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**BREXIT AND ENVIRONMENTAL LAW
WASTE FACILITIES AUDIT ASSOCIATION
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WILLIAM WILSON
Senior Environmental & Regulatory Lawyer
PROSPECT LAW LTD

Political disclaimer: replace any political comment with own views, and re-balance as required

23 June 2016	Referendum vote, after a campaign where, essentially, neither side had prepared for Brexit (contrast with, e.g. Scottish Independence referendum, and Irish civil service preparations as soon as the UK vote was called)
29 March 2017	Article 50 triggered
8 June 2017	General Election – precarious government majority, with DUP
15 December 2017	“sufficient progress” on Negotiations Phase 1 – EU/UK citizens, divorce settlement, Irish Border: “regulatory alignment”?
Now	Negotiations Phase 2 – ‘Implementation’/ Transition period: trade negotiations
October/November 2018	European Union summits: Deal/No deal? Parliamentary votes? DUP vote on budget? Second Referendum? General Election?
29 March 2019	Brexit, with or without ‘Transition’

Polarisation between the main parties, and within them

POLITICAL LANDMARKS

- “In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 agreement.”
- Northern Ireland Border issues:
 - EU/Third Country border
 - Belfast Agreement vs pre-existing Common Travel Area
 - Practical trade and customs issues
 - Irish government vs Unionist positions
 - Integrity of EU single market vs integrity of UK

“REGULATORY ALIGNMENT”: THE NORTHERN IRELAND BORDER QUESTION

- European Union (Withdrawal) Act 2018
- Nuclear Safeguards Act 2018
- Sanctions and Anti-Money Laundering Act 2018
- Trade Bill 2017-19 (HoL Committee Stage)
- Taxation (Cross-Border Trade) Act 2018
- Immigration Bill (Migration Advisory Committee report)
- Agriculture Bill (HoC 2nd Reading 10 October 2018)
- Fishing (Access to Territorial Waters) Bill 2017-19
- Environmental Governance and Principles Bill
- Legislation for the Withdrawal Agreement between the United Kingdom and the European Union (White Paper Cmnd 9674) – Withdrawal Agreement Bill

OVERVIEW – MAIN BREXIT LEGISLATION



- 1000+ Statutory Instruments of key importance in many areas
- Revisions to International Treaties and Conventions and Trade Agreements
- Revisions to the UK relationship with key EU institutions
- Devolution Legislation
- Post-Brexit Legislation

FOLLOWED BY...

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+44 (0)20 7947 5354



- Repeals European Communities Act 1972, ends primacy of EU law and jurisdiction of Court of Justice of European Union
- Aims to import into UK law the entire body of the EU '*acquis communautaire*'
- Takes very wide, and controversial, delegated powers to amend EU law 'deficiencies'
- Contains significant, and controversial, provisions on devolution
- Key issues include: Executive v Parliament; Devolution; Political fissures and crevasses

EUROPEAN UNION (WITHDRAWAL) ACT 2018



- Trade White Paper October 2017
- Agreement on Government Procurement GPA
- Implementation of international trade agreements
- Trade Remedies Authority
- HMRC information
- Issues include: Territorial extent and devolution; Regulation making powers: Third parties to international agreements

TRADE BILL 2017-19



- Future Partnerships paper August 2017
- Customs White Paper October 2017
- Customs Duties
- Trade Defence
- Trade Preference
- VAT & Excise Duties
- Delegated Powers

TAXATION (CROSS-BORDER TRADE) ACT 2018

- Changing from CHIEF (Customs Handling of Import & Export Freight) to CDS Customs Declaration Service, January 2019
- Number of declarations from UK businesses could rise from 55 million to 255 million and 132,000 traders will need to make declarations for the first time
- Parliamentary Committees, Public Accounts Committee, Institute for Government question readiness of HMRC for the changes: *see Commons Library Briefing No. 8126, 4 January 2018, page 8*
- Port of Dover processes 10,000 freight vehicles every day except Christmas Day – equivalent to a 180 kilometer queue
- Motorways as lorry parks in the absence of more sensible arrangements?

SIGNIFICANT CUSTOMS CHANGES



- e.g. REACH – “long and complex” S.I. in preparation to supplement the European Union (Withdrawal) Act 2018
- HSE to be UK equivalent to European Chemicals Agency?
- ECHA website summarises consequences of Brexit absent any other negotiated outcome
- See also Technical Notice addressing what happens to REACH if there is no Brexit deal

1000+ STATUTORY INSTRUMENTS



REVISIONS TO INTERNATIONAL TREATIES AND CONVENTIONS AND TRADE AGREEMENTS

- e.g. EURATOM TREATY exit and Nuclear Safeguards Act 2018, Draft Nuclear Safeguards Regulations, new Nuclear Safeguards Agreement with IAEA, Bilateral Nuclear Cooperation Agreements with Australia, Canada, Japan, USA
- EU-only international agreements
- Mixed agreements
- Trade Agreements



- Political aspects of Devolution a key fault line through entire Brexit legislation – need for restored trust: particularly relevant for Environmental Law as it is mainly a devolved responsibility
- Devolution = potential divergence – implications for e.g. trade, environment
- What issues will require “common frameworks”?
- Separate Devolution Brexit legislation in devolved Parliaments? *European Union (Legal Continuity)(Scotland) Bill* - within devolved legislative powers? Reference to UK Supreme Court by UK AG and Scottish Advocate General, Counsel General for Wales and Intervener
- Practical steps: Welsh government reviewing 1,200 pieces of legislation, 900 with issues needing correcting, 100 Welsh specific, to produce UK Statutory Instruments and Welsh Specific Statutory Instruments
- Implications for operations in Scotland, Wales, Northern Ireland?

DEVOLUTION LEGISLATION



Examples:

REACH, as chemicals continued to be evaluated

Industrial Emissions Directive BREF notes

Circular Economy and EU developments

Air Quality and Water Quality standards

CJEU caselaw

European Union (Withdrawal) Act 2018 as a “pickle jar”

DIVERGENCE



- Treaty obligations reinforcing environmental laws
- Enforcement by the European Commission
- Enforcement by the Court of Justice of the European Union
- Ultimate sanction of Member States risking fines for continuing breaches of EU law
- Legal requirement on government to ensure that penalties for breaches are “effective, proportionate and dissuasive”
(see e.g. Water, Waste, Air Quality Framework Directives, REACH etc)
- Right of individuals to activate enforcement of environmental laws, at no cost, through complaints to Commission

WHAT DOES UK ENVIRONMENTAL LAW LOSE BY BREXIT?

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- Section 16(1) European Union (Withdrawal) Act 2018 commits SoS to publish a Bill setting out environmental principles and how they will be applied: and establishing a public authority with functions for taking enforcement action
- Section 16(2) European Union (Withdrawal) Act 2018 lists the relevant environmental principles

ENVIRONMENTAL GOVERNANCE & PRINCIPLES BILL



- Non enforcement is a serious problem under existing, EU-derived environmental law:

Volkswagen and 1.2 million 'defeat' devices

Air Quality and the ClientEarth cases

Illegal waste sites across the UK

Continued, unenforced river pollution incidents

- In evidence to the Defra consultation, and a parallel one by the Welsh Government, I have recommended a **statutory duty “to secure the effective enforcement of environmental laws”**

ENVIRONMENTAL GOVERNANCE



- Section 16(2) European Union (Withdrawal) Act 2018 –
“2) The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of
 - (a) the **precautionary principle** so far as relating to the environment,
 - (b) the principles of **preventive action to avert environmental damage**,
 - (c) the principle that **environmental damage should as a priority be rectified at source**,
 - (d) the **polluter pays** principle,
 - (e) the principle of **sustainable development**,
 - (f) the principle that **environmental protection requirements must be integrated into the definition and implementation of policies and activities.**“

* List not complete: and also N.B. importance of Common Frameworks

ENVIRONMENTAL PRINCIPLES



- Proposals to amend Directives 2008/98/EC on waste, 94/62/EC on packaging and packaging waste, 1999/31/EC on landfill of waste, 2000/53/EC on end of life vehicles, 2012/19/EU on WEEE
- EU Strategy for Plastics in the Circular Economy
- Key EU targets for recycling, and reducing landfill, e.g. recycling 65% of municipal waste, 75% of packaging waste, reducing landfill to maximum 10% of municipal waste, all by 2030
- Key issue must be extent to which UK takes forward EU Circular Economy thinking and content: c.f. William McDonough/Michael Braungart 'Cradle to Cradle' principles

WASTE: CIRCULAR ECONOMY



- Draft to be circulated across Whitehall/published ‘soon’? ‘November’? ‘This calendar year’?

Mary Creagh MP, Chair EAC, quoted on 13 September 2018 as saying it will set out:

- Zero avoidable waste economy by 2050
- Phase out avoidable plastic waste by 2042
- New targets for waste & recycling, post Brexit, to match EU Circular Economy package
- End to landfill for food waste by 2030
- Reform to PRN scheme

DEFRA RESOURCES AND WASTE STRATEGY



- 'Chequers'/White Paper Common Rulebook for goods?
- No deal Brexit, trading on WTO terms
- Canada ++
- Other (please specify)
- Clearly centrally important to environmental law, and environmental law and standards are very important to trading arrangements

WHAT KIND OF BREXIT, ON WHAT TERMS?



- Space left to write your own updates, given that talks about Brexit are inevitably out of date almost as soon as they are written!

UPDATES SINCE THESE SLIDES WERE WRITTEN



- Legal complexity of Brexit has been compared to removing a person's entire vascular system – while the patient is still alive
- There are opportunities, as well as threats – “It was the best of times, it was the worst of times” - and it is very easy to miss the opportunities while enthralled by the threats
- On one level, business just wants to know what the law is going to be and what trading arrangements will apply
- On another level, we now need not only to be able to say what the law is, but to go back to first principles and to be able to say what it should be, and why that matters.

SUMMARY



PROSPECT
LAW



PROSPECT
ADVISORY

WILLIAM WILSON

Senior Environmental & Regulatory Lawyer

PROSPECT LAW LTD

+44(0)7885-551-405

wew@prospectlaw.co.uk