Professor Richard Macrory (ECB0015)

Andrea Leadsom MP has stated that "in the region of about two-thirds of the legislation that we are intending to bring into UK law will be able to be rolled forward with just some technical changes, so roughly a third won't". There are no further details given. As I mentioned in my evidence, various working parties of UK Environmental Law Association are currently examining different sectors of UK environmental law (nature conservation, waste, etc.) to determine in detail how much is derived from EU law, and the mechanisms chosen for transposition. This will help determine the extent to which the Great Repeal Bill is able to fulfill the intention of retaining existing law until revisions takes place.

This note is in my personal capacity, and my initial impression is that the figure seems rather high. But this is not helped by the fact that we do not know the basis of the two thirds/one third figure – individual items of EU law, page length, etc., and precisely why it is felt that a third cannot be retained. But it is possible to break down the issues a little more. When I refer to post-Brexit, I am assuming a situation where EU legislation no longer has any independent legal force within the UK

Transposition of Directives without reference to EU law in the body of national regulations

The core provisions of many national regulations transpose EU Directives without any reference in the legislation to the Directive in question. An example would be reg 17(1) of the Air Quality Standards Regulations providing that "The Secretary of State must ensure that levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values set out in Schedule 2". The duty and the limit values reflect the obligations in the Directive but are self-standing, and can continue without modification.

EU Regulations and Decisions

The majority of EU environmental law have been in the form of Directives but a significant number are in the form of EU Regulations which do not require transposition and have immediate force of law within the Member State. Kramer's EU Environmental Law (2011) list 111 Regulations in the environmental sphere between 1981 and 2010 (compared to 256 Directives between 1967 and 2010). The Great Repeal Bill could contain a general provision that all EU regulations are to continue to have force of law within the UK until repealed or amended.

Some of the Regulations are highly technical and specific, and many are concerned with setting up various administrative structures such as the European Environment Agency or the Cohesion Fund. But a number have much broader impact and have been used to implement international obligations or where a large degree of conformity across the EU is required.

A good example is Regulation 1013/2006 concerning shipments of wastes both within the EU and to and from third countries, including detailed procedural requirements concerning consignment notifications and the like. The Regulation in part implements the international Basel Convention 1989 to which the EU and other Member States are party. The UK will post Brexit continue to be a party to the Convention, but the Convention is confined to

hazardous wastes while the EU regulation extends its provision to non-hazardous waste movements within the EU. It may prove challenging to preserve the Regulation automatically post Brexit – would competent authorities in other Member States have any obligation to deal with the UK other than in respect of Basel obligation?

One should also mention Decisions which are legally binding on those to whom they addressed. Decisions are often addressed to Member States, though often confined to detail administrative matters such as setting up committees, EU adherence to international treaties, technical standards concerning eco-labelling, etc. Kramer lists some 136 Decisions in the environmental sphere between 1975 and 2010. Post Brexit existing Decisions would have no legally binding effect unless some provision is made in the Great Repeal Bill.

References in national legislation to Directives

Over the past decade, national regulations transposing Directives have increasingly made reference to the Directives in question in the body of the national legislation. The UK seems to have taken this practice rather further than many other EU Member States – known as 'transposition by reference' - possibly as a defensive mechanism to reduce the possibility of infringement actions by the EU Commission on the grounds that national law did not fully reflect the obligations in Directives. The EU Commission, though, is known to be uncomfortable with this method, and it certainly adds complexity in trying to understand the full meaning of national law. An extreme recent example is the Environmental Permitting (England and Wales) Regulations 2010 covering permitting of industrial installations such as waste sites, incinerators, etc. which contains 265 references to Directives including such gems as "4.—(1) The regulator must ensure that every application for the grant of an environmental permit includes the information specified in Article 6(1) of the IPPC Directive. (2) But, when interpreting Article 6(1), the regulator must— (a) ignore points (b), (d) and (g);….."

The extent to which these references can survive depends on the context, and a number of different Categories emerge.

a) Definitions. National regulations frequently refer the definitions contain in EU Directives.
   For example, the definition of 'estuarial waters' in s 28(9A) Wildlife and Countryside Act 1981 refers to the definition in the Water Framework Directive. The Environmental Permitting Regulations defines 'waste' as "except where otherwise defined, means anything that— (a) is waste for the purposes of the Waste Framework Directive, and (b) is not excluded from the scope of that Directive by Article 2(1) of that Directive". There seems no reason why these definitional provisions cannot survive – in the same way that a national law could refer to definitions contained in UN or other international material.

b) Technical specifications. National regulations may refer to EU Directives for technical requirements in relation to matters such as monitoring or characterization. For example, the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003/3242 requires the Environment Agency to characterize river basic districts "in accordance with Annex II to the Directive". The Air Quality Standards Regulations provide that "measurements must be carried out in accordance with the criteria set out in sections A and C of Annex I to Directive 2008/50/EC, and

for the purposes of paragraph (5), measurements must be carried out in accordance with the criteria set out in Annex IV to the same Directive." (reg 6(6) assessment criteria). In principle, again it seems that these requirements could continue, even though the Directive itself has no independent legal status.

c) Substantive obligations. National regulations may refer to substantive obligation contained in Directives. For example the Environmental Permitting Regulations provides that in relation to waste permits that the regulator "5.—(1) The regulator must exercise its relevant functions so as to ensure compliance with the following provisions of the Landfill Directive— …Art 5(3)" (exclusion of certain types of waste from landfill). Or another more general example under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003/3242 "3.—(1) The Secretary of State, the Assembly and the Agency must exercise their relevant functions so as to secure compliance with the requirements of the Directive."

Again, in principle, although it is a little odd to have to look to substantive duties in external documentation, there seems no reason why these types of obligation should not survive into national law even though post Brexit the Directive itself has no independent legal status within the national legal system.

There are examples of national regulations referring to 'obligations' under Directives – for example the Air Quality Regulations give power to the Secretary of State to issue directions "For the purposes of implementing any obligations of the United Kingdom under Directive 2008/50/EC, Directive 2004/107/EC and Council Decision 97/101/EC establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the member State (reg 31(i))" . If regulations are drafted in this way, since post Brexit, there will be no 'obligations' as such under the Directives or Decisions, and this provision would be rendered meaningless in national law.

d) Obligations in relation to other Member States. Some national regulations refer to obligations in respect of other EU Member States. For example, Sched 5 para 10 Environmental Permitting Regulations require the competent authority to consult with other Member States where it is aware the application for an environmental permit may have a significant effect on the environment in another Member State or where that Member State requests information on the permit. These requirements could survive, even if not reciprocated by other Member States post Brexit. The position is made a little more complex because they also reflect obligations under the UN Espoo Convention 1991 requiring cross border consultation for certain specified activities. The UK remains a party to that Convention.

e) References to powers of specific EU institutions. Some national regulations reflecting the provisions of the relevant Directive give specific power or make references to EU institutions. For example, the Urban Waste Water Treatment (England and Wales) Regulations 1994/2841 provide under reg 5 that discharges from very large conglomerations to coastal waters may be subject to less stringent standards in exceptional cases and with the agreement of the European Commission. The REACH Enforcement Regulations 2008/2852 dealing with chemical regulation contains offences for failing to notify the European Chemicals Agency, and other procedural requirements in relation to the ECA. Part 2 The Conservation of Habitats

and Species Regulations 2010/490 contains various obligation in relation to the European Commission – for example, the duty on competent authorities to send lists of proposed sites of Community importance to the European Commission, and the duty to have regard to the opinion of the European Commission where proposed project may damage a site hosting a priority species or habitat type.

These sorts of provision could not survive in that post Brexit the relevant Community institution would have no legal authority or obligation to act. The Great Repeal Bill could provide powers to the Government to amend existing regulations to designate national successor bodies before Brexit takes place in order to preserve the coherence existing legislation – for example in the Habitats Regulations the Secretary of State (or even Parliament) could take over the functions of the Commission.

f) EU emissions trading. The Greenhouse Gas Emissions Trading Scheme Regulations 2012/3038 could not survive in their present form unless the UK makes a separate agreement to remain part of the EU ETS scheme (it currently includes all 28 EU countries plus the EEA countries, Norway, Iceland, and Liechtenstein). The Regulations could be adapted to form the basis of a purely national emissions trading regime but many amendments would be necessary.

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