networks and access to data and standard-setting



England and UK matters

- Office for Environmental Protection
 - Monitor progress on environmental improvement plans and targets
 - Advice to government
 - Monitor implementation of environmental law
 - “legislative provisions”, so not international obligations
 - Oversight of non-compliance
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- Must act objectively and impartially, and with regard to the need to act proportionately and transparently



Office for Environmental Protection

- Appointed by Secretary of State
- SoS can issue guidance on enforcement policy and functions that OEP must have regard to
- Duty on SoS to pay such sums as considered “reasonably sufficient” to enable the OEP to carry out its functions
- Can look at some climate matters, but Memorandum of Understanding with Committee on Climate Change
- Must produce Strategy



Northern Ireland

- OEP will oversee devolved matters in NI as well
- Essentially same as for England
 - One NI member appointed by NI Government and future chairs jointly and other members with consultation
 - NI Government to contribute to resources
 - No power for NI Government to issue guidance on exercise of functions
- Independent Environment Agency promised in *New Decade, New Approach* (the deal to re-establish NI Assembly and Government)



OEP - Enforcement

- Complaints from public of serious failure by public authority to comply with environmental law
 - Also on own initiative
- Information notice where has reasonable ground to suspect breach
 - Authority must provide information requested
- Decision notice
 - Satisfied on balance of probabilities that failure to comply and it is serious
 - Set out steps required - remedy, mitigate or prevent reoccurrence
 - Authority must respond within 2 months
- Environmental review
 - After time for response, refer to court whether original conduct in breach of law
 - Statement of non-compliance
 - Apply judicial review principles and remedies, but not damages
 - Can go directly to judicial review in urgent and serious cases



Scotland

- Environmental Standards Scotland
- Function to monitor
 - - public authorities' compliance with environmental law
 - - effectiveness of environmental law and how it is implemented and applied
 - Includes implementation of international obligations
- Not to deal with particular instances
 - the exercise of ... regulatory functions in relation to a particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case)



Environmental Standards Scotland

- Appointed by Scottish Ministers, with approval of Scottish Parliament
 - Initial non-statutory appointees can be carried over
- Express provision that not subject to direction or control of Government
 - Unless contrary is provided
 - Power for Ministers to revise functions
- Must produce Strategy
- Scope does not extend to climate change targets



ESS - Enforcement

- Information notices
 - Non-compliance reported to court as contempt of court
- Improvement reports
 - Based on non-compliance or lack of effectiveness
 - Made to Scottish Ministers who must publish report and respond
 - Improvement plan must be produced – Scottish Parliament can reject
- Compliance notice
 - Failure to comply where continuing or may be repeated and actual or likely environmental harm
 - Authority can appeal to sheriff court
 - Failure to comply is referred to Court of Session, to be dealt with as if contempt of court
- Can seek judicial review in serious cases



The future

- Welcome that something being done to fill a big gap
- Cannot replace power of EU institutions
- Notable differences across the UK
 - Much stronger enforcement powers in Scotland
- Concerns over extent of ministerial influence
- Much will depend on culture and approach
 - Intention to allow for informal resolution without recourse to legal procedures
- How serious are the governments about delivering on their environmental rhetoric?



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Reid: Mapping post-Brexit Environmental Law

ERA Forum – open access

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