

Delivering Brexit: Legislative Marathon or Sprint?

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United Kingdom's plant biosecurity legislation after Brexit

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United Kingdom's plant biosecurity legislation after Brexit

Outline of presentation

- Themes
- Regulatory background - biosecurity, World Trade Organisation, Single Market
- UK plant health legislation
- Invasive species and protection of habitats
- Regulation of pesticides after Brexit
- Farm-to-fork strategy
- Devolution of plant health and Crown Dependencies
- 'No deal' and WTO
- Conclusions

Themes

- Effect of European Union (Withdrawal) Act, 2018 on UK's biosecurity
- Much EU plant health legislation in wide sense related to the Single Market
- Uncertainty about future relationship with single market and supervisory jurisdiction of ECJ - depends on nature of Brexit

Issues to consider about Brexit processes

- Impact of leaving Single Market on plant health controls
- Consider not just core plant health but invasive species; pesticides – plant health in EU *farm-to-fork food strategy*
- Prospects for life under WTO in event of 'no deal'

Official sources of evidence

- House of Lords EU Energy and Environment Sub-Committee enquiry on 'Brexit: plant and animal biosecurity'

<https://www.parliament.uk/Brexit-plant-animal-biosecurity>

Including written supplementary evidence provided by DEFRA

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-plant-and-animal-biosecurity/written/84572.pdf>

With note on ongoing discussions with Crown dependencies over biosecurity

- Welsh Assembly blog 'Will restrictions on neonicotinoids continue after Brexit?'

<https://seneddresearch.blog/2018/03/20/will-restrictions-on-neonicotinoids-continue-after-brexit/>

- National Audit Office: DEFRA unprepared for Brexit, especially 'no deal'

<https://www.nao.org.uk/wp-content/uploads/2018/09/Defra-Progress-Implementing-EU-Exit.pdf>

Technical notices for 'no-deal Brexit' applying to relevant sectors not yet available

Biosecurity explained

- ***“Biosecurity is composed of three sectors, namely food safety, plant health and life, and animal life and health. These sectors include food production in relation to food safety, the introduction of plant pests, animal pests and diseases, and zoonoses, the introduction and release of Genetically Modified Organisms (GMOs) and their products, and the introduction and safe management of invasive alien species and genotypes”.*** Definition from FAO
- Concept widely adopted and implemented in British Commonwealth as well as UK, more gradually in EU
- Black *et al.* in academic outputs include pesticide registration and control in biosecurity
- Includes aspects of environmental protection – risks from invasive species and GMOs affecting habitats and individual organisms
- Caution! Different meaning in US and in French!

Biosecurity and trade

- Basis in World Trade Organisation's (WTO) normative frameworks for regulation of trade to avoid unfair or unnecessary barriers to trade from tariff or non-tariff measures (NTMs) as import controls
- Biosecurity provisions in the *WTO Agreement on Application of Sanitary and Phytosanitary Measures* ('SPS Agreement') – exclusively NTMs
 - trading goods safely and fairly by managing risks to human health, animal health ('sanitary') and plant health ('phytosanitary')
- 'Trade by standards' according to scientific evidence to justify that imports pose a risk and therefore may be regulated by NTMs that do not become non-tariff barriers
- Harmonisation of standards encouraged. EU has progressed to unification with Single Market

EU Single Market and non-tariff measures

- ‘...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)
- Single market (‘Internal Market’ in EU legislation) regulates NTM’s for internal trade and trade with third countries
- Margaret Thatcher was a strong advocate of Single Market as advantageous for trade (*but red line with ‘social Europe’*), and British experts played key role in shaping the Plant Health Directive and EU food law (‘Comitology’)
- Plant Health Directive follows the normative framework of the 1997 version of the International Plant Protection Convention, itself consistent with WTO's SPS Agreement
- Single border for biosecurity around entire EU. Brexit will mean retraction of borders to pre-EU state.

UK implementation of EU plant health Directives

- EU Directives on plant health (and related areas) are usually implemented as SIs with joint authority of a 'real' UK Act and s.2.2 of European Communities Act (that may amend UK Act)
- Is there reference to this dual authority in the European Union (Withdrawal) Act 2018?
- SIs detailing fees are for e.g. plant health services, are issued under the authority of the Finance Act

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/Plant Health (Northern Ireland) 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 Acts 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

UK Plant Health Acts

- Plant Health Act 1967 covering England and Wales and Scotland
- Plant Health Act (Northern Ireland) 1967
- Neither Act implements 1997 version of International Plant Protection Convention (IPPC) that accommodates WTO's SPS Agreement
- These Acts do not align concepts with IPPC (e.g. 'regulated pest', 'quarantine pest') and do not make reference to key requirements that plant health measures must be based on pest risk analysis
- Directive 2000/29/EC implements 1997 version of IPPC but uses 'harmful organisms' as equivalent to 'regulated pests'
- But new Plant Health Regulation does implement IPPC directly – *considered later*

Common external border for plant health

- Plant health provisions for Single Market came into effect in 1997
- Unified ‘prohibited’ pest lists for whole of EU
- International phytosanitary certificates only required for risk-bearing plants, plant products and other material entering EU from third countries (according to risk-based phytosanitary import requirements)
- Phytosanitary certificates NOT required for movement within EU but plant health safeguards by requiring *plant passports* for movement of sensitive material into *protected zones* declared for specific pests
- Plant passports issued by enterprises under supervision of national authorities
- After Brexit, the UK’s plant health borders will retract back to the original national borders

Specific questions about implementation Plant Health Directive's implementation in UK

Section 8 of EU (Withdrawal) Act 2018 – Dealing with deficiencies arising from withdrawal:

1. Will 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. Will provisions for protected zones ([Annex I of Regulation (EC) 690/2008] and plant passporting (Directive Part 3) be repealed or 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 establishing the conditions under which certain harmful organisms, plants, plant products and other objects listed in Annexes I to V to Council Directive 2000/29/EC may be introduced into or moved within the Community or certain protected zones thereof, for trial or scientific purposes and for work on varietal selections



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 have to protect national borders without 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
- Without plant passporting, increased responsibility will fall primarily on UK plant health authorities for issuing phytosanitary certificates
- Climate change leading to 'migration' of crops and pests from the remaining 27 member states

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

- Under consideration since 2013
- Enacted April 2016
- Concepts of ‘quarantine pests’ and ‘quarantine regulated pests’ (non-quarantine regulated pests) as per International Plant Protection Convention
- Enhanced cooperation between member states
- Repeals Directive 2000/29/EC, coming into force December 2019 – transition period?
- Very important in case of ‘no deal’ and falling back on WTO to implement IPPC
- UK ‘on track’ to implement new Regulation (Chief Plant Health Officer, giving evidence to HoL EU Energy and Environment Sub-Committee, 9 May 2018, but not fully confirmed by Lord Gardiner of Kimble on 16 May)

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**
- Permits for activities on IAS covered by Commission Implementing Regulation (EU) 2016/145
- EU policy and legislation, supported by ECJ, prioritises maintenance of recognised conservation sites over economic development – airports, power stations etc.
- These and other environmental safeguards (*>1,000 legislative instruments*) may be seen as red tape with 'unnecessary legislation' harming business
 - But there may be job losses from weakening of 'green economy' after Brexit

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 unless the government introduces specific legislation that is enforced and not 'zombie' legislation – no ECJ to safeguard citizens and habitats or wildlife against harm from non-enforced legislation
- The Environment Secretary told the Committee in January 2017 not all of the 1,000 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 and others have called for a new environmental watchdog to safeguard the environment but as yet not clear commitment from DEFRA Secretary

Regulation of pesticides - 'plant protection products'

EC/EU Instrument	Short title/scope	UK Instrument	SI No.	Statutory Authority
Regulation (EC) 1107/2009 Repeals Dir 91/414/EEC	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 **active substances** 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
- The same applies 2008 Regulations on pesticide MRLs providing safe food
- Will UK revert to less stringent risk regime seen in Directive 91/414/EEC? →

Plant protection products (PPPs) and UK's internal market

- Welsh Assembly commissioned blog on future use of neonicotinoids in UK after Brexit.
- Neonicotinoids mainly used in oilseed rape but seriously harmful to bees
- UK finally agreed to extending EU-wide ban in 2017
- Devolved powers in agriculture given to Wales and Scotland (and Northern Ireland)
- Welsh Assembly concerned about possible relaxation of restrictions after Brexit from pressure by English farming lobby - Wales has much greater proportion of natural vegetation dependent on bees and other pollinators
- It seems UK internal market will be maintained in respect of pesticide approvals and use in order to maintain exports to EU but 'discussions are ongoing' with devolved authorities

Farm to fork food strategy

- Includes plant health, animal health and welfare as well as food safety in recognition of ‘consumer interests’
- 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
- Pesticide management essential component of food safety but most pesticides used are PPPs for crop production and post-harvest protection
- Will the UK continue to implement the farm-to-fork strategy after Brexit or will it be abandoned?

European Food Safety Authority (EFSA)

- EFSA provides risk assessments to European Commission on all aspects of biosecurity, including plant and animal health, food safety, pesticides and GMOs
- Incorporates Rapid Alert System for Food and Feed (RASFF)
- Answers questions from member states
- Disproportionate number of UK members on EFSA's expert panels
- Dramatic drop in recruitment of UK experts since Referendum
- Will UK pay into EFSA and RASFF after Brexit?

Devolution and borders for plant health

- Responsibility for each of the three main biosecurity sectors and environmental protection devolved to constituent regions
- Discussion on post-Brexit arrangements for devolved powers continue
- Current suspension of Northern Ireland Assembly
- Northern Ireland has special biosecurity status because shares island with the Republic, considered as a single risk unit separate from the UK mainland (e.g. separate Plant Health Acts for NI and UK mainland)
- Special measures (protected zones) for Republic and NI as a whole or NI separate from Republic and mainland
- Re-imposition of a hard border between NI and the Republic will complicate this arrangement and will seriously impact on trade and business within the island and with the UK mainland, e.g. ***plant propagation material, Guinness, dairy, live animals, semen***

Crown dependencies

- The Crown Dependencies currently have a special relationship with the EU but are not part of EU. Protocol 3 of the UK's Treaty of Accession and Regulation (EEC) 706/73 provides for the Crown Dependencies to be part of the EU customs area, and permits the free movement of manufactured goods and agricultural products in trade between them and the Union.
- As self-governing dependencies of the Crown, the governments of the Crown Dependencies are responsible for plant and animal biosecurity within their jurisdictions.
- EU rules on veterinary and plant health, on marketing of seeds and seedlings, on food and feeding stuffs, on quality and marketing standards, currently apply in the Crown Dependencies, in accordance with protocol 3 of the UK's Treaty of Accession and Regulation (EEC) 706/73.

'The UK Government is committed to working with the Crown Dependencies on the UK's withdrawal from the EU and to help them make the necessary preparations.'
(Supplementary evidence from DEFRA to HoL Biosecurity and Brexit enquiry.)

'No deal' and WTO

- UK benefits from EU trade deals with 60+ countries and specific agreements with 168 countries
- Deals recognise commitment to social, economic and welfare rights as well as 'physical' standards as NTMs
- UK cannot automatically apply these deals post-Brexit
- Most concern in media about tariffs but NTMs must be included in new deals
- Application of Most Favoured Nation (MFN) principle
- Any concessions on NTMs or other measures offered to Trading partners could be insisted on by any other WTO member →
- Opening borders to EU in 'no deal' emergency might mean open borders with all other countries because of MFN
- WTO's future in doubt because of Trump outrage against organisation



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OUTRAGEOUS! World Trade Organisation could MEDDLE with Brexit deal agreed by UK and EU

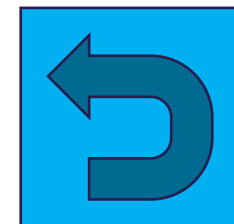
OUTRAGEOUS! World Trade Organisation could MEDDLE with Brexit deal agreed by UK and EU

BRUSSELS bureaucrats are not the only ones who may cause barriers to the UK's attempts to sign a customs deal with the EU after Brexit, with a legal expert arguing the World Trade Organisation (WTO) could also meddle in efforts to create a viable trading relationship with the bloc.

By **DAN FALVEY**

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From legitimate reference to Most Favoured Nation Principle from a WTO member!



Conclusions

- Major challenges for plant health legislation and its implementation/enforcement posed by Brexit with underlying constitutional issues, especially status of Northern Ireland and general devolution of powers for agriculture yet to be resolved
- Similarly for legislation in plant health-related sectors – wildlife and habit protection from invasive alien species, pesticide registration and regulation
- Need to consider impact of Brexit legislative initiatives (if any) on:
 - plant health risks to UK
 - safety and quality of food from plants, both home grown and imported and role of EFSA
- Will protection of plants, habitats and wildlife be weakened without 'hard' EU regulatory provisions enforced by European Commission and backing of ECJ?
- Uncertain future in event of 'no deal' and reliance on WTO

Looks like being a marathon for DEFRA!

Thank you for your attention!

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