



The
manufacturers'
organisation

BREXIT BRIEFING

BREXIT & ENVIRONMENTAL LEGISLATION: UPDATE ON THE MANUFACTURER'S PERSPECTIVE



OVERVIEW AND SUMMARY OF RECOMMENDATIONS

EEF's members take their responsibilities to the environment and public health seriously. They do not want standards eroded as a result of Brexit and fully endorse the government's commitment to leave the environment in a better state than it found it, as set out in the recent 25-Year Environment Plan.

This requires careful attention to be paid to the UK's considerable body of environmental legislation, most of which has built up since we joined the EU, resulting in a set of laws that are deeply intertwined.

Lists compiled by the House of Commons Library show 141 EU directives in the area of environment, consumer and health protection and 527 pieces of directly applicable legislation, including regulations and decisions.^{1,2} There is another smaller swathe of legislation relating to energy and its use.

A number of these have a direct and sometimes considerable impact on manufacturers, especially larger ones, both in terms of processes and activities onsite (energy management, pollution control and management of waste) and the goods manufactured (energy efficiency, labelling, chemical content etc).

Manufacturers' views in this area haven't changed fundamentally since the referendum. While committed to their role in society, their priority in the context of Brexit is still frictionless trade with the rest of the EU, meaning securing a strong economic partnership is key, as is the prevention of any non-tariff barriers to trade. This should start in the short-term with effective transposition of the EU acquis to the UK statute book wherever practical, while also undertaking negotiations as quickly as possible where there is need for cooperative action.

Beyond that, there may be changes that could be made to streamline UK legislation in some areas over the longer term without weakening its overall aims. However this should be approached in a systematic and transparent manner and only once the UK has left the EU.

While EEF understands the degree of work needed to plan for various outcomes of EU negotiations, concern is growing about the continuing degree of uncertainty. Government is only now beginning to share its thinking, which of course is hampering manufacturers' ability to plan for the future. In some policy areas, this is also limiting the input we can provide to government. This lack of clarity will become an increasing problem for companies as we move further into 2018.

¹House of Commons Library, 2017, Briefing Paper number 7943, Legislating for Brexit: EU directives

²House of Commons Library, 2017, Briefing Paper number 7863, Legislating for Brexit: directly applicable EU law

An agreement on a transition period would obviously allow more time, but two years will not be long enough for detailed negotiations and policy formation to be undertaken or for companies to adequately prepare for new operating conditions.

This paper incorporates the results of a workshop on Brexit held last summer with subject experts and public affairs professionals from a range of manufacturing companies. It aims to summarise the complexities of this policy area in relation to Brexit, the frustrations around the lack of transparency from government and manufacturers' key priorities for regulation in the post-Brexit period.

These are our recommendations:

- 1. The complexity of policy in this area needs to be recognised and addressed in a holistic way. This must include keeping stakeholders appraised of timetables for all the reforms being planned and delivering a clear mechanism of how to engage in the planning of any reforms.**
 - 2. Government should ensure early discussions are held with the EU about climate and environmental regulation once negotiations are broadened.**
 - 3. Government needs to publish a list of all EU legislation in the climate, energy and environment field and its plans for transposition to UK law. Secondary legislation should not be used where there will be a change to policy.**
 - 4. Government officials need to be empowered to have open discussions with stakeholders about the options being considered and potential impacts on business as soon as possible.**
 - 5. Ministers should give a clear view on new EU proposals due to be transposed after March 2019 and whether they would be likely to adopt them if offered the choice.**
 - 6. UK negotiators should press for the flexibility to take an alternative approach to environmental regulation where necessary, provided the same outcomes are achieved. However, the UK's product-related regulations on climate and environment should continue to match those imposed in the EU post-Brexit, except in exceptional circumstances where this would be damaging to UK interests. (Circumstances could arise where rules are unfairly targeted at UK products.)**
 - 7. When the government talks about reforming its approach to environmental legislation it must consider the need for regulatory stability and be very clear about the timescales over which this is being proposed. Efforts to simplify UK law will be welcome in some cases but must be pursued systematically and not for some years after Brexit.**
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8. UK negotiators should press for close regulatory cooperation with the EU in this policy area.
 9. To minimise the chance of accidental regulatory divergence, the UK courts should be required to pay due account to EU case law regardless of when it occurs.
 10. It is important to have a discussion about the decision-making processes the government will insert into retained EU law to allow updates. These processes must be transparent and allow adequate stakeholder engagement.
 11. Close cooperation is also needed between the UK government and devolved administrations to ensure that any desire for further devolution during the repatriation of powers to the UK does not create additional complexity for companies operating across borders, or unnecessary fragmentation of any markets created.
 12. Enforcement bodies should take a pragmatic approach to any breaches in climate and environmental law that arise around the time of Brexit through no fault of the companies involved.
 13. Any other regulatory change should be kept to a minimum while companies attempt to prepare for Brexit.
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1. THE COMPLEXITY OF CLIMATE AND ENVIRONMENTAL LEGISLATION

The complexity and interconnectedness of climate and environmental regulation in the UK and EU make it hard for those aiming to separate out our legislative mechanisms. Box 1 summarises the policy areas of most concern to our members. However, there are a number of cross-cutting problems that apply across this policy field:

- **Cross-border impacts and regulatory targets:** A number of EU targets in this area, especially climate and energy related ones, are set across the bloc. Some are sub-divided and attributed to particular member states on a statutory or non-binding basis, such as the Effort-Sharing Decision, which covers a portion of greenhouse gas emissions. The same is true of EU renewable energy and energy efficiency targets. The UK could decide to take or leave its portion of these, trade deal permitting, although this would affect the rest of the EU.

Other legislative targets may potentially be harder to disentangle, eg the EU-wide cap on greenhouse gas emissions from the power sector and heavy industry under the EU Emissions Trading System (ETS). Also the phasedown in production/import of certain fluorinated gases.

The assessment of what represents Best Available Techniques (BAT) for site and waste management under the Industrial Emissions Directive (IED) – used to determine environmental permit conditions – is currently also developed at EU level.

- **Product regulation and links to trade:** Some environmental challenges have resulted in product rules, including energy efficiency standards for energy-using or related products, rules on chemical content and reporting, and restrictions on the use of ozone-depleting substances in refrigerant equipment. Some of these are determined internationally, but others could act as barriers to trade if the UK decides to take a different approach that the EU cannot recognise.

BOX 1, Policy areas of particular concern to EEF's members:

- REACH: impacts on supply chain continuity; ability to trade; compliance; and access to data
- Climate: future of carbon pricing; renewable energy targets; and ability of UK to compensate trade-exposed sectors for indirect costs of decarbonisation passed through by electricity sector
- Industrial Emissions Directive and other pollution laws: future involvement in, and application of, EU Best Available Technology standards; and potential for increased adaptation to local circumstance
- Waste: future definitions of waste and end-of-waste
- Resource efficiency and Circular Economy: broad approach

- **Administration and regulatory bodies:** UK regulators and other UK organisations and experts play a key role in a wide range of European regulatory institutions, including Euratom (nuclear regulation), ACER (gas and electricity), ENTSO-E and ENTSO-G (energy networks), European Chemicals Agency (ECHA) expert committees, the Seville Process (IED), technical standard-setting committees for product energy efficiency and energy labelling regulations, and numerous comitology committees (these approve secondary EU legislation either directly or through a scrutiny process).

Additionally, for some legislative systems, compliance is proven at EU level. This includes the EU Transaction Log for the EU ETS. Here, allowances must be submitted in the spring following the end of each, calendar-based, compliance year. REACH registration is administered by ECHA, with non-EU countries forced to act through third-parties.

Ongoing UK membership of Euratom after 2019 has already been ruled out by the government. A continued role in rule-making

in other areas also looks unlikely, although various non-EU members do have observer roles on some committees.

In the case of ECHA, there are also confidentiality rules around the data used to make decisions that mean an attempt by the UK to mirror subsequent changes to EU legislation may have to be done without seeing the full evidence base behind them.

There are resourcing implications for the UK in duplicating expert bodies, or upskilling existing UK regulators as well as setting up IT systems. Questions remain over how quickly this can be done.

- **Joint funds:** There are well acknowledged issues around UK access to the EU's Horizon 2020 R&D programme. But joint funds also cause complications in the EU ETS, which has several funds used to support innovation and moves to cleaner power in Eastern Europe. Some of this transfers funding from Western European countries to eastern ones, providing an opportunity for the UK to save some money by leaving. However, this could also deprive UK-based innovation projects or cross-border projects in which UK firms would have been involved.
- **Regulatory divergence soon after Brexit:** Even if the intention is to ensure parity of EU and UK legislation, there is a risk the two sets of jurisprudence could rapidly diverge creating complications for manufacturers who may have to comply with two sets of rules in order to trade goods or comply with pre-existing contracts. This could happen through the courts: under the draft text of the EU (Withdrawal) Bill, pre-March 2019 case law from the ECJ would apply to 'retained' EU law, but UK courts would have flexibility as to whether they refer to later ECJ rulings.³

Legislation with rapidly changing lists and standards such as eco-design and energy labelling, the Industrial Emissions Directive and, especially, chemicals rules will be

problematic in this respect as there can be changes several times a year that the UK would have to decide whether to adopt.

***Recommendation 1:** The complexity of policy in this area needs to be recognised and addressed in a holistic way. This must include keeping stakeholders apprised of timetables for all the reforms being planned and delivering a clear mechanism of how to engage in the planning of any reforms.*

***Recommendation 2:** Government should ensure early discussions are held with the EU about climate and environmental regulation once negotiations are broadened.*

2. UNCERTAINTY REMAINS HIGH

Eleven months on from the triggering of Article 50, manufacturers are still very uncertain as to the regulatory environment they will be operating in from March 2019 and, even more so, over the longer term. There is a general understanding that the government is aiming for continuity in the short term but little on how this will be achieved in more complex policy and regulatory areas or what back-up mechanisms are in place. The recent deal around regulatory consistency on the island of Ireland has also created ambiguity and questions around what 'regulatory alignment' might mean in practice.

Some government officials now appear to have a mandate to discuss more openly the regulatory issues surrounding Brexit. This is to be welcomed and wherever possible expanded upon. We would also support the intention set out by the Secretary of State and in the 25-Year Environment Plan to establish some kind of framework for environmental regulation post-Brexit. We await more details, but this could be valuable if it prevents the legislative environment changing in unpredictable ways with every new government.

However in the meantime, manufacturers remain unsure, for example, whether their

³There is also uncertainty as to how much EU-derived legislation has to change before it is effectively seen as new UK legislation

BOX 2, Immediate REACH risks

The lack of certainty as to REACH's future shape is causing considerable concern among downstream manufacturing industries, some of which are reliant on a huge range of substances and chemical formulations. Crucial supply chains could be interrupted by the invalidation of EU registrations held by UK firms. This could require them to switch their registration to that of an importer into the EU or their EU customers to register on their behalf, and/or duplicate registrations to be prepared for the UK market. In all cases, the cost and time required could cause withdrawal of some chemical products from the market and therefore substantial disruption to supply chains.

Manufacturers are also concerned about the invalidation of authorisations held by UK firms which are needed for downstream formulation, component manufacture or aftermarket services in the EU, disrupting the sale and operation of UK (and non-UK) end-products. These would likewise take considerable time and cost to rearrange. The UK government may also require new authorisations to be sought for EU-authorized substances used here.

Disruption of supply chains due to the above effects could cause widespread impact to customers of the chemicals industry across all sectors. The issue is particularly pressing in fields such as defence and aerospace where there are lengthy approval pipelines for any change to a product. In the immediate pre-Brexit term, there is an additional worry as to whether the prospect of Brexit will discourage registration of essential substances by the final May 2018 REACH deadline for low-volume substances as these registrations could be valid for less than a year. When surveyed in late 2016, 17% of EEF members were considering registering substances for the 2018 deadline and half believed they would be impacted via their supply chain.

supply chains will be affected by interruptions to the REACH regime (see box 2), or they need allowances to cover next year's obligations under the EU Emissions Trading System. They also don't know what influence they will have on other upcoming regulatory changes. This includes updates being made to the reference documents used to draw up industrial plants' environmental permits under the IED, the future of renewable energy targets or circular-economy approaches.

Even the more straightforward elements of domesticating EU environmental policy could conceivably impact the behaviour of regulators, and R&D projects may have to look for new forms of support.

Companies are wondering what they can do now to prepare in the absence of more detailed information. EEF's wider research shows that for around half of member

companies, uncertainties around Brexit are acting as a check to investment.⁴ Decisions in the environmental field are likely to be similarly affected.

Even if the passage of the EU (Withdrawal) Bill goes to plan, secondary legislation bringing across EU directives and regulations, and amending them where necessary, will not be laid before Parliament for some months. This leaves limited time for detailed scrutiny of such a vast body of materials before spring 2019. Proper consultation with industry over the government's approach must be carried out as soon as possible before that happens. At the very least there needs to be clarity on which elements of pre-Brexit law will be amended during the transposition process and how considerable those changes will be. Any substantial reforms that go beyond keeping pre-Brexit EU legislation workable should be subject to scrutiny.

There should also be a discussion with stakeholders around the plans that need to be implemented for 'no deal' situations across all policy areas.

Recommendation 3: *Government needs to publish a list of all EU legislation in the climate, energy and environment field and its plans for transposition to UK law. Secondary legislation should not be used where there will be a change to policy.*

Recommendation 4: *Government officials need to be empowered to have open discussions with stakeholders about the options being considered and potential impacts on business as soon as possible.*

Recommendation 5: *Ministers should give a clear view on new EU proposals due to be transposed after March 2019 and whether they would be likely to adopt them if offered the choice.*

3. MANUFACTURERS' PRIORITIES

It is difficult to be definitive about our preferred options without more detail of what is being considered and prepared for negotiations with the EU. However, there are some principles on which manufacturers can agree:

- **Trade and international competitiveness:**

With half of the UK's manufacturing exports by value going to EU countries, the priority in both the short- and long-term for our sector is maintaining excellent trading relationships with our nearest neighbours and being able to compete with them on equal terms. This means avoidance of any regulatory, tariff or non-tariff barriers to trade is essential. This and the fact that manufacturers do not want the added cost and administrative burden of producing different products for different markets, means we would support continued regulatory alignment with EU legislation for climate and environmental regulation governing products (for example most chemicals-related rules,

and ecodesign energy efficiency standards for energy-related products and appliances). Nonetheless, there should be some flexibility to allow for any developments that are directly counter to UK interests.

There have been suggestions that products sold in the UK could be more lightly regulated, but that would open consumers up to the dumping of sub-standard and dangerous goods from other countries and undermine environmental protection, while also undercutting more responsible UK producers.

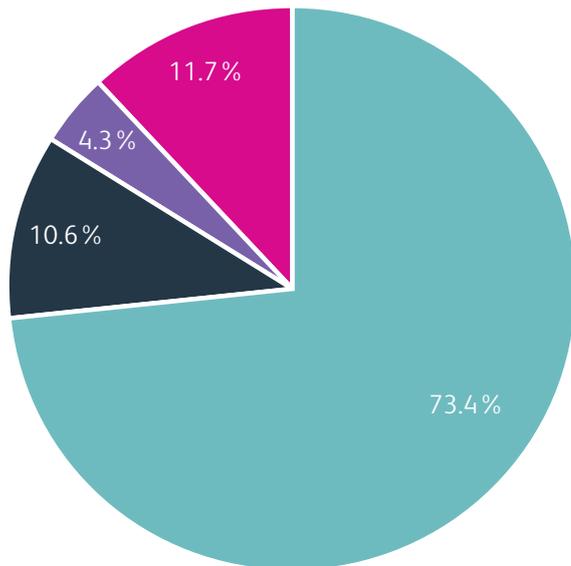
For that reason, EEF welcomes the announcement in the Clean Growth Strategy that the government plans to keep step with new EU ecodesign standards. This is important as the standards, which cover products like washing machines and kettles, but also some industrial equipment, are currently set at the level of least-lifetime cost to the consumer, saving consumers money while helping achieve environmental goals. They apply to all products placed on the market and at EU level they and linked rules on energy labelling are expected to save 175 million tonnes of oil equivalent (MTOE) – equivalent to the primary energy consumption of Italy – by 2020. The government must stick to this commitment, absorbing any criticism from the press, and consider other product-based regulatory regimes which need the same approach.

It is also notable that non-EU countries are adopting regimes inspired by EU ones, including: pollutant standards for cars in China which will be brought into closer alignment with EU rules from 2020; an ever growing number of countries with some form of ecolabel and ecodesign rules, half of them in some way derived from the EU approach;⁵ and the Republic of Korea and Turkey, which have chemicals regimes based on REACH.

- **Regulatory stability:** When it comes to environmental legislation, EEF's members are very clear that another short-term priority in this highly regulated area must be stability.

⁵European Commission, 2015, Savings and benefits of global regulations for energy efficient products

Manufacturers' response to the question: In a post Brexit world, which of the following options would your company prefer to see in relation to EU environmental legislation that affects business?



- All legislation carried over into UK law and amended on a case-by-case basis
- All legislation repealed and new laws drafted
- Other
- Don't know

Source: EEF Climate, Energy and Environment Survey, Autumn 2016

Even when it comes to REACH, often a particularly contentious regime in the past, 85% of our members did not want a change to the current approach when surveyed after the referendum.⁶ Many have spent considerable time and money integrating it into their business and see no value – and varying degrees of pain – in moving away from it. The situation regarding transposition of complex regulatory regimes such as those highlighted in section 1 must be resolved as soon as possible.

Efforts to simplify UK law will be welcome in some cases (see below) but must be pursued systematically at a later date.

For some legislation, there are natural points at which such a review should fall. For instance, there are benefits to the UK remaining in the EU ETS until the end of the current phase in 2020 as now seems to be acknowledged by government, regardless of the length of any implementation period. Government should look seriously at alternative approaches after that, unless there is a strong trade-related argument for remaining. For REACH, any reforms should take into account the considerable amount of time it can take in some industries to find and approve alternative substances.

- **Flexibility to streamline process-based legislation over time:** There is a clear divide between product-related legislation and that covering activities and processes that occur on UK soil with more limited impact on exports or human health and the environment in other countries. This category would include pollutant control, waste and water management. We strongly support continued protections in these areas, but note that 60% of member companies asked about their greatest concerns with respect to environmental management quoted the cost of regulatory compliance.⁷

Hence, we believe that in some process-based legislative areas there might be more streamlined ways of achieving the same outcomes that should be examined. This should be done in a structured manner, looking across policy areas to ensure policies on, for example, air pollution and climate fit together, and focusing on the outcomes to be achieved.

One example on this front would be to consider implementing a single, annual environmental reporting framework that replaces the current system of overlapping climate, energy efficiency and environmental demands.

Recent trade agreements between the EU and Republic of Korea and Canada both

⁶EEF, 2016, Britain and the EU: Manufacturing an orderly exit
⁷EEF Climate, Energy and Environment Survey, Autumn 2016

acknowledge the importance of protecting human health and the environment while encouraging regulatory cooperation, but note that this should not limit the ability of signatories to set their own environmental standards. The UK is in a different situation as its regulatory regime is already aligned with the EU's, but the government should aim to retain the right to set its own climate and environmental regulation where necessary – as per the Prime Minister's Florence speech – as long as this achieves the same environmental and human health outcomes as the EU's approach.

- **Regulatory cooperation between the EU and UK:** Given manufacturers' desire to continue replicating EU law in the short-term, and indefinitely in the case of most product-related legislation, it would be desirable for the UK government to cooperate as closely as possible with the EU. UK experts have played a key role in the development of EU legislation thus far, it would be to everyone's detriment for this to cease. This would also allow UK regulators a fuller understanding of the basis under which EU proposals are drawn up and approved.

Assuming the UK is largely mirroring EU legislation rather than being an active participant in some regimes, this could include: early UK consultation on regulatory changes; a continued role within ECHA and some recognition of REACH registrations and authorisations carried out under each others' systems, potentially saving industry huge expense and administrative burden (see box 2); involvement in the Seville Process for identifying BAT under the IED; and some kind of continued role in committees drawing up appliance ecodesign and energy labelling rules.

- **Avoiding accidental regulatory divergence:** As discussed in section 1, there are various ways UK legislation could diverge from EU laws, even if the initial intention is to retain parity. This should be borne in mind

by the courts but also when updates are made to rapidly changing areas of EU law such as REACH. Manufacturers have multi-year investment cycles and need to plan ahead. They want to know whether the UK will implement the new recycling definitions and targets approved as part of the Circular Economy Package but also whether smaller legislative updates made after the UK leaves the EU will also be replicated. It is also important to have a discussion as soon as possible about the decision-making processes the government will insert into transposed EU legislation to enable future updates. Transparent decision making processes are needed for updating this retained EU law over time.

In addition, close cooperation is needed between the UK government and devolved administrations to ensure that the desire for further devolution during the repatriation of powers to the UK does not create additional complexity for companies operating across borders or unnecessary fragmentation of any markets created.

- **Sympathetic enforcement:** Companies are concerned about the risk of accidental breach of environmental regulation around the time of EU exit – for instance, due to being unable to surrender EU ETS allowances because of an unexpected lack of access to the relevant registry. Given the current degree of uncertainty and the risk of glitches in the transposition of regulation and accompanying systems, we would ask regulators to show consideration in case of administrative problems around the point of EU exit.
 - **Limit other change:** With the degree of upheaval and uncertainty already being created by Brexit and the potential for change across a broad variety of regulatory areas, this would appear to be a bad time to implement additional regulations unless they can be demonstrated to have a clear impact on productivity.
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Recommendation 6: UK negotiators should press for the flexibility to take an alternative approach to environmental regulation where necessary, provided the same outcomes are achieved. However, the UK's product-related regulations on climate and environment should continue to match those imposed in the EU post-Brexit, except in exceptional circumstances where this would be damaging to UK interests. (Circumstances could arise where rules are unfairly targeted at UK products.)

Recommendation 7: When the government talks about reforming its approach to environmental legislation it must consider the need for regulatory stability and be very clear about the timescales over which this is being proposed. Efforts to simplify UK law will be welcome in some cases but must be pursued systematically and not for some years after Brexit.

Recommendation 8: UK negotiators should press for close regulatory cooperation with the EU in this policy area.

Recommendation 9: To minimise the chance of accidental regulatory divergence, the UK courts should be required to pay due account to EU case law regardless of when it occurs.

Recommendation 10: It is important to have a discussion about the decision-making processes the government will insert into retained EU law to allow updates. These processes must be transparent and allow adequate stakeholder engagement.

Recommendation 11: Close cooperation is also needed between the UK government and devolved administrations to ensure that any desire for further devolution during the repatriation of powers to the UK does not create additional complexity for companies operating across borders, or unnecessary fragmentation of any markets created.

Recommendation 12: Enforcement bodies should take a pragmatic approach to any breaches in climate and environmental law that arise around the time of Brexit through no fault of the companies involved.

Recommendation 13: Any other regulatory change should be kept to a minimum while companies attempt to prepare for Brexit.

EEF is dedicated to the future of manufacturing. Everything we do, from business support to championing manufacturing and engineering, is designed to help our industry thrive, innovate and compete locally and globally.

In an increasingly uncertain business environment, where the UK is now on a path to leave the European Union, we recognise that manufacturers face significant challenges and opportunities. We will work with you throughout this period of uncertainty to ensure that you are on top of any legislative changes and their implications for your business.

Furthermore, as the collective voice of UK manufacturing, we will work tirelessly to ensure that our members' voices are heard during the forthcoming negotiations and will give unique insight into the way changing legislation will affect their business.

Our policy, employment law, health, safety and sustainability and productivity experts are on-hand to steer you through Brexit with rational, practical advice for your business.

UK Steel

UK Steel, a division of EEF, is the trade association for the UK steel industry. It represents all the country's steelmakers and a large number of downstream steel processors.

For further information contact:

Roz Bulleid

Head of Climate, Energy and
Environment Policy
rbulleid@eef.org.uk
020 7654 1521

Sam Pentony

Environment Policy Adviser
spentony@eef.org.uk
020 7654 1569

For information on how EEF
can support your business call:
0808 168 5874

www.eef.org.uk

For more information contact
the EEF Policy and External Affairs
team on **020 7654 1555**

www.eef.org.uk

@EEF_Press