

Innovation in Plant Biosecurity 2017 Movement and Borders

Where will the UK's borders lie? UK Plant biosecurity legislation after Brexit

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Background

- Great Repeal Act for immediate incorporation of EU Acquis into UK law at moment of Brexit with pruning out of 'unnecessary' laws over course of time and amendment of retained instruments
- Much EU plant health legislation in wide sense related to the Single Market which it seems the UK is likely to leave, or lack full access to, while no longer being subject to rulings of the Court of Justice of the European Union ('ECJ')

Issues to consider about Brexit processes

- Impact of Brexit on plant health controls
- Consider not just core plant health but invasive species; pesticides – plant health in farm-to-fork food strategy

Outline of presentation

- Single market and World Trade Organisation
- Constitutional considerations
- EU Regulations and Great Repeal Bill/Directives and Great Repeal Bill
- How selected EU legislation on plant health has been incorporated into UK law
- Questions on plant health legislation after Brexit
- Specific aspects of Plant Health Directive's implementation in UK
- Pest risks increased or diminished if UK's borders retract to original state?
- Invasive species and protection of habitats
- New EU Regulation on protective measures against plant pests
- Clues on environmental protection legislation in general post Brexit
- Plant protection products; farm-to-fork strategy
- Conclusions

Single market and WTO

‘...The European Union is essentially a common market, and open to varying degrees of acceptance by the member states of the Union is an ongoing experiment in social democracy. This means that the common market is subject to regulation, and, that there is an ongoing commitment to various social, economic and welfare rights. ...’ (*The Politics of the Common Law. Perspective, rights, processes and institutions*, 2nd edn. Gearey A, Morrison W, Jago R. 2013. Routledge-Cavendish)

- UK was fully supportive of the Single Market as advantageous for trade and played key role in shaping the Plant Health Directive and EU food law
- Plant Health Directive follows the normative framework of the 1997 version of the International Plant Protection Convention, itself consistent with WTO's SPS Agreement

Constitutional considerations

- *Great Repeal Bill* to repeal European Communities Act 1972 and incorporate *all EU law* into UK law at the moment of Brexit. 'Unnecessary' legislation to be gradually removed
 - An enormous and complex task including political, economic and constitutional hurdles to legislative reform
 - Controversy about potential use of 'Henry VIII' clauses (again!) →
 - What will be role of devolved administrations in plant health?
- Article 50 Bill: only verbal assurances that Parliament will have vote on Brexit deal
- 'Will UK no longer be subject to CJEU/ECJ'?
 - Commission insists on ECJ jurisdiction during any transitional period
 - Still probably confusion between ECJ and ECHR apparent during referendum campaign – anathema to Human Rights Act 1998

EU Regulations and Great Repeal Act

- Regulations as part of EU law have direct effect
- Usually transposed as UK Statutory Instruments, especially if there are national enforcement provisions
- "Henry VIII" provision of s.2(2) of the European Communities Act 1972 provides statutory authority (*Europhobe outrage*)
- With repeal of ECA, Great Repeal Act will bring all 'EU Laws' into UK law where they depended for authority provided by ECA s.2(2).
- However, a prominent 'leave lawyer' has argued that ECA 2(2) should not be repealed but "*extended*" to give ministers more power to amend UK law by returning to Henry VIII powers

Directives and Great Repeal Act

- Directives are not laws and must be implemented through national instruments (but not necessarily legislation)
- Implemented as SIs under authority of a 'real' UK Act if possible, albeit often as amended by ECA 1972
- SIs detailing fees for e.g. plant health services, are issued under the authority of the Finance Act
- Will Directives be included in Great Repeal Bill?
- The key issue for all legislation originating in the EU is how quickly decisions will be made to amend, repeal or replace instruments with 'home grown' legislation and whether there will be any preparatory work after Article 50 is triggered

How selected EU legislation related to plant health has been incorporated into UK law*

EC/EU Instrument	Short title/scope	UK Instrument	SI No.	Statutory Authority	Comments
Directive 77/93/EEC	'Plant Health Directive'	The Plant Health (Great Britain) Order 1993	1993 No. 1320	Plant Health Act 1967 as amended by ECA 1972	Repealed by Dir 2000/29/EC
Directive 2000/29/EC	'Plant Health Directive'	The Plant Health (England) Order 2015	2015 No. 610	Plant Health Act 1967 and ECA 1972	Amends 2005 Order and finally repeals 1993 Order
Directive 2000/29/EC	'Plant Health Directive'	Plant Health (Plant Passport Fees) (England) Regulations 2007	2007 No. 720	Finance Act	
Regulation (EU) 1143/2014	Alien invasive species	-	-	-	Direct effect

* Excludes forestry orders

General questions on plant health legislation after Brexit

What 'falling off cliff into WTO' actually means in case of hard Brexit is beyond the scope of today's presentation, but

- If UK joins WTO, adoption of 1997 version of IPPC necessary – how could this be achieved?
 - Amended Plant Health Act 1967, itself pre-WTO?
 - Plant Health law adopted by Great Repeal Act, amended or not?
 - New home grown plant health laws?
- How will Brexit affect devolution?
 - Currently separate Acts for GB and NI (N.B. Possible/likely reestablished border with Irish Republic)
 - SIs currently devolved to regions

Specific aspects of Plant Health Directive's implementation in UK

If the UK's SIs that implement Directive 2000/29/EC are not amended or replaced on Brexit/leaving Single Market:

1. Can the Schedules implementing the Annexes be 'cherry-picked' for those pests, commodities and import requirements relevant to the retracted borders?
2. Will pest risk analysis be required *de novo*?
3. Will [Plant Health Licences](#) for R&D on prohibited pests be relaxed for pests not posing a threat to UK?
4. Can provisions for protected zones ([Annex I of Regulation (EC) 690/2008] and plant passporting (Directive Part 3) be ignored?
 - Or could 'plant passport' be interpreted to mean 'phytosanitary certificate'?
5. Consequence of abolition of plant passports ➔

Licences under Part 8 of Plant Health (England) Order 2015

- For trials, experiments and work involving varietal selection
- Reference to Directive 2008/61/EC



Pest risks diminished or increased if UK's borders retract to her national boundaries?

- No need to worry about pests of plants included in Annexes to 2000/29/EC not cultivated or important ecologically?
- But UK may lack benefit of community action to prevent pests which are threats to UK from spreading from entry at remote EU borders
- UK will still have obligations under IPPC to prevent pests which are present in UK or in transit from being transmitted to other countries including remaining 27
- Increased responsibility will fall primarily on UK NPPO(s) for issuing phytosanitary certificates instead of plant passports
- Climate change leading to 'migration' of crops and pests from the remaining 27 member states

Invasive species and protection of habitats

- Protection of wildlife and habitats under Wildlife and Countryside Act 1981 ('Birds Directive', 'Habitats Directive')
- Regulation (EU) No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species
 - Direct effect and in force from 1 January 2015 but UK national provisions covering offences, etc. may not be issued
 - Aligned with Bern Convention of **Council of Europe**, as is WCA 1981
- Permits for activities on IAS covered by Commission Implementing Regulation (EU) 2016/145

Regulation (EU) 2016/2031 on protective measures against plant pests

- Under consideration since 2013
- Enacted April 2016
- Expands scope to include invasive alien species
- Concepts of ‘quarantine pests’ (IPPC) and ‘quality pests’ (non-quarantine regulated pests)
- Enhanced cooperation between member states
- Repeals Directive 2000/29/EC in December 2019 – after Brexit
- Could this be model for IPPC consistency?

Clues on legislation post Brexit for environmental protection in general

- Environmental Audit Committee: Brexit posed risks for UK farming, the countryside and wildlife unless ministers took concerted action to maintain subsidies and standards; and environmental protections could be weakened
- The Environment Secretary: not all of the 800 environmental laws could be replicated. Only two-thirds of existing EU environmental legislation could be "rolled forward" with minimal technical changes, she said.
- House of Lords called for a new environmental watchdog to safeguard the environment

Plant protection products

EC/EU Instrument	Short title/scope	UK Instrument	SI No.	Statutory Authority
Regulation (EC) 1107/2009	Placing PPPs on the market	The Plant Protection Products Regulations 2011	2011 No. 2131	ECA 2(2)
Directive 2009/128/EC	Framework for sustainable use of PPPs	The Plant Protection Products (Sustainable Use) Regulations 2012	2012 No. 1657	ECA 2(2)
Regulation (EC) 396/2005 as amended	MRLs for pesticides	The Pesticides (Maximum Residue Levels (England and Wales) Regulations 2008	2008 No. 2570	ECA 2(2)

- Approval of a.s at EU level. Decisions of product use nationally
- Disagreement about e.g. neonicotinoids but the 2011 Regulations essential for trade in food (and in PPPs) with EU member states whether UK is inside or outside Single Market
- Similarly 2008 Regulations on pesticide MRLs
- Will UK revert to less stringent risk regime seen in Directive 91/414/EEC?

Farm-to-fork strategy

- Pesticide management essential component of food safety but most pesticides used are PPPs for crop production and post-harvest protection
- Maintaining a high level of plant (and animal) health is key objective of EU's farm-to-fork food strategy with vertical and horizontal aspects
- Good Agricultural Practice including safe and effective pesticide use is a HACCP pre-requisite
- Will the UK continue to implement the farm-to-fork strategy after Brexit or will it be abandoned in favour of a narrower sectoral approach?

Conclusions

- Major challenges for plant health legislation and its implementation/enforcement posed by Brexit with underlying constitutional issues yet to be resolved
- Similarly for legislation in plant health-related sectors – wildlife and habitat protection from invasive alien species, pesticide registration and regulation
- Need to consider impact of Brexit legislative initiatives on:
 - plant health risks to UK
 - safety and quality of food from plants, both home grown and imported
- Will protection of plants, habitats and wildlife be weakened without 'hard' EU regulatory provisions and backing of ECJ?

Thank you for your attention

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