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Brexit Law – your business, the EU and the way forward

Environmental and climate change laws – divergence or more of the same?

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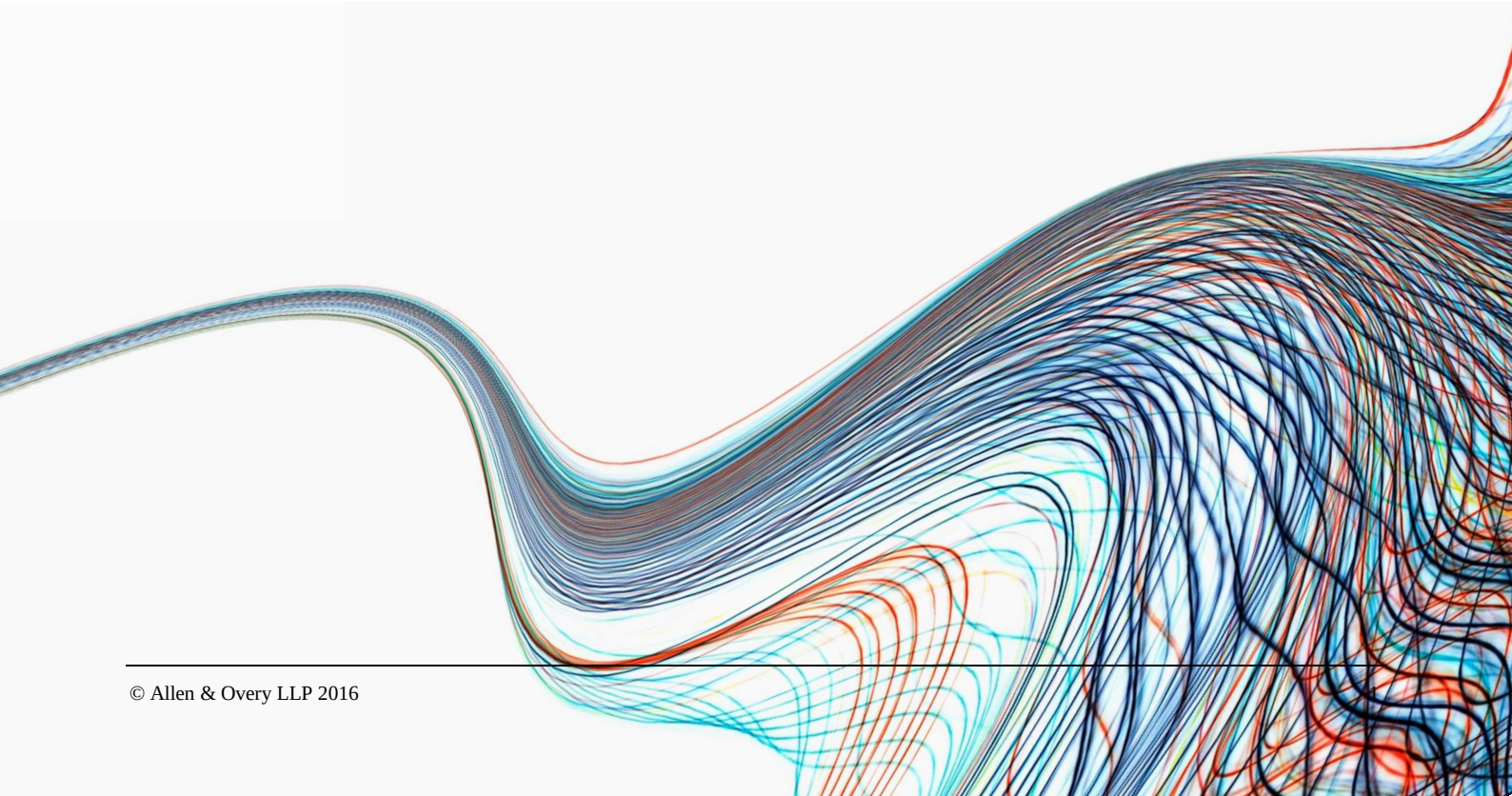
The United Kingdom's referendum vote to leave the European Union on 23 June 2016 has raised questions about the future direction of environmental and climate change policies in the UK. In the near term it is business as usual. The long-term picture looks far less clear.

Issue in focus

Businesses across Europe are subject to a wide range of environmental, climate change and product-related laws. These take the form of EU Directives (requiring implementation by each Member State), Regulations (which are directly applicable) and national-level rules. A significant amount of soft law also exists in the form of EU and/or national-level guidance. The precise form of the legislation very much depends on the policy area. The key point, however, is that over the last two decades, by far the majority of UK environmental and climate change policy law has been driven by the EU.

How the UK will disentangle itself from this picture raises both questions of substance (how far does the UK Government and Parliament wish to continue to follow EU policy initiatives in this area?) and form (what steps would need to be taken now even to maintain the status quo?). Similarly, the form of the UK's post-Brexit arrangements with Europe, including the type of trade deal(s) the UK is able to strike with the EU after a Brexit will affect the approach to adopting EU legislation on the environment and climate change. Those who thought that a Brexit would lead to significant



de-regulation in these areas may be sorely disappointed; although there clearly will be voices calling for a lighter touch regulatory regime in the UK.

In this early post-Referendum period, it is not yet clear what the Government's position on the environment and climate change agenda will be. However, now is a good time to consider the impact of any potential changes so that strategic planning can begin.

This article is one of a series of specialist Allen & Overy papers on Brexit. To read these papers as they become available, please visit www.allenovery.com/brexit.

Key considerations and analysis

After Brexit what (if anything) would replace European-derived environmental, climate change and product regulatory laws?

Precisely how the UK would achieve an orderly exit from the EU partly depends upon the trade settlement (if any) agreed between the UK and the EU following a Brexit (see below for further discussion of the EEA/EFTA and free trade agreements) and also upon the basis of the domestic law currently in place. In certain areas, it may be possible for national laws implementing EU Directives to remain in place. In this regard, very little may need to change as a result of a Brexit.

An example of this is the UK's environmental permitting regime. Here, the UK Government has implemented national-level laws and brought a variety of industrial processes within the environmental permitting regime simply by referring to the Directives covering these processes (all dealt with under the Environmental Permitting Regulations). As a result, EU-derived technical standards (BREFs), which are a critical factor in permitting decisions, apply to a large number of processes in the UK.

At one level, the legal framework for the permitting of installations could remain largely intact. However, the UK will have to consider how to deal with the detailed European technical standards which underpin much of the regime Any divergence from EU standards would require a new set of national rules to be developed (potentially with certain rules covering a transitional period) to support regulators making permitting decisions. This issue comes into sharper focus given the UK's difficulties in implementing several key Directives on industrial emissions and cleaner air.

A significant number of the UK's environmental laws (producer responsibility, waste and environmental liability are just some examples) are derived from Directives and based upon European environmental policy. It remains an open question as to whether much of this will (or even can) be left in place. In a number of these areas, it is difficult to see any UK Government taking a radically different policy approach than that set out by the European Commission. This is the logical starting point with changes being implemented over time to adapt existing laws to any divergent UK policy which may emerge in the future.

The position as regards EU-level Regulations is more nuanced. In this case, we have directly applicable laws together with EU, and typically Member State level, guidance. The REACH regime on chemicals is a good example of some of the questions Brexit poses.

REACH is one of the most complex pieces of European product law adopted in the last decade. It is contained within a detailed and directly applicable EU Regulation. There is also a significant amount of soft law (in the form of guidance) issued by the European Chemicals Agency (**ECHA**). In general terms, the UK has a choice between implementing a mirror regime (a significant undertaking particularly for the designated UK regulators) or perhaps adopting an equivalent regime (the Norwegian model) or decide to drop the regime entirely. This will be directly influenced by the terms of any trade deal(s) agreed with the EU post-Brexit and it is difficult to predict, at this stage, what shape any such deal(s) may take.

Even though REACH is just one of numerous environmental regulations affecting industry, there will be many strong voices in the UK's chemical industry calling for this to be an area of de-regulation and the regime to be left behind. However, even if the UK decided not to replicate the regime, UK-based manufacturers and sellers of chemicals will find that they cannot market their products in the EU without, at the very least, obtaining a registration from ECHA which will essentially passport the product throughout the EU. Given that many manufacturers will already have the registrations, there is a question about the status of such registrations after Brexit. Will there be transitional arrangements so as to grandfather these

registrations? If they are to be grandfathered, then surely the product must continue to comply with the technical standards and requirements of REACH?

The key point is that, if UK-based exporters wanted to see their products in the EU, they would have to comply with many of the product-related laws and standards that currently exist and will, in the future, be imposed. This is precisely the dilemma that countries such as South Korea and China found themselves in. Given that Europe is a key market for electronic products, Asian exporters have had to ensure that their products complied with national laws implementing the RoHS Directive which limited the content of certain hazardous substances in electronic equipment. This has led to countries adopting their own RoHS equivalent regimes so as to drive compatibility. The UK would likely have to take the same approach. Similar issues arise in the case of markets for exported waste products such as recyclables. After Brexit, these products would still have to meet certain common standards and trades would have to be regulated under WTO or other treaty arrangements.

What approach will the UK Government take to climate change policy?

There are no signs as yet that the current Government will take a different path from the EU on climate change policies. The UK has for many years seen itself as a leader in climate change initiatives and has introduced much of its own domestic legislation in addition to EU laws. For example, the UK has enshrined its own greenhouse gas reduction targets in the Climate Change Act and has shown its commitment to these targets through its' recently issued Fifth Carbon Budget, which aims to reduce carbon emissions by 57% against 1990 levels by 2032. It is understood that the Government has committed to publishing before the end of the year the plans to meet this target. The UK is also a separate signatory to key international climate change Conventions (including the most recent Paris Agreement).

The UK was one of the first EU countries to develop its own Emissions Trading Scheme, which heavily influenced the EU model. It has introduced a raft of climate change and energy efficiency-related legislation over the past decade, including introducing a Carbon Floor Price to incentivise a low carbon energy market. The Government has committed to setting the long-term direction of the Carbon Price Floor in the 2016 Autumn Statement.

However, there are questions on how the UK can continue to meet future climate change obligations: whether it will (or will be able to) do so alongside the EU bloc and possibly retain (or not) its share of the EU's reduction burden. Indeed, its future role within the EU Emissions Trading Scheme (**EU ETS**) is far from clear. Will the UK need, for instance, a bilateral agreement to link any UK specific scheme that may be put in place with the EU ETS or will it push to remain a participant in the European scheme (assuming the latter was even possible)? Participation in the EU ETS requires close co-operation with the EU and experience with alternative arrangements (such as that between Norway or Switzerland and the EU) suggest that compatibility issues drive convergence between the schemes.

Whatever the legal mechanics, climate policy is certainly an area where we can expect there to be calls from some sides for a retrenchment of policy and the adoption of a more tailored UK approach. It is, however, difficult to see any UK Government diverging significantly from the approach of the last decade.

Would international conventions provide an adequate basis for regulation of environmental and climate change issues in the UK ?

On their own, probably not. The EU and the UK are both separate signatories to a number of major international conventions, particularly on environmental issues such as air and water quality, biodiversity, marine protection, hazardous substances and on nuclear energy. Many EU environmental rules are, themselves, based on key obligations under international conventions. However, to look exclusively to international conventions alone will likely be an insufficient basis for a UK approach. This is partly because there are significant areas of law which are largely untouched by conventions (e.g. waste management) and because certain key conventions (e.g. those on chemicals) are implemented in the UK via EU Regulations. These directly applicable Regulations will fall away (in the absence of any transitional provisions) once the UK leaves the EU.. So, even allowing for the UK's historically proactive stance on signing up to many of the key conventions, there are areas where fresh

legislation would be required post-Brexit and in the event of any subsequent repeal of EU-derived laws.

Another potential issue is whether the UK will wish to negotiate as an independent party to the conventions. The future relationship with the EU may be such that the UK is, in any event, required to follow the EU position in these negotiations (for instance, under the EEA model)

How would membership of the EEA/EFTA or a bilateral trade agreement affect environmental laws in the UK?

If the UK seeks to participate as an independent member of the EEA/EFTA (for which approval would be required from the other members of these groups), there may in practice be little change to the legal landscape. As a member of the EEA, most of the EU rules on environment, climate change and product regulation which currently apply to the UK would continue to apply. However, as a non-EU member of the EEA, the UK would not be permitted to participate directly in any of the EU law and policy making institutions (such as the EU Commission and Parliament). Many would regard this as a more damaging position than the UK is in today.

There is clearly a much greater risk of divergence in the event that the UK does not follow the EEA route. This will also bring with it greater political risk as successive UK Government (and the devolved administrations of Scotland and Wales) seek to put their stamp on environmental and climate policy.

Would the UK continue to be bound by decisions of the Court of Justice of the EU (CJEU)?

There exists a significant body of environmental law which emanates from decisions of the CJEU. This has developed in three main ways: first, as a consequence of the mechanism by which national courts can refer questions of legal interpretation to the CJEU (with the result binding the referring court); second, the fact that the English courts must interpret English law in the light of EU law; and third, individuals can rely on directly effective rules to assert their rights in national courts. An obvious example of the influence of the CJEU is in the area of waste law where the legal debate continues as to how best to distinguish between waste and products. CJEU judgments often have immediate and direct implications for businesses across a wide range of sectors. In this regard, a Brexit raises two immediate questions. How would UK regulators respond to decisions of the CJEU and would the UK Courts be bound (in law or practice) to follow CJEU decisions? Again, the answer may depend on the form of the future relationship between the UK and the EU (for example, an EEA/EFTA arrangement requires CJEU judgments to be followed). In addition, it is difficult to perceive how the UK could follow many of the EU's environmental policy and legal developments without also following and applying the judgments of the European courts.

What about the devolved administrations?

Environmental law is one of the areas devolved to the regional administrations of Scotland, Wales and Northern Ireland. The push for greater devolution, particularly in Scotland, looks set to continue. Brexit raises some important questions within this context. It is conceivable that we will see some significant divergence in environmental policy and laws between the devolved administrations and England. For businesses operating in the UK, this will merely serve to add to their regulatory burden.

What does this mean for you?

At this stage, there are still more questions than answers and this will continue to be the case for some time.

Given the importance of the EU as an export market for UK-based businesses it's clear that , exporters will still need to comply with many of the European rules in order to gain access to the EU market. In this regard, even if Brexit leads to some de-regulation on environmental, product and climate-related policies, there may be sound commercial reasons for businesses to comply with certain EU standards and requirements. However, in many areas little may change aside from the legal architecture. Much will also depend on the terms of any trade deal(s) the UK negotiates with the EU and other countries. As we have witnessed in the context of the negotiations on the Transatlantic Trade and Investment Partnership, environmental and sustainability issues are likely to feature in any new deals and prove a challenging area to settle. It's difficult to imagine the

EU accepting a watering down of key environmental principles as part of any such deal.

Given the level of uncertainty, now is the time to start assessing the impact of Brexit in its potential forms on your business and how you can mitigate the risks. These issues will be most acute for UK-based exporters into Europe where you have, to date, needed to comply with broadly consistent rules and standards which effectively passport your products throughout the EU. Divergent environmental rules and new terms of trade as between the UK and EU (amongst other trading blocs) clearly have the potential to disrupt your business. Now is also a good time to engage with your trade associations to bring key issues to the attention of those charged with negotiating the new relationship between the UK and EU.

As the picture becomes clearer, we will update the issues in this paper and we would welcome your comments and questions in the meantime.

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