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# Sewage Discharges: Interaction between UK and EU Law continues post-Brexit

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## Key messages

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The broad takeaways from this policy briefing are:

- UK law relating to discharges of sewage is largely derived from EU law. Key legislation in this area such as the Water Framework Directive and Urban Waste Water Treatment Directive have been particularly expensive and difficult to apply and there are many examples of EU member states failing to apply them in full by the due dates.
- There is no divergence (yet) between UK and EU law relating to sewage discharges.
- Despite Brexit and the 2023 Retained EU Law Act, interpreting EU law is relevant in the UK.
- The wording and language used in both EU and UK legislation relating to discharges of sewage is imprecise.

# 1. Introduction

There has been much concern about the discharge of untreated sewage in the UK – in England, Northern Ireland, Scotland and Wales. This includes both the extent of use of storm water overflows (SWOs) when there is excessive rainfall, but also the discharge of untreated sewage when there has been low or no rainfall.

The Office of Environmental Protection (OEP) is currently investigating whether discharges of sewage are breaching the law in England. Since the UK has left the EU the question whether such discharges are in breach of EU law is strictly irrelevant, but as much existing UK law covering sewage is derived from EU law, the interpretation of EU law is still relevant. This paper also deals with the question whether UK and EU law diverge.

The paper does not deal with the powers and duties to monitor discharges to water in order to maintain water quality and it focuses mainly on England and Wales.

## 2. EU law and sewage discharges

There is no one item of EU law that deals exclusively with the quality of discharges of sewage to rivers and the sea, although there are a number of Directives that are relevant to sewage:

- The *Urban Wastewater Treatment Directive* 91/271 (UWWTD) deals mainly with the requirement for sewage works to be constructed to certain standards depending on the size of the population affected and the sensitivity of the receiving waters. It also deals with the capacity of sewers and the quality of discharges. These provisions (quoted below) are not precise and have been interpreted by the Court of Justice of the EU (CJEU) and recently by a UK court.
- The *Industrial Emissions Directive* 2010/75 (IED) sets out rules for the permits needed to operate an industrial plant. It covers independent wastewater treatment plants not covered by the UWWTD.
- The *Water Framework Directive* 2000/60 (WFD) sets standards to be met by surface water. Waters are to be classified under different categories of ecological status and must be monitored.
- The *Quality Standards for Water Directive* 2008/105 supplements the WFD by setting quality standards for surface waters (or exceptionally sediments and/or biota) for 33 priority substances and 8 other pollutants. Although none of these substances are pathogens contained in sewage, untreated sewage frequently contains industrial chemicals.
- The *Bathing Water Directive* 2006/7 sets standards that bathing waters are to meet including faecal contaminants indicating the presence of sewage.
- The *Sewage Sludge Directive* 86/278 sets standards for sludge that can be spread on land and does not deal with discharges to water.

All these Directives were binding in the UK before Brexit. The UK legislation that transposed them into UK law have all been retained as UK law. Before Brexit they will all have been carefully checked by the European Commission which will have corresponded with the UK if there were doubts about the correctness of transposition.

Correctly *transposing* EU law into UK law is one thing; correctly *applying* a Directive in practice is another. Both the UWWTD and WFD have proved particularly difficult and expensive to apply, and there are many examples of failures by many EU Member States to apply them fully by the due dates. The CJEU has found many Member States to be in breach including the UK in 2012 ([see below](#)).

**The Directive most relevant to the current debate is the UWWTD. This deals only briefly with discharges from sewers ('collecting systems') in this passage in Annex 1:**

“Collecting systems shall take into account wastewater treatment requirements. The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding:

- volume and characteristics of urban wastewater,
- prevention of leaks,
- limitation of pollution of receiving waters due to storm water overflows”

**A footnote to [Annex 1](#) reads:**

“Given that it is not possible in practice to construct collecting systems and treatment plants in a way such that all wastewater can be treated during situations such as unusually heavy rainfall, Member States shall decide on measures to limit pollution from storm water overflows. Such measures could be based on dilution rates or capacity in relation to dry weather flow or could specify a certain acceptable number of overflows per year.”

This footnote clearly allows for SWOs but requires the Member State to adopt measures to limit pollution from them thus repeating in different words the previous requirement on ‘limitation of pollution of receiving waters due to storm water overflow’. The footnote includes the key word “unusually” in describing heavy rainfall. The Directive does not provide further detail. However, EU case law has interpreted this.

In [Case C-301-10](#) the CJEU found the UK to be in breach of the UWWTD in 2012. The European Commission had argued that the UWWTD “*must be interpreted as providing for an absolute obligation to avoid spills from storm water overflows save for exceptional circumstances*”. To determine this, the Commission stated that one should look at issues such as the frequency and the volume of the water flows. As a result, the Commission argued that “*the more an overflow spills, particularly during moderate rainfall, the more likely is that the overflow’s operation is not in compliance with Directive 91/271/EC*”. This observation shows how imprecise is the wording of the Directive.

One result of this adverse judgement was that the UK Government decided that the Thames Tideway Tunnel (the ‘Super Sewer’) should be built to capture almost all the raw sewage and rainwater that currently overflows into the Thames estuary from a very densely populated area of the UK. The contract to build the tunnel was let in 2015 and it is expected to be completed in 2025 at a cost of over £4 billion. Thus, the UWWTD and the CJEU judgement had a considerable impact in the UK before Brexit. This example also underlines the point that any solution to the problem of SWOs can take both time and money.

### 3. UK law on sewage discharges

In addition to the UK Regulations (set out in Statutory Instruments (SIs)) that transposed the EU Directives listed above; two UK Acts are also relevant. These are all discussed in the recent judgement in the [Wildfish Conservation Case {2023} EWHC 2285](#):

- The *Water Industry Act 1991* (WIA1991) consolidates the Water Act 1989 (which had privatised the water industry and created Ofwat) with subsequent measures. It places a duty on sewerage undertakers to provide a sewerage system to drain an area and to “effectually deal” with the contents of that system. It also sets out the role of Ofwat as the economic regulator of the privatised water and sewerage industry in England and Wales. The enforcing authority under WIA1991 is not the Environment Agency (EA).
- The *Environment Act 2021* (EA 2021) enables the Government to set measurable long-term targets for various subjects including water and biodiversity. Section 80 headed ‘Storm overflows’ (amending WIA1991) was introduced during the final stages of the Bill’s passage through Parliament when the sewage issue had been politicised. It requires Defra to publish a ‘[Storm Overflow Reduction Plan](#)’ and regular progress reports, as well as annual reports by sewerage undertakers and the Environment Agency. These are additional to the requirements of the UWWTD.

All the EU Directives listed above have been retained as UK law under the *European Union (Withdrawal) Act 2018*. The most relevant to the discharge of sewage is the UWWTD, now retained in SI No.2841 *The Urban Waste Water Treatment (England and Wales) Regulations 1994* (amended in 2003).

The Environment Agency can grant a permit to discharge polluting matter to water (under the *Environment Permitting (England and Wales) Regulations 2016* (SI No.1154)) and to vary them so as to comply with the 1994 Regulations.

In the Wildfish case, the claimants (Wildfish Conservation and the Marine Conservation Society) in two applications for judicial review (heard together) challenged the lawfulness of Defra’s Storm Water Overflow Reduction Plan. The court did not quash the Plan, but it clarified that while the Plan contains measures to improve the performance of storm overflows, it does not prejudice the need for the sewerage companies to comply with the requirements of the 1994 Regulations. What was perhaps most significant was that it also clarified that the EA has a duty, as well as the power, to enforce ongoing compliance with the 1994 Regulations by amending permits.

Although the 1994 Regulations repeat the passage in Annex 1 of the UWWTD quoted above, the actual wording of the footnote, also quoted above, has been omitted for reasons that remain unclear. The judgement in the Wildfish case (para.59) refers to a passage in the Regulations (para.2 of Schedule 2) about the limitation of pollution from the use of storm overflows and goes on to say that the ‘equivalent’ provision in the Directive is the footnote that it quotes in full. However, the footnote uses different words and importantly talks about ‘unusually’ in describing heavy rainfall. The court must have believed the footnote was relevant to its interpretation of the 1994 Regulations.

The Wildfish case contains much analysis of the existing law which cannot be fully discussed here. As a result of the *Retained EU Law (Revocation and Reform) Act 2023* (known as REUL), the UK Supreme Court, the Court of Appeal and other courts at the same level have a power to depart from previous judgements of the CJEU. Lower courts still remain bound<sup>1</sup>. The judgement in the ‘Wildfish case follows many of the observations made in 2012 by the CJEU.

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<sup>1</sup> This paragraph was amended on 29 January 2024 to clarify that some UK courts now have the power to depart from judgements of the CJEU.

## 4. The OEP's investigation

The OEP has already identified possible failures to comply with the law relating to untreated sewage discharges by Defra, Ofwat and the Environment Agency. In September 2023 the OEP issued 'Information Notices' to these three bodies giving two months to reply. OEP will now be considering the responses, and its conclusions will be awaited with great interest.

## 5. Commentary and Conclusions

There are several key conclusions of this briefing:

- UK law relating to discharges of untreated sewage is largely derived from EU law so that, despite Brexit, EU law is relevant in the UK and has to be interpreted.
- There is currently no divergence between UK and EU law relating to sewage discharges. The omission in the 1994 Regulations of the footnote in the UWWTD would probably not have been regarded as substantial at the time.
- Defra's 'Storm Water Overflow Reduction Plan' now required by the WIA1991 does not prejudice the need for the sewerage companies to comply with the requirements of the 1994 Regulations on discharges from sewers.
- The way infringement proceedings are brought in the UK has of course changed since Brexit. Before Brexit, the European Commission could receive complaints about failures in the UK to implement EU law, and the Commission could then refer the matter to the CJEU. The judgement of the CJEU in 2012 had the dramatic consequence that the UK Government decided that the Thames Tideway Tunnel should be built. That judgement should have sent a signal to the sewerage undertakers, the regulators (EA and Ofwat) and the Government that discharges from sewers needed to be taken seriously more generally. It appears not to have done so until public opinion, and a 2021 Private Member's Bill, forced the issue up the political agenda.
- The OEP was created post Brexit to play a role previously played by the European Commission. But it goes further as it can investigate failures to implement UK law that are not derived from EU law. As is shown by the current investigation into sewage discharges, it can move rather more swiftly than was often the case with the EU. The outcome of OEP's current investigations will be watched with great interest. One possible outcome could be a recommendation that the 1994 Regulations be made more precise.



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