Environment & Climate Regulation

Contributing editors
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Per Hemmer, Bech-Bruun

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Preface

Environment & Climate Regulation 2019

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Environment & Climate Regulation*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Korea and a new Climate article from the Dominican Republic.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Carlos de Miguel Perales of Uría Menéndez and Per Hemmer of Bech-Bruun, the contributing editors, for their continued assistance with this volume.

London
October 2018

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United Kingdom

Tallat Hussain
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Legislation

1 Main environmental regulations

What are the main statutes and regulations relating to the environment?

Environmental protection

The UK has a substantial body of environmental law and policy. This chapter discusses the main aspects of this area of law, including planning, environmental permitting, hazardous substances, conservation, waste management and environmental liability. The key statutes and regulations relating to the environment are discussed in the sections below. They include:

- the Environmental Protection Act 1990;
- the Town and Country Planning Act 1990;
- the Environmental Permitting (England and Wales) Regulations 2016; and
- the Environmental Damage (Prevention and Remediation) Regulations 2015.

While there are many similarities in environmental law and policy across the UK, there is also variation between the laws of England, Scotland, Wales and Northern Ireland. This chapter focuses on the law in England and Wales unless otherwise specified.

UK environmental law has been heavily influenced by EU law and policy. EU Directives on environmental law are implemented through domestic secondary legislation, while EU Regulations relating to environmental matters are directly applicable in the UK.

According to the UK's Article 50 Withdrawal Notice and as legislated in the European Union (Withdrawal) Act 2018, it intends to exit the European Union in March 2019. This means that, subject to any transition period agreed between the UK and European Commission, EU law will cease to apply in the UK on exit day. However, initially, the substance of EU law will be retained in the UK via procedures in the European Union (Withdrawal) Act. Discussion of EU law below should be read with this context in mind. The 'Update and trends' section contains further detail as to the operation of withdrawal legislation and the potential effect of the UK's exit from the EU on UK environmental law.

Human rights

One piece of relevant legislation that will remain after withdrawal from the EU is the European Convention on Human Rights (the ECHR). The rights in this convention and their operation in the UK will remain unaffected by the UK's withdrawal from the EU.

The UK has ratified the ECHR and enshrined it in domestic law via the Human Rights Act 1998. Although the ECHR does not contain a specific right to a healthy environment, it does protect rights that can be related to environmental issues, including:

- the right to life under article 2 of the ECHR (which has been litigated in relation to issues such as dangerous industrial activities, exposure to nuclear radiation and natural disaster preparedness and protection);
- the right to respect for family life and home under article 8 ECHR (which has been litigated with respect to dam construction, industrial pollution, noise and access to environmental information); and
- protection of property under article 1 of Protocol 1 to the ECHR (which has been litigated with respect to issues such as expropriation or other impacts on property associated with developments).

2 Integrated pollution prevention and control

Is there a system of integrated control of pollution?

The UK has a system of integrated pollution prevention and control, established through the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016/1154) (EP Regulations).

The Environmental Permitting (EP) regime provides a one-stop shop for environmental permits and covers activities that release emissions to land, water and air, or that involve waste. An environmental permit is generally required for a 'regulated facility' and for an activity discharging substances to surface water or groundwater. Conducting these activities without a permit is an offence.

Regulated facilities include a wide range of industrial installations, waste operations, mining waste operations, activities handling radioactive substances, activities that involve discharges to water or groundwater, small waste incineration plants, solvent emission activities, flood risk activities, medium combustion plants and some small generators. There are some exemptions for facilities that pose a low risk to the environment.

The EP Regulations were amended in 2018 to incorporate new medium combustion plants into the regime, with a staggered entry process for existing medium combustion plants. These amendments also introduced controls on emissions of nitrogen oxides from diesel generators below 50MW capacity.

To obtain a permit under the EP regime, many industrial activities over certain thresholds will need to comply with best available techniques.

3 Soil pollution

What are the main characteristics of the rules applicable to soil pollution?

Soil pollution and contaminated land issues are managed and addressed through several avenues, including local planning laws made under the Town and Country Planning Act 1990, the building consent process, the environmental permitting regime and Part 2A of the Environmental Protection Act 1990 (the Part 2A Regime).

Part 2A of the Environmental Protection Act 1990

The Part 2A Regime addresses 'unacceptable' levels of risk to land and is not intended to apply to normal levels of contaminants in the soil (naturally occurring contaminants or low-level, diffuse pollution and common human activity other than specific industrial processes).

Under this regime, local authorities are required to inspect their area and identify contaminated land. Authorities must take a risk-based approach to this process, considering the likelihood that harm to people or the environment, or pollution of water will occur and the scale or seriousness of such harm. Risk of harm is assessed based on the current use of the land in question.

Where contaminated land is identified, the enforcing authority must identify and serve a remediation notice on appropriate persons requiring them to remediate the contamination, unless it is satisfied

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that appropriate remediation is being carried out voluntarily and within an appropriate timescale. There are two classes of appropriate person:

- Class A persons: those who 'caused or knowingly permitted' the contaminating substance to be present in, on or under the land; and
- Class B persons: the current owner or occupier of the site (regardless of whether it is aware of the contamination).

Where it is not possible to identify an appropriate person for a particular site, the site may be classified as an orphan site, for which the enforcing authority is able to step in and carry out the necessary remediation (eg, in an emergency, by agreement with the appropriate persons or where no appropriate person can be found). The enforcing authority is entitled to recover its reasonable costs from the appropriate persons if it steps in to carry out remediation.

4 Regulation of waste

What types of waste are regulated and how?

Waste management law in the UK is heavily influenced by EU law. The EU Waste Framework Directive (Directive 2008/98/EC) is implemented in England and Wales through the EP regime and the Waste (England and Wales) Regulations 2011 (SI 2011/988). There is also a large volume of other EU waste directives and domestic regulations applicable to specific areas of waste management in the UK.

The definition of 'waste' in the EU Waste Framework Directive (adopted in the UK) is broad: 'any substance or object which the holder discards or intends or is required to discard'.

There are several categories of waste, some with specific legal regimes. The main category is 'controlled waste' (household, industrial or commercial waste). However, additional regulations and regimes are also in place to manage specific types of waste, such as hazardous waste, packaging waste, waste batteries, end-of-life vehicles, mining waste and radioactive waste.

A permit under the EP Regulations and planning permission may be required for activities related to the use, recycling, treatment, storage or disposal of waste. Businesses and organisations will also need to comply with the overarching legislative requirements: the duty to apply the waste hierarchy and the waste duty of care. These are explored below.

The waste hierarchy is:

- prevention;
- reuse;
- recycling;
- other recovery (eg, energy recovery); and
- disposal as a last resort.

The Environmental Protection Act section 34 imposes a duty of care on anyone handling controlled waste (with a more limited application to householders concerning domestic household waste) to take all reasonable steps to ensure that the waste:

- is not disposed of unlawfully, or treated, kept or disposed of in a way that causes pollution or harm;
- does not escape from a person's control;
- is only transferred to an authorised person; and
- is accompanied by a waste transfer note in the proper form.

There are also separate duties attached to certain other types of waste – for example, extractive waste from mining and quarrying works.

Failure to comply with the duty of care is an offence. It is also an offence to carry out regulated activities (which include waste activities) under the EP Regulations without an environmental permit and to deposit controlled or extractive waste without a permit or in breach of a permit (section 33 Environmental Protection Act). Treating, keeping or disposing of controlled waste or extractive waste in a manner likely to cause pollution or harm to human health is similarly an offence.

The UK government has expressed general support for current EU reforms, which aim to move towards a circular economy. However, despite various policy initiatives, there has been no formal legislative change to implement a circular economy in the UK.

5 Regulation of air emissions

What are the main features of the rules governing air emissions?

There is legislation governing both ambient air quality and point source pollution in the UK.

Emissions to air from activities such as industrial installations are regulated through environmental permits under the EP Regulations. Permits will often contain limits and other conditions for emissions of substances such as sulphur dioxide, nitrogen oxides, carbon monoxide and particulates, with additional requirements imposed on large combustion plants.

Air quality law and policy in the UK flows from various pieces of EU legislation. However, the UK's implementation of the EU law through Air Quality Plans has been subject to repeated court challenges. In 2018, the High Court ruled that the government's revised July 2017 air quality plan was unlawful and insufficient to ensure that the UK complies with EU air quality limits. In response, the government directed 33 local authorities to carry out studies in 2018 to determine measures to reduce nitrogen dioxide air pollution in their areas. The government will publish a supplement to the UK air quality plan in October 2018.

The UK National Air Quality Strategy 2007 contains high-level policy direction and standards. In mid-2018, the government consulted on a new draft Clean Air Strategy. The government has announced that it plans to publish the final UK Clean Air Strategy and detailed National Air Pollution Control Programme by March 2019.

The Environment Act 1995 requires local authorities to review air quality in their areas and enforce the air pollution standards set in the National Air Quality Strategy. The National Planning Policy Framework also states that when preparing local plans, local authorities should aim to minimise pollution, including air pollution.

The statutory nuisance regime in the Environmental Protection Act covers nuisances resulting from air pollution (eg, smoke, fumes, gases, dust or smells) and imposes a duty on local authorities to inspect their areas, serving abatement notices where necessary. The common law of nuisance will also apply to certain air emissions. These regimes are discussed further below.

Air pollution is also regulated through bans on certain substances (eg, chlorofluorocarbons) and specific restrictions for substances such as fluorinated greenhouse gases (F-gases) and persistent organic pollutants.

The UK participates in the EU Emissions Trading Scheme and has implemented legislation and policy aimed at addressing greenhouse gas emissions.

6 Protection of fresh water and seawater

How are fresh water and seawater, and their associated land, protected?

The EU Water Framework Directive (Directive/2000/60/EC) integrates the management of surface water bodies and groundwater. The Directive requires that all surface water bodies are to achieve 'good ecological status' and 'good chemical status' by 2015. However, there are separate, lower, standards for heavily modified and artificial water bodies and standards that are more specific set for protected areas such as drinking water abstraction areas, habitat protection areas, recreational waters and nutrient-sensitive areas. No water body should be permitted to deteriorate in status from one class to another.

The main implementing regulations for the Water Framework Directive are the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 (SI 2017/407), with cross-border river basin districts provided for in special, separate regulations. Discharges to water are also regulated via the EP regime. No person may cause or knowingly permit a water discharge activity or activity affecting groundwater without an environmental permit, nor may a person operate a facility that involves discharges to water without a permit. This regime therefore covers water discharges as part of regular operations and one-off accidents or spills.

The Water Resources Act 1991 contains additional domestic provisions relating to water abstraction, management and pollution control.

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7 Protection of natural spaces and landscapes

What are the main features of the rules protecting natural spaces and landscapes?

There are national parks and other kinds of protected areas designated across the UK.

In England, portions of the countryside have been given protection under the National Parks and Access to the Countryside Act 1949. The national parks designation provides protection via statutory requirements to conserve and enhance the natural beauty, wildlife and cultural heritage of these areas and to promote opportunities for public understanding and enjoyment of these areas (although conservation takes precedence).

In the UK, sites may also be designated as Areas of Outstanding Natural Beauty (AONB) under the Countryside and Rights of Way Act 2000. All decisions on development proposals that may affect an AONB must have regard to the purpose of conserving and enhancing the natural beauty of the AONB.

The planning regime under the Town and Country Planning Act also provides for specific rules in local areas relating to landscape protection and the landscape impacts of proposed activities and developments.

Town and village greens can also be registered and protected under the Commons Act 1857 and subject to a specific regime for management and protection.

8 Protection of flora and fauna species

What are the main features of the rules protecting flora and fauna species?

There are several overlapping national, EU and international habitat and species protection regimes applicable in the UK.

The key EU-level protections come from the Habitats Directive (Directive 92/34/EEC) and Birds Directive (Directive 2009/147/EC) – often collectively described as the Natura Directives. These Directives require measures protecting certain habitats, species and wild birds of European importance. Any plan or project that is likely to have a significant effect on a protected site must be assessed and, if the plan or project receives a negative assessment and there is no alternative solution, can only be undertaken if it is for 'imperative reasons of overriding public interest'. The Natura Directives are implemented through several UK regulations.

There are also national designations for nature conservation. The main type of designation is a Site of Special Scientific Interest (SSSI) under the Wildlife and Countryside Act 1981. An SSSI may be designated due to the flora or fauna present or the geological make-up or physiography of the area. SSSIs will usually have a management agreement or management scheme in place that will govern the kinds of activities permitted in the area. Other forms of protection for habitats and species include designations of National Nature Reserves or Local Nature Reserves, and Limestone Pavement Orders.

In the marine environment, there are two kinds of marine protected areas:

- marine sites designated under the Natura Directives for the protection of habitats and species, known as European Marine Sites; and
- Marine Conservation Zones (MCZs) established under the Marine and Coastal Access Act 2009 (Scotland and Northern Ireland have separate marine protected area regimes, although there are many similarities and overlaps with the regime in England and Wales).

The Marine Strategy Framework Regulations provide additional protection for marine flora and fauna species and require the pursuit of 'good environmental status' and an 'ecosystem-based approach' to the management of human activities in the marine environment.

The UK has ratified several international treaties relating to biodiversity protection and has designated protected areas or additional statutory protections pursuant to these international regimes. In particular, the UK has over 100 Ramsar sites designated under the 1971 Convention on Wetlands of International Importance. Another example of the influence of international treaties can be found in section 40 of the Natural Environment and Rural Communities Act 2006, in which public bodies have a duty to have regard to the purpose of conserving biological diversity in accordance with the 1992 Convention on Biological Diversity, so far as is consistent with the proper exercise of their functions.

9 Noise, odours and vibrations

What are the main features of the rules governing noise, odours and vibrations?

The EP regime manages noise, odour and vibrations through environmental permits for regulated activities. Local planning rules and planning permission also address these matters and may set limits for their relevant areas. The UK also has legislation governing health and safety and labour conditions relating to exposure to noise and vibrations.

More generally, noise, odour and vibration are common kinds of nuisance and are addressed through the statutory nuisance and common law nuisance regimes (see question 10).

10 Liability for damage to the environment

Is there a general regime on liability for environmental damage?

There are numerous avenues through which both civil and criminal liability can be imposed in the various statutory regimes dealing with particular environmental matters. For example, the wildlife protection regimes contain offence provisions, as do the waste, water and EP regimes. Liability regimes also exist for specific activities such as mining and oil and gas activity.

Many environmental offences are strict liability offences. In such cases, liability is not based on fault or intention. In several statutory regimes, liability for environmental damage is imposed on the person who 'causes or knowingly permits' damage. Liability can also fall upon landowners or occupiers regardless of whether they caused or permitted the acts causing the damage.

Under the EP regime it is a criminal offence to operate without a permit. Similarly, failure to comply with the conditions of a permit will also incur criminal penalties. However, the enforcing authority may also issue non-criminal sanctions, such as enforcement or suspension notices, breach of which will also constitute an offence.

The Environmental Damage (Prevention and Remediation) Regulations 2015 in England and Wales impose liability for more serious environmental harm. The courts have held that 'environmental damage' means 'a measurable deterioration of the environmental situation' of protected species or natural habitats, surface or ground water and land. The environmental liability regulations impose criminal liability and also empower regulators to require the relevant operator to take immediate preventive action, report an imminent threat to regulators and carry out remedial measures.

The statutory nuisance regime is set out in Part 3 Environmental Protection Act. The Act sets out the categories of things that can amount to statutory nuisance that unreasonably interferes with the use or enjoyment of another person's home or other premises. Local authorities implement and enforce statutory nuisance provisions by inspecting, investigating complaints and issuing abatement notices. Breach of an abatement notice is a criminal offence and can be prosecuted summarily.

The common law nuisance regime provides for civil causes of action in tort in cases of public and private nuisance. Private nuisance is caused by a person doing something or using their land in a way that encroaches upon a neighbour's property rights (including activities such as producing noise, odour or spills). A claimant can seek compensation for actual physical damage or loss of enjoyment of their property, to the extent that the damage was reasonably foreseeable. Public nuisance arises from an act that endangers or obstructs the public in the exercise or enjoyment of common rights – for example, obstruction of a highway. Public nuisance proceedings are rare, as the statutory nuisance or other statutory regimes often provide a more straightforward and effective remedy.

11 Environmental taxes

Is there any type of environmental tax?

The UK government levies taxes on energy production and energy products (eg, climate change levy, fossil fuel levy, tax on hydrocarbon oils), which make the largest contribution to government revenue from

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environmental taxes. Transport taxes also apply, covering the ownership and use of motor vehicles (in particular, new diesel taxes are in force as of April 2018). Finally, there are taxes imposed on the extraction of raw materials (eg, aggregates levy and minerals royalties) and on the management of waste (eg, taxes on landfills).

In July 2018, HMRC published draft legislation for the Finance Bill 2018–19 which contains several provisions relevant to environmental taxes, including:

- a tax exemption for vehicle battery charging at the workplace to remove any liability to income tax arising from the provision of charging facilities for employees;
- an exemption from vehicle excise duty for taxis capable of zero emissions;
- a lower rate of heavy goods vehicle road user levy for vehicles that meet the latest Euro 6 emissions standard; and
- an exemption from the climate change levy for mineralogical and metallurgical processes – to ensure that this exemption remains operable after the UK exits the EU.

Hazardous activities and substances

12 Regulation of hazardous activities

Are there specific rules governing hazardous activities?

The EU Seveso III Directive aims to prevent major accidents caused by dangerous substances and limit the consequences of any accident that does occur. It is implemented in the UK through separate regimes in Scotland, Northern Ireland, England and Wales.

In addition to any applicable permits required under the EP regime, hazardous substances are subject to a separate permit regime in England and Wales. The Planning (Hazardous Substances) Act 1990 generally requires consent from the relevant Hazardous Substances Authority (in most situations, this is the local planning authority) to hold hazardous substances above certain thresholds. It is a criminal offence to hold hazardous substances on, under or over land without a hazardous substances consent (unless the quantity held is below the statutory threshold or falls within an exception), to hold hazardous substances in excess of the quantities permitted by a consent, or to breach consent conditions.

The Health and Safety Executive (HSE) is tasked with preventing work-related death, injury and ill-health in England, Wales and Scotland. The HSE sets a 'consultation distance' around sites with hazardous substances consents, marking the area that the HSE regards as at risk from the activities carried out at the site or from the materials held or used on the site. Any applications for planning consent within the consultation distance must be submitted to the HSE.

In addition, any business that manufactures, stores or uses any dangerous substances in bulk amounts exceeding certain threshold quantities is subject to the Control of Major Accident Hazards Regulations 2015 (SI 2015/483) (COMAH). The COMAH regime applies predominantly to chemical and petrochemical-related activities, fuel storage facilities and fuel distribution. Activities such as storage of gas, large warehouses and distribution facilities, and the manufacture and storage of explosives may also be captured.

13 Regulation of hazardous products and substances

What are the main features of the rules governing hazardous products and substances?

In addition to the regulatory regimes applying to hazardous activities, there are laws in the UK governing hazardous products and substances.

The EU Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH Regulation) has direct effect in the UK. The REACH Regulation imposes obligations on UK-based manufacturers and importers of chemical substances. It also imposes obligations on downstream users, including distributors, retailers and professional users of products in the EU. The REACH Regulation takes a risk-based approach, with more onerous requirements and scrutiny attached to more high-risk substances.

Employers are required to control substances that are hazardous to health and prevent or reduce their workers' exposure to such substances under the Control of Substances Hazardous to Health Regulations 2002 (SI 2002/2677). Under these regulations, all employers are required to carry out assessment of the risks to the workforce, contractors, visitors and customers caused by hazardous substances and prevent or adequately control those risks.

The UK has specific laws on the control of asbestos – relating to the use, management and removal of asbestos in non-domestic premises. There is also separate regulation for the use of hazardous substances (such as lead, mercury and cadmium) in the components of electrical equipment and for product classification and labelling.

14 Industrial accidents

What are the regulatory requirements regarding the prevention of industrial accidents?

The Health and Safety at Work etc, Act 1974 sets out general duties that employers owe employees and, in certain circumstances, other persons. It also imposes duties on employees. This legislation is supplemented by a significant volume of regulation, codes of practice and guidance. The HSE is the main regulatory body in this area and also carries out prosecutions. The range of health and safety obligations imposed upon employers is extensive – these include assessing and reviewing work-related risks faced by employees, making appropriate arrangements for preventive and protective measures, and auditing the adequacy of company procedures.

Directors, company secretaries or managers can be held individually criminally liable for health and safety offences. In addition, the UK has corporate manslaughter and homicide laws in place.

The COMAH regime also applies to prevent major accidents in the workplace.

Environmental aspects in transactions and public procurement

15 Environmental aspects in M&A transactions

What are the main environmental aspects to consider in M&A transactions?

Environmental issues are relevant in almost every M&A transaction.

The extent and complexity of the issues in each case will depend on the target and nature of the deal (eg, whether it is an acquisition of shares or assets). The target business should be properly investigated during the due diligence process to determine the extent of its environmental impacts, the level of compliance and future compliance requirements, and any liabilities or potential liabilities. Warranties, indemnities and other contractual terms are likely to be necessary to apportion and manage the risk between the parties.

In a share sale, the buyer normally acquires the risk of any environmental liability associated with the target company. This could include liability for pre-completion polluting activities, non-compliance with permits, contamination on properties owned or occupied by the target, liabilities incurred via joint ventures, or contracts.

In an asset sale, the buyer will usually have a greater level of protection and will not assume liability for actions of the operating company. However, asset purchasers may still assume or incur liability for contaminated land or water pollution relating to the land or asset being acquired and any compliance issues related to the asset (eg, issues that may affect compliance with permits, or liability for clean-up or remediation, as the new owner or occupier of land).

In brief, the main environmental aspects to consider in M&A transactions are:

- the nature of the business to be acquired, including any actual or potential impacts it may have on the environment;
- the permits held or required to be obtained;
- any environmental liabilities incurred by the business (historic and current);
- any claims by third parties or investigations by regulators;
- any upgrade works required;
- potential future changes to environmental or planning laws that may affect operations;
- the systems and policies that the business has in place to manage its environmental impacts;
- the land that is the subject of the transaction and its status (ie, whether it is contaminated, subject to environmental protections, or subject to planning obligations or restrictions);
- whether an indemnity, warranty or other contractual condition should be sought from the seller; and
- whether environmental insurance should be obtained.

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16 Environmental aspects in other transactions

What are the main environmental aspects to consider in other transactions?

Environmental aspects arise in many corporate transactions, not only M&A deals.

In financing transactions, environmental policy, regulation or liability may affect the borrower's creditworthiness or reduce the value of any security. Due diligence will be essential to assess and manage any environmental risks in the transaction. Lenders may require a borrower or sponsor to provide guarantees or other forms of security for environmental obligations and in some circumstances lenders may be directly exposed to liability associated with the assets in question. Some lenders may also have requirements relating to environmental and social matters that they wish to build into the financing documents. For example, if the institution in question has signed up to the Equator Principles or International Finance Corporation Performance Standards on Environmental and Social Sustainability.

Initial public offerings or mergers may also require consideration of environmental issues. The UK Companies Act 2006 imposes requirements on some large listed companies in terms of disclosure of non-financial matters. These reporting obligations require disclosure of issues such as the company's impact on the environment, carbon emissions and steps taken to address environmental issues associated with the business.

Environmental issues are highly relevant to real estate transactions. The appropriate checks should always be carried out to investigate the environmental laws applicable to the site in light of the purchaser's intended use of the property as well as any restrictions arising through planning laws, conservation laws, cultural heritage laws or relevant permit conditions. The nature of environmental protections or operations on neighbouring sites may also be relevant.

Insolvency proceedings can also raise environmental issues, particularly if the company in question has outstanding obligations required by environmental permits or if it has unaddressed compliance issues, liabilities or claims against it. In particular, site remediation or decommissioning issues may arise in this context.

17 Environmental aspects in public procurement

Is environmental protection taken into consideration by public procurement regulations?

In England and Wales, most public procurement contracts are governed by the Public Contracts Regulations 2015 (SI 2015/102). There are also separate specific regulations governing procurement in areas such as utilities contracts.

Public contracting authorities shortlist applicants by setting selection criteria. The authority must exclude a candidate that it knows has been involved in certain criminal offences (eg, relating to proceeds of crime, fraud, bribery and corruption, violation of the Modern Slavery Act 2015) or where there is proof of non-payment of taxes. In some cases, these kinds of offences may be connected to breaches of environmental law.

The Public Contracts Regulations 2015 also entitle authorities to exclude a candidate from further participation at their discretion. One of the grounds on which this can be done is violations of environmental, social and labour laws and commitments arising under certain international treaties (eg, those dealing with forced or child labour).

Further, environmental and social aspects may feature as award criteria for the full tender, although all award criteria must still be linked to the subject matter of the contract in question.

The Public Services (Social Value) Act 2012 also requires contracting authorities to consider how the services they intend to procure 'might improve the economic, social and environmental well-being' of the area in which the services are to be provided.

Environmental assessment

18 Activities subject to environmental assessment

Which types of activities are subject to environmental assessment?

In England, the general environmental impact assessment (EIA) process is governed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571. Similar requirements are also in place for Wales pursuant to the Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017 (SI 2017/567). For certain developments of a particular scale and impact (eg, crude oil refineries, thermal power stations and other large combustion installations) an EIA will always be required. For other developments, an EIA may be required if the development in question is in a sensitive area and meets certain criterion or exceeds certain thresholds.

Additionally, there is a distinct regime in the UK implementing EU law on strategic environmental assessment (SEA) (Directive 2001/42/EC). SEAs involve the assessment of whole plans and programmes at a strategic level, rather than the assessment of individual projects.

19 Environmental assessment process

What are the main steps of the environmental assessment process?

The following process applies to EIAs required as part of the planning process:

- the developer seeking to undertake a project is responsible for undertaking an EIA;
- if a developer is unsure whether their development requires an EIA, they can ask the relevant planning authority for a screening decision;
- planning authorities can also make determinations as to the issues to be covered in a particular EIA at the request of the developer (known as a scoping opinion);
- the EIA is then prepared and submitted alongside the planning application. The authority will take account of the EIA when considering the permit and there will be an opportunity for members of the public and other statutory bodies to comment on the impacts of the development; and
- finally, the authority will make its decision and publish it, including its reasons and any mitigation measures required to avoid, reduce or offset the development's environmental impacts.

Specific EIA requirements and regulations apply in other situations, such as the marine licencing regime, with variations in the applicable procedure.

Regulatory authorities

20 Regulatory authorities

Which authorities are responsible for the environment and what is the scope of each regulator's authority?

There are several authorities responsible for environmental management and regulation in the UK.

In England and Wales, the Environment Agency and Natural Resources Wales have primary responsibility for environmental law enforcement and regulation. There are also many specialist regulators, such as Natural England (the governing body for protected sites), the Marine Management Organisation (responsible for marine licensing and regulation) and the Health and Safety Executive.

In Scotland, the Scottish Environmental Protection Agency is the principal environmental regulator. As with England and Wales, there are a number of specialist regulators in Scotland as well, including Marine Scotland and Scottish Natural Heritage.

In Northern Ireland, the Northern Ireland Environment Agency is the main environmental regulator.

Some regulators have UK-wide mandates, such as the Oil and Gas Authority.

Local authorities are responsible for local planning laws and planning consents, statutory nuisance, air quality management, and they have primary responsibility for the contaminated land regime.

21 Investigation

What are the typical steps in an investigation?

Local authorities have general investigative powers to inspect their area for statutory nuisances and to investigate potential contaminated land. Inspections of these and other matters such as periodic review of permit compliance are done by taking a risk-based approach.

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Update and trends

The UK government initiated procedures for withdrawal from the European Union in 2016 and recently passed the European Union (Withdrawal) Act 2018 (EU Withdrawal Act), which details procedures for (among other things) the retention of EU law in the UK on the date that it exits the EU (exit day is expected to be 29 March 2019). The general approach of the EU Withdrawal Act is to retain the EU laws applicable in the UK on exit day, with powers granted to government ministers to make amendments to ensure 'operability' and remove or amend references to EU law or institutions. This will involve thousands of statutory instruments.

The approach to withdrawal from the EU and its effect on the laws applicable in the UK will also be influenced by the outcome of political negotiations between the UK government and the European Commission. Pending approval by the European Parliament and UK Parliament, the draft withdrawal agreement reached in March 2018 includes a transition period in which the UK would remain subject to EU law until December 2020, preserving much of the pre-exit status quo. The final Withdrawal Agreement is anticipated in late 2018 and will require further legislation as well as parliamentary approval.

Initially, there is unlikely to be significant immediate change to the substance of environmental law applicable in the UK after exit day. There may, however, be law reform processes initiated in the wake of the UK's exit in a number of policy areas, particularly along the lines identified in the government's 25 Year Environment Plan (discussed further below). Separate bills relevant to EU exit will also be prepared relating to agriculture and fisheries. Those policy areas may therefore see a more substantial immediate change through the EU exit process.

The EU Withdrawal Act also contains provision for the retention of various environmental principles contained in the Treaty on the Functioning of the European Union and elsewhere in the general body of EU law (eg, the polluter pays principle, precautionary principle). The EU Withdrawal Act requires the government to introduce a bill that enshrines those environmental principles in UK law, requires the creation of a policy statement elaborating the principles, and obliges the government to establish a duty to 'have regard to' the policy statement (section 16). It also requires the establishment of a public authority with 'watchdog' functions to scrutinise the actions of government ministers and their compliance with environmental law.

In January 2018, the 25 Year Environment Plan was published, setting out the government's stated ambition in a number of environmental policy areas in England over the coming years. The core areas of focus identified in the 25 Year Environment Plan include:

- embedding an 'environmental net gain' principle for development in the planning regime;
- improving the land management system including new farming rules relating to water use;
- improving soil health;
- reducing flood and coastal erosion risks;
- publishing a strategy for nature, developing a Nature Recovery Network, and reviewing National Parks and Areas of Outstanding Natural Beauty;
- reforming the approach to water abstraction;
- encouraging community initiatives and programmes connecting people with the environment;
- maximising resource efficiency and reducing pollution, including litter and in particular aiming for zero avoidable plastic waste by 2042;
- publishing a Clean Air Strategy and Chemicals Strategy;
- introducing a new fisheries policy;
- achieving 'good environmental status' in UK seas while allowing marine industries to thrive;
- tackling climate change and providing leadership on the issue internationally; and
- assisting developing nations to improve the environment.

The Environment Agency carries out investigations of serious environmental incidents. It has broad powers to conduct investigations, including power of entry, examination and investigation, powers to take measurements, photographs and samples, and powers to request information and require production of documents or records. Refusal to cooperate is a criminal offence. There are notice procedures and other checks on the exercise of these powers.

22 Administrative decisions

What is the procedure for making administrative decisions?

The applicable administrative process for decision-making on environmental matters will be highly fact-dependent. These processes can differ depending on the subject and the type of decision. Many of the statutory regimes in place outline specific procedures.

Permitting decisions are subject to statutory appeal processes. The Planning Inspectorate deals with most planning and permitting appeals, including appeals of enforcement notices. Planning Inspectorate decisions can, in turn, be appealed to the High Court.

In general, as well as any specific procedure set out in statute, administrative decisions can be challenged in the UK through the judicial review process (discussed below).

As well as procedures for specific administrative decisions, the Environmental Information Regulations 2004 (SI 2004/3391) require public authorities to provide the public with access to environmental information and introduce a presumption in favour of disclosure. However, authorities may refuse requests for information in certain circumstances.

23 Sanctions and remedies

What are the sanctions and remedies that may be imposed by the regulator for violations?

Not all breaches of environmental legislation will constitute an offence. In some circumstances (particularly in the case of low-level or first-time offending), a regulator may take lesser interventions such as providing advice and guidance or issuing warnings.

There is a broad range of sanctions and remedies available in the UK for breaches of environmental law, including:

- imposition or variation of conditions on permits;
- requirements for developers to provide compensation or security to ensure financing for activities such as site remediation;
- enforcement notices, stop notices, compliance notices and works notices;
- non-compliance penalty notices;
- suspension or revocation of environmental permits;
- prohibition notices;
- injunctions;
- step in and cost recovery powers for regulators to carry out remedial works themselves;
- civil sanctions including monetary penalties, fines and enforcement undertakings; and
- criminal sanctions including formal caution, prosecution, fines, ancillary orders following conviction including disqualification of a director, confiscation of assets, forfeiture of equipment, compensation order or remediation order.

The Sentencing Council for England and Wales has published sentencing guidelines that recommend penalties dependent on factors such as an organisation's size, the category and scale of offending, and individual culpability.

24 Appeal of regulators' decisions

To what extent may decisions of the regulators be appealed, and to whom?

Many statutes set out specific procedures for appealing regulators' decisions. Generally, civil fines or notices issued by a regulator are appealed to the General Regulatory Chamber of the First-tier Tribunal and the Planning Inspectorate hears appeals of permitting decisions or notices issued by local authorities. Criminal enforcement action can be appealed via either criminal court processes or statutory processes. The lawfulness of an administrative decision can also be challenged via judicial review (see question 25).

Rights of appeal are subject to time limitations and specific grounds in some cases.

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Judicial proceedings

25 Judicial proceedings

Are environmental law proceedings in court civil, criminal or both?

Environmental law proceedings can be brought in civil, criminal and administrative courts in the UK. The forum will depend on the matter at issue in the proceedings.

Judicial review proceedings in the Administrative court are also available to challenge environmental decision-making and may be used in the absence of other avenues or if other remedies have been exhausted.

Judicial review proceedings must be brought within strict time limitations and can only challenge the manner in which a decision was made, not the substantive merits of the decision itself.

26 Powers of courts

What are the powers of courts in relation to infringements of environmental law?

The courts have broad powers in relation to breaches of environmental law.

In cases of criminal offences, courts will commonly issue fines. They also have powers to make compensation orders and may order confiscation of property. In cases of the most serious offending, the courts have powers to sentence individuals to imprisonment. When deciding on appropriate sanctions the courts will consider a range of mitigating and aggravating factors and will follow the Sentencing Council's Environmental Offences Definitive Guideline.

In a civil claim, the usual remedy will be damages to the injured party, although the courts can also grant injunctions.

In judicial review proceedings, courts can make orders quashing a decision, requiring a decision-maker to reconsider its decision or prohibiting certain action. Courts can also make declarations clarifying the law or clarifying the rights or obligations of the parties to the proceedings.

27 Civil claims

Are civil claims allowed regarding infringements of environmental law?

Contractual claims may arise regarding infringements of environmental law if that infringement triggers a breach of warranty or other term or condition in the contract. Contracts may also contain indemnities for environmental liability that could become the subject of a civil claim.

Civil claims can be brought in tort in situations of common law nuisance and under the statutory nuisance regime. The usual remedy is damages, although courts are also able to grant injunctions.

28 Defences and indemnities

What defences or indemnities are available?

Liability for environmental damage can arise from a number of sources, as discussed above.

In cases involving strict liability, defences may be limited. Where the offence in question is governed by a specific statutory regime, there may be particular defences available through that legislation.

It will be a defence to a statutory nuisance claim if the defendant can show it has used 'best practicable means' to prevent or counteract the effects of a statutory nuisance. Although, that defence is subject to a number of limitations set out in the Environmental Protection Act. There are also some potential defences to common law nuisance such as that the nuisance was caused by an 'act of God'. However, planning permission or an environmental permit will not, in and of itself, constitute a defence to a nuisance claim. It is also not generally a defence to argue that the claimant 'came to the nuisance' by acquiring or moving to their property after the nuisance had started.

There are no statutory indemnities under UK law. Indemnities in contracts can provide remedies in the case of costs incurred due to another party's illegal acts. However, contractual indemnities will not be enforceable if they purport to indemnify a party against the consequences of its own deliberate criminal actions.

29 Directors' or officers' defences

Are there specific defences in the case of directors' or officers' liability?

Directors will not normally be liable for the acts or omissions of a company in the ordinary course of business.

However, a director can personally commit and be liable for an environmental offence. Additionally, under several pieces of environmental legislation, directors or company officers can be held liable if an offence committed by the company was done with their consent or connivance or can be attributable to the director or officer's neglect (more common in situations of small companies where directors are closely involved with the running of the company). In many cases, multiple parties can be held jointly and severally liable for environmental damage.

Companies may choose to indemnify directors in respect of proceedings brought by third parties for environmental damage.

30 Appeal process

What is the appeal process from trials?

Specific statutory regimes may dictate particular avenues or procedures for appeal or challenge.

Generally, in a civil matter, the appellant will first make an application to the court that made the decision subject to the appeal. If permission is declined, permission to appeal can be sought from the relevant appellate court. The substance of an appeal may sometimes be restricted: for example, in some instances appeals may only be allowed

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on a point of law or against the remedy granted, rather than allowing for a full re-opening of the case.

The decisions of planning authorities can be reviewed in the Planning Court, a specialist court within the Queen's Bench Division of the High Court of Justice. Appeals from the High Court can be made first to the Court of Appeal and finally to the UK Supreme Court.

In the criminal courts, the right of appeal depends on the original plea. If the defendant plead not guilty, they have the right to appeal to a higher court against conviction and sentence. If a guilty plea was entered, the defendant can generally appeal their sentence only.

International treaties and institutions

31 International treaties

Is your country a contracting state to any international environmental treaties, or similar agreements?

The UK is a party to a number of international environmental treaties. Some key treaties ratified by the UK include:

- the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998;
- the Convention on International Trade in Endangered Species of Wild Fauna and Flora;
- the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention);
- United Nations Convention on the Law of the Sea 1982;
- the Convention on Biological Diversity 1992;
- the Convention on Environmental Impact Assessment in a Transboundary Context 1991;
- United Nations Framework Convention on Climate Change, the Montreal Protocol on Substances that Deplete the Ozone Layer 1987 and the 2015 Paris Agreement on Climate Change;
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989; and
- the Convention on Long-range Transboundary Air Pollution 1979.

32 International treaties and regulatory policy

To what extent is regulatory policy affected by these treaties?

The UK is obliged to implement the international treaties that it has ratified, which frequently results in law or policy changes. The UK is also an active participant in many international fora, and this can trigger domestic law or policy change. The influence of international treaties and international policy more generally in the UK may increase further after it has exited the EU (see 'Update and trends').

In addition, international policy can have an impact on transactions. International 'soft law' instruments or initiatives such as the Equator Principles and IFC Performance Standards are increasingly adopted by lenders and imposed upon borrowers or projects through contractual arrangements.

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