UK/EU divergence in environmental regulation

The case of the EU Industrial Emissions Directive

The 2010 EU Industrial Emissions Directive (IED) is one of the cornerstones of pollution control in the EU establishing a regulatory regime covering industrial activities that may cause pollution (to air, water and waste). The European Commission is proposing to amend the directive, which may cause legal divergence between the EU and UK. However, it is important to consider how industry is regulated in practice beyond the legal texts and compare this in the UK and in different EU member states.

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Author:
Andrew Farmer

Introduction

The 2010 EU Industrial Emissions Directive (IED) is one of the cornerstones of pollution control in the EU. It establishes a regulatory regime covering the main industrial activities that may cause pollution (to air, water and waste). This includes large industry, such as coal and gas power stations, metal furnaces and chemical works. However, it also regulates many smaller activities, such as those using solvents in coating, as well as activities not normally associated with "industry", such as some intensive animal units on farms. The IED includes specific requirements for these installations to apply and obtain permits to operate, expectations for emissions to be below certain requirements and for competent authorities to inspect and ensure the installations comply with those requirements.

The IED includes provision for ongoing tightening of the legal obligations that it lays down for existing and new installations. Its obligations may impose significant costs on industry, which may increase over time with the tightening of requirements. As a result, one might consider that there could be pressure within the UK for it to diverge from these obligations inherited from EU law. It is useful to explore the legal situation in the UK and what this might mean for understanding how to consider future divergence.

1. A (partly) UK foundation

It is important to note that the core approaches in the IED are strongly influenced by UK policy and practice. The IED, adopted in 2010, was a revision of the earlier 1996 Integrated Pollution Prevention and Control Directive (IPPC). This directive owed much to the England and Wales system of Integrated Pollution Control adopted in 1990 (and a similar system adopted a year later in Scotland)[1]. Of course, there were elements in IPPC (and more in IED) which departed from, or were additional to, the former UK approach, but the core concepts are similar.

As a result, one would not expect any future divergence to be based upon an argument that a distinctly UK approach needs to be adopted as an alternative to the EU approach (though there is nothing to stop a government arguing to reject the earlier UK approach). Rather, it is more likely that divergence (if any) would concern issues of detail in the legislation – but it is detail that can make all of the difference to levels of pollutants emitted.

2. Transposition in UK law

These are the regulations that transposed the IED into UK law:

- In England and Wales: The Environmental Permitting (England and Wales) Regulations 2016[2] (SI 2016 No. 1154, as amended) (which consolidated and replaced SI 2010 No. 675, as amended)
- In Scotland: The Pollution Prevention and Control (Scotland) Regulations 2012 (SSI 2012 No. 360, as amended)
- In Northern Ireland: The Pollution Prevention and Control (Northern Ireland) Regulations 2013 (SR 2013 No. 160, as amended)

For the purposes of this document, the focus is on the 2016 England and Wales Regulations. In these, Schedule 7: Part A installations, covers the Industrial Emissions Directive.

The transposition of the IED into UK law was manifested in three different ways, in a pattern followed for many directives:

[1] For a detailed examination of the evolution of this area of EU law (including its relationship to pre-existing regulation regimes and involvement of IEEP) see: Nigel Haigh (2015). EU Environmental Policy: Its journey to centre stage. Routledge

[2] https://www.legislation.gov.uk/uksi/2016/1154/schedule/7/made

1. The copying out of all or part of the text of an EU directive into UK law. In this case the text remains the same and it is easy to compare to the original. Note that this might also include occasional slight additions, such as reference to a specific competent authority.

2. To reword the text of all or part of a text of a directive in the UK law – aiming to retain the directive's provisions. This requires more analysis to determine whether transposition is complete.

3. For the UK law simply to cross reference to an article in a directive (e.g. on the principles that operators/regulators are to apply). In this case there is no question of whether transposition is complete (for that article).

3. Cross-referenced provisions

The cross-referencing in UK legal transposition is common in the 2016 Regulations. For example, they state (Schedule 7, paragraph 5): "The regulator must exercise its relevant functions so as to ensure compliance with the following provisions of the Industrial Emissions Directive— (a)Article 5(1) and (3); (b)Article 7…". The full list of Articles referred to for this one point is 14. There are further cross references to the directive.

If the UK had not left the EU, this cross-referencing would mean that, for those Articles, future amendments would automatically be law in the UK – no need for further transposition. In law these are called "ambulatory" references, as the meaning of the law follows any changes to the original text. But how has the UK's exit from the EU affected this?

This question is addressed in the 2018 Withdrawal Act, Schedule 8, Part 1[3] (amended by The European Union Withdrawal (Consequential Modifications) (EU Exit) Regulations 2020, Regulation 3[4]). The Withdrawal Act ensured, amongst other things, that all EU law transposed under the provisions of the European Communities Act (as the 2016 Regulations were) are retained in UK law ("retained direct EU legislation") once the European Communities Act was repealed. However, it also recognised the issue of cross-referencing to EU law in "retained direct EU legislation", which it refers to as "ambulatory references". Schedule 8 addresses these. Effectively it states that these are to be understood as referring to the text of EU law as it was in place at the time of UK exit. The Withdrawal Act explicitly states that future amendment is the prerogative of UK legislative processes.

However, such ambulatory references in the 2016 Regulations are not the only relevant cross-references in the UK implementation of the IED. It is common for EU environmental law itself to cross-reference to other EU law – to ensure that definitions, procedures, etc., remain coherent across the body of law as individual items of legislation evolve. The IED itself cross-references to a wide range of other EU law. This includes directives such as those on Environmental Impact Assessment, Major Accident Hazards, Waste Framework, Carbon

[3] https://www.legislation.gov.uk/ukpga/2018/16/schedule/8/enacted

[4] https://www.legislation.gov.uk/uksi/2020/1447/regulation/3/made

Capture and Storage, etc. This ensures dynamic alignment within EU law. For example, a key aspect of the IED is to regulate waste production by industry. The IED does not define "waste" but cross-refers to the definition in the Waste Framework Directive. If that changes, so does the understanding within the IED regulation.

As already seen, the Withdrawal Act (amended) breaks the dynamic alignment mechanism for those provisions cross-referenced in the 2016 Regulations. However, while it *freezes* that cross-reference to the text at the point of UK exit, some of these Articles in IED also cross-reference to other EU law. Are those links still live? The answer is *no*. This was addressed in the Environmental Permitting (England and Wales) (Amendment) (EU Exit) Regulations 2019[5] which provide a list of amendments to the 2016 Regulations which affect how references to the IED are to be interpreted[6]. Amongst other things, the 2019 amendments go through the IED text and for each cross reference to other EU law they state that this is to be understood, effectively, either as that EU law at the time of UK exit from the EU or as the relevant UK transposing legislation. The 2019 Regulations, point by point, sever the dynamic links within the IED for the purposes of UK implementation.

In conclusion, it can be seen that, while UK transposition of IED involved much cross-referencing to EU law, these cross-references are now all effectively frozen. No change at EU level would affect them. As a result, in considering potential amendments of the EU law itself, where these amend, rather than replace, the existing directive this will mean that two versions of the directive (or parts of it) will have legal force in different jurisdictions within Europe. The new amended version will be in force in the EU, while specific parts of the old directive will still have legal force in the UK. This will apply not only to the IED itself, but also to the EU law it cross-references to.

4. Proposed revision of the IED – the EU to diverge from the status quo

At the time of writing (July 2022), the UK has not intimated anything specific that it might change with respect to the IED (with one exception – see below) and, therefore, diverge from the EU legislation. However, in April 2022 the European Commission proposed a revision of the IED[7]. If the proposal is adopted and becomes EU law, it can be assumed that the revised text would not be transposed into UK law. In effect it will have diverged from the law continuing to

[5] https://www.legislation.gov.uk/uksi/2019/39/made

[6] The 2019 Regulations also have the effect, where there is reference to ongoing EU level activity within the IED, to freeze this at the point of UK departure from the EU (e.g., with regard to exchange of information on BAT). Also, where the IED makes an obligation on a Member State, the Regulations, where appropriate, clarify that this applies to a regulator.

[7] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste. COM/2022/156 final.
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0156R%2801%29

apply in the UK. It is useful to consider some of the specific changes that the Commission is proposing.

An important issue for the IED is the range of industrial activities that come within its scope and are subject to regulation. These are listed in Annex I of the directive and are (largely) copied out in Part 2 of Schedule 1 of the UK Environmental Permitting Regulations 2016[8]. Clearly, if the European Commission were to amend the list of activities in Annex I, this could result in divergence with UK law. Essentially, amendments agreed within the EU could:

- Add a new class of industrial activity to those subject to the IED provisions;
- Or could remove an existing activity;
- Or could change the threshold (such as the scale of operation) for a type of activity to which the IED applies.

The Commission proposes the following amendments:

- Under *production and processing of metals*, the proposal adds "2.7. Manufacture of lithium-ion batteries (including assembling battery cells and battery packs), with a production capacity of 3.5 GWh of more per year."
- Under *mineral* industry, the proposal adds "3.6. Extraction and treatment (operations such as comminution, size control, beneficiation and upgrading) of the following non-energy minerals:

  (a) industrial minerals, including barite, bentonite, diatomite, feldspar, fluorspar, graphite, gypsum, kaolin, magnesite, perlite, potash, salt, sulphur and talc;

  (b) metalliferous ores, including bauxite, chromium, cobalt, copper, gold, iron, lead, lithium, manganese, nickel, palladium, platinum, tin, tungsten and zinc."

The first of these captures the major increase in manufacture of batteries for electric vehicles. This is a global phenomenon, but it is interesting to note that the UK is now developing major manufacturing capacity in this area, such as the announcement of a 38 GWh production facility in Sunderland, which would make it one of the largest in Europe[9]. In this sector, UK regulations focus on waste batteries and producer responsibility rather than the application of the IED so it is an area of potential divergence of considerable relevance to the UK and the UK/EU relationship.

Another area where the European Commission proposes to amend Annex I concerns intensive livestock units on farms. The IED regulates intensive pig and poultry units above specific size

[8] To be accurate, some is not a precise copy out, as activities are included in the Regulations which are not subject to IED (Part B activities), for example.

[9] https://www.theguardian.com/business/2021/oct/25/uk-battery-gigafactory-electric-car-sunderland-envision-nissan

thresholds. The proposal adds a new Article (70a) specifically on this area, changing the calculation of thresholds and including cattle alongside pigs and poultry, the only farm animals referred to in the existing regulation. This would be a significant extension of the directive and help address an important source of emissions. However, it also introduces a lighter touch regulation for these installations, such as the possibility to ask for registration rather than the full permitting process. This has raised environmental concerns from NGOs[10], but, for the purposes of this document, the point is that provisions for intensive animal units would diverge from the current position in the IED and, therefore, represent a potential cause of divergence from the status quo and, therefore, with the UK.

Interestingly, the UK, or England at least, is already making moves in this area. The UK 2019 Clean Air Strategy[11] noted that cattle are responsible for 28% of UK ammonia emissions. As a result, the government proposed several actions to address ammonia emissions from agriculture including "extension of environmental permitting to dairy and intensive beef farms by 2025". It noted that "unlike the pig and poultry sectors, ammonia emissions from dairy and intensive beef farms are not currently regulated. Given their contribution to ammonia emissions and other pollutants, we will work with the industry to agree appropriate emission limits and Best Available Technique (BAT) documents for limiting pollution from these sectors." The Environment Agency is still exploring this with reference to England. To help farmers, grants will be available under the Countryside Stewardship environmental aid scheme to help them prepare for the impact of this extension of environmental permitting requirements[12].

While the developments at EU and UK level might seem to mirror each other and, therefore, indicate that divergence would be avoided, this may not be the case. It is not clear what the threshold calculations for regulation would be in the UK (and whether this would be different from the EU), nor how BAT might be interpreted, nor whether a lighter touch regulation might be followed. Different countries within the UK are free to adopt their own approaches and there is no presumption of consistency if they do choose to act. Further, the European Commission proposal is just that at this stage, a proposal, and could be amended during adoption. While it is possible that, after all the dust has settled, UK and EU approaches on regulating larger intensive livestock units might be the same, in all likelihood some differences will emerge.

On the issue of Annex I of the IED – the inventory of industrial activities subject to regulation – amendment at EU level could result in divergence with the status quo and, therefore, with the UK, on the relatively probable scenario that the EU will add to Annex I and the UK will decide not to follow. Note that Member States are free themselves to regulate a greater range of activities than those that are obligatory according to the requirements of the IED and some do.

[10] NGO preliminary assessment of the European Commission's proposal for revised IED and E-PRTR. https://eeb.org/library/ngo-preliminary-assessment-of-the-european-commissions-proposal-for-revised-ied-and-e-prtr/

[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf

[12] https://www.rabdf.co.uk/latest-news/2021/2/9/grants-available-to-help-farmers-prepare-for-ammonia-permitting-rules

Departure from the EU does give the UK freedom to remove activities from the current regulatory system; it does not, however, confer new freedom to add to the list as this existed already.

If the EU were to extend the scope of the IED with respect to the range of industrial activities to which it applies, the UK may or may not chose to follow and it could be influenced by the prevalence or absence of such activities within the country and their environmental and economic significance. Several different outcomes are possible, with the fine detail potentially being critical to the degree of harmonisation between UK and EU law.

The potential scope for non-alignment is considerable, with the issue of enforcement being one example. Much of the IED concerns the process of regulation (permitting, inspection, enforcement). The current proposed amendment to the IED includes changes to various aspects of these processes. For example, there is the issue of the penalties to be applied to operators if they are found not to comply with their permit conditions.

Article 79 of the Directive simply states that "Member States shall determine penalties applicable to infringements of the national provisions adopted pursuant to this Directive". This has interesting implications with regard to transposition into national law - it is not possible to copy out or cross-refer to this Article – the obligation on Member States must be interpreted in elaborated national law for it to have effect. In the UK this is done via Regulations 38 and 39 of the Environmental Permitting Regulations 2016 (although effectively the whole of Part 4 of the Regulations concerns the use of different actions concerned with non-compliance). Regulation 38 details specific offences under the Regulations and Regulation 39 details the penalties (imprisonment or fines).

It is important to note that the UK has a history of reliance on criminal law to address offences under the IED, rather than administrative law as in many other countries (although the use of administrative penalties in the UK is evolving). As a result, other countries may issue more penalties, but those in the UK tend to be tougher. This difference is well established in the literature[13], but it is interesting to speculate whether it could be interpreted as a more recent form of divergence in future.

Concern over the ineffective use of penalties in environmental law has led the European Commission to propose significant amendments to Article 79. If adopted, penalties will need to take account not only the gravity of the offence (harm, intention, etc.) but also be proportionate to the financial turnover of the offender (i.e. to act as a deterrent). Further, a new Article is proposed which would allow individuals harmed by non-compliant operators to seek compensation.

Assessing the impact of this amendment on divergence with the UK is not entirely straightforward. In England, for example, at the time when the UK left the EU, IED Article 79 already had been transposed into domestic law, but for the reasons mentioned above, it was not the same text as in the Directive, a position also applying in the countries remaining in the

[13] Farmer, A.M., Faure, M and Vagliasini, G.M. (2017). Environmental Crime in Europe. Bloomsbury Publishers.

EU. This was to be expected. Some of the principles in the new Commission proposal do mirror those already applied in the UK (e.g., taking account of the financial status of the offender and gravity of an offence). The proposed new Article also would interact with EU environmental liability regimes, an approach that has been adopted in the UK[14] as well.

Given these considerations, more detailed analysis is required to assess how far the Commission's proposals on penalties would result in divergence, assuming no change in UK legislation. However, for the purposes of this paper, this issue is an example of where the UK had to elaborate legal provisions beyond the bare text of the directive (so not being copied out or cross referenced) and that the Commission is proposing an amendment which would not be reflected in the current UK law although at least some elements already may meet the new provisions.

On compliance assurance more generally, the UK has a relatively good track record on inspection compared to many EU Member States and has supported enhancement in this area across the EU through the network of environment agencies, IMPEL[15]. However, in recent years domestic bodies such as Environment Agency England have been subject to significant resource constraints and this is affecting their ability to inspect, prosecute, etc. It is not clear, however, whether these operational changes would have been sufficient to be considered to give rise to non-compliance with IED and some Member States could be considered much worse. It is clearly an area of concern within the UK and one that bodies such as the OEP and environmental groups need to examine closely, but it is not a specific case of divergence.

5. Reduced "divergence" (or difference)

Another form of divergence of interest is where the UK might require something in law that is not required in EU law, i.e. where its legislation goes further. There was an example of this in IED implementation, but it has been removed during the process of UK exit from the EU.

The IED includes a list of substances that are to be specifically considered in regulatory decision making for air and water emissions. These cover various inorganic and organic substances. The 2016 Regulations, Schedule 7, 2e state, ""substance" is to be read as including, after the words "its compounds" in Article 3(1) of the Industrial Emissions Directive, the words "and any biological entity or micro-organism". This is an elaboration beyond IED requirements to include biological "emissions" alongside the non-biological. Note that this was not a new provision introduced in implementing the IED but was also included in implementing its predecessor directive on IPPC in the 2010 Environmental Permitting Regulations[16].

What this meant was that operators and regulators in England and Wales had gone beyond ("diverged" in some sense?) the essential requirements of the IED while the UK was a Member State. Such additions are of course perfectly permissible under the EU Treaty (and IED) so do

[14] Note that the scope, severity, etc., of penalties encouraged or required in EU environmental legislation is complicated and linked to the debate on the future of the Environmental Crime Directive 2008/99/EC and the Environmental Liability Directive 2004/35/EC.

[15] The European network of environmental regulators, https://www.impel.eu/en.

[16] https://www.legislation.gov.uk/ukdsi/2010/9780111491423/schedule/7

not constitute divergence in this sense. But it does underline the point that any similar "divergence" of this kind in future may well be within the scope of what is permitted under the Directive rather than a departure from it that can be attributed to post Brexit freedoms in the UK. Indeed, there are examples of other Member States going beyond the minimum requirements of the IED[17]. Therefore, in tracking divergence, certain questions will arise if the UK adds to the scope of its environmental law something that is not explicit in EU law. Is this something it could have done legitimately as a Member State? Indeed, does an EU Member State do this? Or is it a "freedom" that exit from the EU allows the UK to do?

Interestingly, the process of exit from the EU presented an opportunity for the Government to alter this specific addition to IED in the UK implementation machinery. The Environmental Permitting (England and Wales) (Amendment) (EU Exit) Regulations 2019 amended the 2016 Regulations, deleting paragraph 2. This was not a necessary amendment to remove the links and dependencies on EU law, but a conscious contraction in the scope of implementation in England and Wales. Effectively, this specific "difference" from IED has been removed.

6. Not everything is law

Considering actions beyond the simple letter of the law is important in understanding divergence and the IED is a good example of this. The IED has many provisions which are flexible (e.g., how to interpret risk-based inspections). Furthermore, regulators in some countries (including the UK) have long recognised the limits of the IED and sought to work with industry to tackle wider issues that are not addressed in basic permitting. These types of actions have, for example, been a focus for discussion within IMPEL. Let us consider an example arising from the proposed amendment to the IED.

The proposal introduces an amendment to Article 11. Article 11 sets out the general principles governing the basic obligations of the operator. The proposal adds to the list already in the text, by including "the overall life-cycle environmental performance of the supply chain is taken into account as appropriate". This wider supply-chain consideration is important and a departure from the more site-based nature of IED regulation: it seeks to require consideration of wider circular material use and the role of industry in promoting this within the regulatory process.

Clearly, this amendment would not now apply in the UK unless there is a decision to amend its law in a similar way. However, it must be noted that, for some industrial sectors, regulators across the UK have been working with businesses to explore upstream and downstream relationships to encourage use of secondary materials, develop by-products, etc. This is not a legal obligation, however.

So, in principle the UK could mirror developments in the EU as set out in developing EU law but do this in a non-legislative way. The "gap" between the UK and EU Member States in this regard might be rather different to what it appears on paper and indeed it cannot be assumed that all Member States necessarily will implement the amendment proposed to Article 11 in a

[17] For example, the scope of activities regulated in Sweden is broader than required by the directive.

satisfactory way. There are reasons not to assume that a provision in EU law that is lacking in UK law in itself makes practice in the EU more "advanced" than the UK. In reality this may not be the case.

7. Development of conclusions on BAT

Another critical aspect of the implementation of the IED is the category of "supporting activities". The most important of these is the exchange of information between Member States, the European Commission, industry and other stakeholders on what are Best Available Techniques (BAT) to achieve the necessary emission levels.

The IED requires that industrial plants are authorised only if they use BAT to reduce their environmental impact. BAT reference documents (BREFs) are developed and issued for guidance by an EU funded body – the European IPPC Bureau (part of the European Commission's Joint Research Centre in Seville). With exit from the EU, the UK is no longer part of this process, though information and views from UK industry are likely to continue to feed into it through European-level industry associations. The concept of "available" in BAT is not limited to the EU, so relevant developments in the UK ought to be taken account of in Seville.

Once the BREFs are published, the European Commission uses them to develop "BAT Conclusions", adopted as Commission Implementing Decisions, i.e., as law. They set out the range of emission limits expected in operating permits. The IED allows a little flexibility in how these are interpreted.

Future Commission Implementing Decisions will not have any legal effect in the UK, but the Government intends to replicate the EU structure and processes, bringing together regulators and consulting stakeholders across the UK to develop conclusions on what is BAT[18] through the (internal UK) Common Frameworks Principles. In doing so it can obviously draw on anything developed by the EU. Given Scotland's aim to match future EU standards on emissions, the Scottish Government may support a close matching to EU definitions of BAT and if so, it will be interesting to see whether this would result in tensions within the UK BAT determination process.

The replication of the development of conclusions on BAT at UK level is an additional administrative cost to the UK. Some industrial companies with interests in both the EU and UK will need to input both to Seville and the UK process (so adding to their costs). Many submissions to Seville are publicly available and so could be used by the UK in a cost-effective way. However, the technical working groups which play an important part in Seville do discuss confidential information (especially on commercially sensitive cost issues) and this would presumably not be available to the UK.

The technical working groups follow agreed approaches to understanding what is "best" and what is "available". However, this is not a precise activity and NGOs often consider that the conclusions reached have included too much compromise with the views of one or more

[18] February 2022. Integrated Pollution Prevention and Control – The Developing and Setting of Best Available Techniques (BAT) Provisional Framework Outline Agreement and Concordat.

industrial stakeholders. In considering divergence, on the one hand, one might expect that if the process were entirely objective, then the EU and UK conclusions on what is best and what is available would be very similar. However, given the nature of the decision making, the relative importance of views within the two parallel processes is likely to differ. The same view might hold more sway in one of these processes than the other, even with all other information being equal. Divergence is possible.

Conclusion

This note is not a comprehensive review of all the different elements of the IED, its transposition and implementation in the UK and how these might diverge from the EU, including with regard to the many amendments proposed by the Commission in April 2022. It has sought to highlight different types of legal and practical relationships between the UK (mostly England and Wales) and the EU directive and how these different relationships affect an understanding of what we might mean by "divergence".

At present the main driver of potential divergence is the proposed Commission amendment and the UK's response to it. If adopted, UK and EU law will no longer be harmonised. Only on limited issues has the Government intimated specific changes it aims to make, although more may arise in future. However, on any scenario, proper understanding of divergence clearly involves more than simply comparing EU and UK legal texts. The law may diverge, but practical implementation might not. Conversely, the law may look similar, but this might mask differences in practical interpretation. Close analysis of both dimensions is required

This briefing is part of an IEEP project, funded by the John Ellerman Foundation, which aims to contribute to knowledge, engagement and exchange on divergence in the environmental field, particularly in respect of EU/UK differences but also taking account of the changing dynamics of intra-UK policy and legislation on the environment.

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