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BREXIT AND ENVIRONMENTAL, PRODUCT AND CHEMICAL LAW

THE TROUBLESOME ONE THIRD

15 November 2016

In giving evidence to the Environmental Audit Committee on 25 October 2016, Ms Andrea Leadsom (the Secretary of State for Environment, Food and Rural Affairs) stated that "*As far as possible, we will be bringing all EU legislation into UK law, and at first glance it appears that [it] will be feasible to do between two-thirds and three-quarters of [environmental] legislation…There are roughly a quarter that cannot be brought immediately into law either because it requires technical attention or falls away, and that's the bit we will be looking at to see what steps need to be taken*".

This paper considers the UK government's proposal to transpose EU law into UK law, with a focus on the particular difficulties that may arise with regard to environmental, product and chemical law. We consider some specific examples (including the 'REACH' chemicals regime) that will be particularly difficult to transpose and may fall within the troublesome 'one third'[1] that Ms Leadsom alludes to.

1. SUMMARY

- *Transposition of EU environmental law into UK law will be challenging in the case of EU Regulations – these currently have direct effect in the UK and were written to apply to member states*
- *This becomes further complicated in those areas of EU derived law which have a high degree of EU-based administration (by bodies such as the European Chemicals Agency) and market access considerations*
- *The EU's REACH chemicals regime is a good example of the particular technical difficulties that will arise*
- *Various other factors complicate the transposition process – such as devolved administrations, accountability mechanisms and resource availability*
- *The extent of the difficulty in these areas is highly dependent on the 'exit deal' negotiated (if any) within the Article 50 period*
- *The approach will likely also be informed by a desire to increase 'equivalence' of environmental and product standards to assist market access post-Brexit*
- *The transposition is therefore more than a purely legal mechanism.* ***The solutions to these issues will involve important policy decisions that will have an immediate, difficult to reverse and significant effect on environment, product and chemical regulation and EU-UK trading***

[1] Ms Leadsom referred at various points to 'one third' or 'one quarter' of EU environmental law being difficult to transpose at various points in her evidence. For the purposes of this paper we refer to her more pessimistic estimate of one third only.

2. THE GREAT REPEAL BILL AND TRANSFERRING 'EU LAW' INTO 'UK LAW'

Key Point: *the Great Repeal Bill will establish the mechanism for the transfer of EU law, but cannot in itself make all EU law effective and enforceable in the UK upon 'Brexit Day 1'.*

In early October 2016 the UK government announced that a 'Great Repeal Bill' would be prepared to not only repeal the European Communities Act 1972, but also ensure that EU law would be rolled forward into UK law upon 'Brexit Day 1'. That body of transferred EU law can then, following Brexit, be considered and repealed, amended or retained as desired.

Limited detail is available as to how the Great Repeal Bill will seek to achieve this transposition. Various constitutional and legal complexities will need to be addressed. However at present, based on statements on the government's website, it appears that the Bill will:

a) take a "*simple approach*" transposing EU law into domestic law "*wherever practical*" on 'Brexit Day 1';

b) include powers for ministers to make secondary legislation, which will allow "*flexibility to take account of the negotiations with the EU as they proceed*"; and

c) allow "*new domestic regimes [to be established] in areas where regulation and licensing is currently done at an EU level*", including any amendments required to ensure the law operates effectively at a domestic level.

These statements indicate that **the Bill will not be a panacea which in itself makes all EU law effective and enforceable in the UK upon 'Brexit Day 1'**. Instead it appears that the Bill will propose giving ministers the powers (through, it would appear, secondary legislation – possibly a controversial approach depending on how it is framed) to establish the detailed mechanics for transposed EU law to take effect in the UK immediately upon 'Brexit Day 1'.

3. EU ENVIRONMENTAL LAWS – 'REGULATIONS' AND 'DIRECTIVES'

Key Point: *EU and UK environmental laws are generally intertwined to such an extent that 'overnight' separation will be difficult.*

EU Regulations will, generally, pose relatively greater challenges for transposition than Directives. This is because there is at present no detailed domestic implementing legislation in these areas.

Additionally, in some key areas, the UK currently lacks the expertise, agencies and functions to be able to administer the regimes once transposed (for example, it will likely need to replicate at least some functions of the European Chemicals Agency).

It is likely that product-related regulations (such as 'REACH') feature particularly prominently in the troublesome 'one third'.

Ms Leadsom mentioned that DEFRA's review of environmental legislation is ongoing. There is no doubt that this review is a significant exercise - over 50% of the UK's environment, product and chemical law has been estimated to be EU-derived, drawn from **more than 200 legal acts on areas as diverse as water quality, nature protection, forestry, waste management, industrial pollution control, energy efficiency, chemicals and GMOs, air quality and noise**.

There are two principal categories of EU law that will be under review: 'Directives' and 'Regulations'. EU Directives set out requirements which member states must then implement through their own (usually more detailed) domestic legislation. EU Regulations, on the other hand, establish more detailed and specific rules/frameworks which are automatically part of the law of each member state without implementing legislation.

In most cases, the 'Brexit Day 1' transposition of EU environmental law comprised in Directives should be *relatively* straightforward from a statutory perspective. In these areas UK domestic secondary legislation already exists and the Great Repeal Act will (presumably) recognise that this should remain valid and in force notwithstanding the repeal of the EU treaties (and with it, the binding effect of the Directives).

For example, the EU's Directive 2010/75/EU of the European Parliament and the Council on Industrial Emissions (known as the Industrial Emissions Directive, or IED) is primarily implemented in England through the Environmental Permitting (England & Wales) Regulations 2010, which include a domestic regime for monitoring and enforcement (mainly through the Environment Agency). This is not to say that even here the transposition process will be entirely straightforward. For example, the domestic regulations cross-refer extensively to a variety different environmental Directives – query if, post-Brexit, these should be deemed to be 'frozen' Directives as at 'Brexit Day 1', or the 'live' Directives as amended from time to time by the EU? Other provisions in the regulations refer to EU Treaties, rely on Commission decisions and guidelines for criteria (eg as to what constitutes "hazardous"), and refer out to designated European conservation sites; the efficacy of which will all need to be considered. Further, the Industrial Emissions Directive also establishes sophisticated EU-wide forums for developing reference documents (known as 'BREFs') which inform operators seeking to meet the 'best available techniques' standards of the Directive. The formal status of these upon 'Brexit Day 1' will also need to be considered.

Additionally, although existing implementing regulations may themselves remain largely in place on 'Brexit Day 1', depending on the nature of the 'exit deal' negotiated certain of the underlying expertise, agencies and functions necessary to administer them may not transfer. For example, whilst much of the regime concerning GMOs is contained in Directives (and therefore implemented at the domestic level), the European Food Safety Authority plays a key ongoing role in the area.

In short, even for locally implemented legislation, EU and UK law are intertwined to such an extent that 'overnight' separation will be difficult. However, more complex still are EU Regulations. In theory, the Great Repeal Act may be able to give the EU Regulations effect so that they have force of law in the UK on 'Brexit Day 1'; but the **reality is that EU environmental Regulations were written to apply to a member state (or a member of the EEA) and large parts will, absent amendment, be irrelevant or unworkable for a person outside the union or the EEA (risking unenforceable 'zombie laws')**. Further, these laws will remain in force for the remaining EU member states and, depending on the nature of the 'exit deal' negotiated, UK businesses trading with the EU may consequently find themselves subject to new hurdles, tariffs and controls from 'Brexit Day 1'.

In terms of environmental law, **EU Regulations are particularly prevalent in product-related areas such as medicines, pharmaceuticals, food law and chemicals**.[2] EU Regulations are preferred here as the systems often involve various EU institutions and administration with an active role (eg the European Medicines Agency or the European Chemical Agency), and relate to the free movement of goods between member states; and as such a high degree of legal consistency across the community is critical. However, those same considerations make the transfer of those regulations into UK law extremely complex. A good example of this is the 'REACH' Regulation (Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals).

4. REACH: A CASE STUDY OF TECHNICAL COMPLEXITY

Key Points: *the chemicals Regulation REACH is likely to be one of the regulations which DEFRA considers will be 'difficult' to transpose and will require further legal provisions.*

Amongst other technical difficulties, REACH only applies to substances within EU/EEA territories, establishes and is administered by an EU body (the European Chemicals Agency), has detailed provisions requiring member state co-operation and contributions, and has led to a body of substance registrations held at the EU level. Depending on the nature of the UK exit, much of this may need to operate very differently upon 'Brexit Day 1'.

REACH is one of the areas for which DEFRA has policy responsibility; and likely falls (at least in part) within the troublesome 'one third' alluded to by Ms Leadsom. It essentially requires manufacturers or importers of substances (either on their own, or as part of preparations or articles) within the EU[3] to register them, evaluate their effects, submit evaluations to the European Chemical Agency ("**ECHA**"), obtain authorisations for certain substances of very high concern, comply with certain restrictions or bans, and communicate details of all of this throughout the supply chain. The Regulation – which exceeds some 500 pages – currently has direct effect in UK law. Only very short, enforcement-related, domestic regulations (the REACH Enforcement Regulations 2008) exist.

The operation of REACH is critical to UK industry. **The chemicals industry has been estimated to be the UK's largest manufacturing exporter, with 60% of exports going to the EU.** Similarly, huge quantities of the raw materials needed for manufacture within the UK across a range of industries are currently imported from the EU under the REACH regime.

Were the Great Repeal Act to simply provide that the REACH Regulation shall continue to have effect upon Brexit, and **should there be no further supplementary regulation, then the regime is likely to become technically unworkable in a number of respects**. For example:

- **Scope**: currently, the Regulation places restrictions on manufacturing or marketing substances in the EU only. As the UK would no longer be part of the EU on 'Brexit Day 1' this would mean that – read literally - REACH's restrictions would not apply to the UK,

[2] There are other areas of environmental law which are comprised in EU Regulations, such as EU Regulations on agriculture, other single market-relevant areas such as the Regulation on Classification, Labelling and Packaging (CLP), the Biocidal Products Regulation; and various others on emissions standards and greenhouse gases (see fuller list here). These will all involve their own particular transposition challenges.

[3] Whilst the EU is referred to in this section for convenience, REACH (along with most other product-related Regulations) also applies to the EEA states equally, and EU should be read to include EEA for these purposes.

leaving its domestic market as a regulatory void. Whilst this may be straightforward to remedy, it is a good example of the type of fundamental issue that arises when transposing a Regulation written to apply to persons within the EU.

- **Administration**: ECHA currently administers REACH across the EU and the EEA, with all registrations submitted to, and evaluated and administered by, it. Whether ECHA can or is willing to continue to administer UK registrations etc post-Brexit will depend on many factors, not least: (i) whether the UK stays within the single market; (ii) agreement on logistics and budget for ECHA to do so, either on a transitional or permanent basis; and (iii) whether it is politically acceptable to either side for an EU body to maintain a key role in the area. It seems more likely that at least part of its responsibilities will need to transfer to a UK body (possibly the Health and Safety Executive, or a new body). This will be an onerous undertaking for that body - noting that ECHA currently has nearly 600 staff and a long history and in-depth experience of administration in the area.

- **Existing Registrations**: The status of existing REACH registrations by UK companies with ECHA, post-Brexit, is currently an unknown. A transitional mechanism may need to be established, whereby existing registrations remain but are copied across to a new UK regulator for the purposes of domestic regulation. The existing regime makes no provision for this and it may not be a straightforward process. For example, extensive potentially sensitive commercial and technical data has been submitted to ECHA in connection with those existing registrations and it is not currently clear if existing data sharing arrangements under REACH would naturally accommodate such a transfer.

- **Guidance / Commission Regulations**: the Regulation provides for a significant amount of soft law (in the form of guidance) on REACH which is issued by ECHA. Similarly the Commission is also responsible for updating certain technical supplementary information to REACH (such as lists of restricted substances). Query whether the UK (keen to assert the primacy of UK law) will be prepared to maintain these references and formally recognise emerging guidance/technical regulations from ECHA and the Commission going forward.

- **Member State Obligations**: the Regulations contain various requirements in respect of co-operation and reporting between the member states and the EU institutions – eg countries must formally report to ECHA, put persons forward to various management boards, report to the Commission on enforcement statistics every 5 years etc. Clearly, much of this will not be relevant upon Brexit, but the UK may still wish to put in place some degree of provision for EU information sharing and co-operation.

- **'Gold-plating'**: In keeping with the EU's free movement principles, the Regulation requires participants to not restrict the entry/movement within their markets of any REACH compliant products. Query whether the UK is willing to legislate for this post-Brexit: ie effectively guaranteeing not to put in place more onerous requirements than that established by ECHA/the EU.

5. OTHER COMPLEXITIES IN TRANSPOSITION OF EU ENVIRONMENTAL LAW

Key Points: *in addition to the complexities bespoke to individual EU environmental laws, various other factors will create additional complexity and confusion. In particular, the devolved nature of environmental law, the status of ECJ judgments which are key to various areas of environmental practice and regulation, market access risks stemming from divergences in regulatory approaches, skills and resource shortages for EU work 'repatriated' to the UK, and a potential accountability gap absent the Commission, may also pose issues.*

Above are some specific transposition issues identified through the prism of REACH. Many of those issues arise in a very similar fashion in other environmental regimes – particularly product-focused areas. We highlight below some additional more general points of interest around the challenging task of disentangling 'Environment', 'Product' and 'Chemical' law following Brexit:

1. **Environmental policy is 'devolved'**: as noted above, it seems to be proposed that ministers are given the power to amend through secondary legislation. However, as environmental matters are devolved, how this will operate in practice is unclear; and without an 'EU' legal centre ground to tether to, we may see extensive variances emerge between England, Wales, Scotland and Northern Ireland.

2. **Proposed status of existing/future ECJ judgments on environmental matters is unclear**: for example, there are a string of ECJ judgments on what constitutes "waste". Certain industries (e.g. waste incineration, recovery operations, refuse derived fuel manufacture) have in part developed around the ECJ's line of interpretation. Whether the UK follows this will be a legally important, and politically sensitive, issue with commercial implications. If the UK does so, query how it will give these cases legal recognition.

3. **Any UK 'variances' in any transposition/interpretation of EU-derived 'environmental', 'chemical' and 'product' law could complicate market access/cross border shipments**: to the extent the UK departs from the EU in 'transposing' EU laws, or in the subsequent interpretation of these (e.g. see above point re ECJ rulings) this could negatively impact key exports. For example, over 60% of the UK's chemicals are exported to the EU on some estimates – if these comply with less stringent UK interpretations/applications of REACH this could lead to increased compliance costs.[4] Risk of variances are particularly pronounced given the distinct legal systems (civil v common).

4. **Resource constraints**: whilst this a 'Brexit-wide' issue, there is a particular concern of skills/resource shortages arising in respect of environmental issues (including in the devolved administrations) given their extensive and technical nature, and the fact that so much law-making in this area has been EU-driven in recent years. This includes skills and resources to:

    i. develop the secondary legislation to 'bring down' the existing EU environmental laws;

    ii. enforce and administer those laws should EU institutions (ie ECHA) no longer do so;

    iii. research, formulate and develop new policies/legislation going forward; and

    iv. develop 'best available techniques' industry standards, incorporated into environmental permits (eg equivalents to the EU BREFs), should these not be tethered to the EU.

    Following the UK's exit from the EU, the UK may have to bear the cost of developing its own documents or potentially rely on EU policies/documents without having a seat at the table.

[4] For example, a recent ECJ case significantly extended the commonly understood scope of a provision of REACH that requires producers and importers to provide information to the ECHA when an article contains more than 0.1% of a substance of very high concern by weight. The judgment effectively found that this 0.1% threshold was calculated by reference to the weight of any individual components within a larger product containing the substance in question, rather than the weight of the whole product (ECHA had previously interpreted REACH to require the latter). Query what legal effect this critical judgment would have in the UK post-Brexit, eg if the domestic regulation was challenged by an industry member on this point? If the UK courts were to find differently, this would lead to different regimes in this respect, which could be a trade barrier.

5. **Potential Accountability Gap**: more generally, the EU setting external standards which are enforceable (especially through ECJ / infraction proceedings by the Commission) has arguably had a valuable role in allowing the UK government to be held to account for environmental matters – for example:

   i. the £4 billion 'London super-sewer' arguably only became reality after the UK government was threatened with very signficant fines for breaches of EU water laws;

   ii. a recent spate in spending on catchment plans/sensitive farming is also arguably the result of EU pressure; and

   iii. recent Client Earth successes against the government have been for breaches of the EU's Air Quality Directive. Similarly, there have been arguments that the third runway at Heathrow would not have been permitted but for Brexit, on the basis that the runway makes compliance with EU air quality standards much more difficult.

   Under questioning, Ms Leadsom rejected any suggestion that existing domestic enforcement mechanisms (ie the UK courts) would be insufficient, but this is an area which may merit further consideration.

6. NEGOTIATIONS WITH THE EU, EQUIVALENCE AND THE SINGLE MARKET

Key Points: *the transposition will not be taking place in a vacuum.*

Any exit deal negotiated with the EU prior to Brexit (if indeed any is negotiated in time) will be a key factor in how much heavy lifting the 'Brexit Day 1' transposition regime will need to do. This being an unknown complicates any estimate of how much legislation will be easily transferred.

The reality is that outside pressures will also influence just how much of the legislation the government deems can be 'practically' transposed. For example the trade benefits of a high degree of conformance of UK law with EU product regulations may incentivise the government to overcome difficulties in this area. On the other hand, time and resource constraints, and public/political will for fuller independence, could see the government finding a higher degree of insurmountable difficulties in the transposition process.

Ultimately, **the extent of the difficulty in disentangling UK environmental law from EU environmental law will be heavily influenced by the exit deal that is negotiated** and (particularly for product and chemical-related requirements) the issue of UK access to the single market. As noted at the outset of the paper, the government has suggested that the Great Repeal Bill should give ministers the power to make secondary legislation, so that they can have "*the flexibility to respond to ongoing negotiations*". Depending on those negotiations, the troublesome 'one third' could wax or wane.

At one extreme of the spectrum ('soft-est Brexit'), the UK could in theory (albeit it seems unlikely) join the EEA – or a substantially similar arrangement allowing full single market access with harmonised laws – within the stipulated negotiation period (2 years or as extended). In this case the transposition of REACH etc becomes much easier.

Should the UK seek a 'hard' Brexit, and be determined to pursue a complete separation with absolute administrative independence, then bringing EU regimes such as REACH into UK law suddenly becomes much more complex.

In the latter case bespoke environmental, product and chemical regulatory regimes may need to be developed in certain areas. However this would lead to the government needing to grapple with a key policy decision prior to 'Brexit Day 1' – to what extent should the regime put in place be harmonised with the EU regime?

A key incentive for the government to do so (and push the transposition as far as it can) in product-related areas is that maintaining an equivalent UK regime will help reduce barriers to trade for UK manufacturers exporting into the EU. However the limits of this should be recognised – unlike financial services regulation, for example, most products Regulations do not have formal equivalence provisions recognising third-party laws, and this would need to be agreed on a bespoke basis with the EU.

For example, if the UK put in place a regime which had equivalent requirements to REACH, a substance or article manufactured in the UK compliant with such a domestic regime would likely satisfy the EU requirements and not need re-configuring. However, unless the EU can be persuaded to adopt a formal equivalence mechanism, significant added administrative burdens would remain for the UK exporter. The substance or article would still need to be 'registered' with ECHA upon import into the EU.[5] As it is being exported to the EU an 'only representative' would need to be appointed within the EU by the UK manufacturer. If it contained a substance of very high concern which the UK regulator 'authorised' for marketing in the UK under a domestic regime; a separate EU authorisation would need to be obtained under REACH. In addition there is the risk of regulatory discrepancies – a separate UK regulator may interpret the law, or scientific data, differently to an EU institution.

All of this would constitute a significant additional cost for the UK manufacturer exporting to the EU as compared to a manufacturer trading internally within the EU, leading to a competitive disadvantage for the UK manufacturer. (Of course the converse of this is that it will also increase cost for those EU companies exporting into the UK.) The long-term approach the UK takes to address such issues may be subject to full parliamentary consideration, scrutiny and regulation. However, **the issue cannot be left to that post-Brexit period, as the approach taken by the 'Day 1 Brexit' solution will involve important policy decisions that will have an immediate, difficult to reverse and significant impact on environmental regulation and EU-UK trading**.

Doug Bryden / John Buttanshaw
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[5] Assuming not already registered – and see note above re uncertain status of existing UK registrations.