

Avocetta Meeting Helsinki 2013

National Report United Kingdom

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1. Two major constitutional/political developments which may have significant impacts on how UK handles EU law in future years

- (a) Scotland

Following agreement with the UK Government and the Scottish Government in October last year, there will a referendum in Scotland on 18 September 2014 with the simple question, "*Should Scotland be an Independent country*"? In the event of a yes vote by ordinary majority, arrangements would begin with independence probably taking place in 2016.

Whether an independent Scotland would have to reapply for membership of the EU remains an open question. The Scottish Nationalist party initially implied that through succession rights it would automatically remain a member, but most legal opinion indicates it would have to reapply.

Opinion polls remain fairly balanced, with the latest suggesting 36% in favour of independence and 44% against. A larger majority would prefer greater devolution of powers as a solution (eg at present environment is devolved but energy policy is not). My personal view is that Scotland will not vote for independence but will secure more devolved powers.

- (b) United Kingdom and the EU

Over the last 12 months the UK Independence Party (which seeks withdrawal from the EU in favour of the EEA or similar trading relationship) has been securing a higher percentage of votes in local and national elections. The latest suggests that it may secure the largest number of votes of any political party in the European elections next year.

UKIP poses the greatest threat to the Conservative Party forcing it to take a tougher European stance. The Prime Minister (who holds a coalition with the minority pro-EU liberal democrats until 2015) has a current policy of renegotiating powers within the EU and then holding an in-out referendum in 2017 based on the result of the negotiations. But many more Eurosceptic conservatives are pushing him to go further and faster. Current opinion polls indicate around 45-50% in favour of withdrawal, 36% in favour of staying and the rest undecided.

Unless the UK secures a major repatriation of powers before the referendum (unlikely), I suspect that there will be a majority in favour of withdrawal. When there was last a referendum on the subject in the 1970s the European Community was presented by all the politicians as basically a single trading market and no more, and the majority of the population would probably wish to see it this way, and are less enamoured with federalist political aspirations. One argument being made by the sceptics is that with the expansion and strengthening of GATT and WTO procedures, many of the attractions of the Single Market are now available under international trade rules in a way that simply did not exist in the 1970s.

(c) Implications for environmental policy

Over the next 18 months there is likely to be an increasing scrutiny of the benefits of EU environmental policy to the UK. For instance I have just received an e-mail from our Environment and Energy Ministries stating, *“The Department for Environment, Food and Rural Affairs (Defra) and Department of Energy and Climate Change (DECC) have launched a call for evidence examining the impact of EU competence for environment and climate change on the UK. This is part of the Government's wider Review of the Balance of Competences, which will provide an informed and objective analysis of what EU membership means for the national interest.”* Some of the major environmental NGOs are beginning to think what would be the real environmental implications of withdrawal from the EU.

2. Supreme Court case on Air Quality Action Plans

Under the 2008 Air Quality Framework Directive. Member States had to achieve specified quality standards for NO_x by January 2010. Art 22 provided that where these standards cannot be achieved in any particular zone or agglomeration, Member States *‘may postpone those deadlines by a maximum of five years for that particular zone or agglomeration’* Member States who take advantage of this derogation must prepare air quality plan which is sent to the Commission to assess whether it is feasible.

Many Member States including the UK have sent plans to the Commission seeking the 5 year derogation. The UK indicated that 40 zones were in breach of the 2010 deadlines, plans were sent for 23 zones securing compliance by 2015, but for the remainder the UK indicated compliance would not be achieved between 2015 and 2020 and for London not until 2025. The UK implicitly argued that many Member States knew their 2015 plans unrealistic and that at least the UK was being honest.

Infringement proceedings were begun by the Commission against the UK in respect of the non-compliant zones where no derogation was sought, but in the meantime ClientEarth brought a legal action against the UK in front of UK courts arguing that the UK had an obligation to produce a plan to secure compliance with the Directive by 2015 once they were aware the 2010 limits could not be reached.

The Commission stayed their proceedings, arguing that, *“Our normal policy is to stay or close complainant files where the issue in question is before the national courts so as to allow national proceedings to run their course before deciding whether or not to instigate our own infringement proceedings.”*

During the hearing the Supreme Court indicated that they were not in a position to judge the technical soundness of plans and that the Commission was far better placed (in reality it is less clear that the Commission has the staff to fully assess on the plans coming in). On May 1st It referred a number of questions to the CJEU on the interpretation of the Directive and in particular whether Article 22 in fact mandatory. But at the same time it made a Declaration that the UK was in breach of its obligations under the Directive to comply with the NO_x limits: *“Such an order is appropriate both as a formal statement of the legal position, and also to make clear that, regardless of arguments about the effect of articles 22 and 23, the way is open to immediate enforcement action at national or European level”*. (Lord Carnwath) Client Earth v Secretary of State for Environment, Food and Rural Affairs [2013] UKSC 25.