
**Submission from Mr Richard Greenhill**

I draw to your attention three points in relation to the Water Supply (Water Quality) (Amendment) Regulations 2018 (SI 2018/706) made on 14 June which were laid before Parliament on 18 June and will come into force on 11 July 2018.

First, the Regulations are nearly 9 months late in implementing Commission Directive (EU) 2015/1787 of 6 October 2015 amending Annexes II and III to Council Directive 98/83/EC on the quality of water intended for human consumption. The 2015 Directive was required to be implemented by Member states "by 27 October 2017 at the latest", in accordance with article 2(1) thereof. Whether this delay is reasonable is unclear because neither the Explanatory Note after the Regulations nor the accompanying Defra Explanatory Memorandum makes any mention of the 2017 deadline or of the fact that the transposition is late, let alone attempt any explanation or justification for the breach. Nor is there any such mention in the accompanying Transposition Note.

It seems to me that it is discourteous for ministers to fail to ensure that such pertinent information is included in the material laid before Parliament and published alongside the Regulation. Indeed, I would suggest that the Government should be committed to including such information in Explanatory Memoranda whenever secondary legislation implements a binding obligation late or with known defects.

Second, the Regulations are somewhat confusingly named. They apply in relation to water suppliers wholly or mainly England, as do the Water Supply (Water Quality) Regulations 2016 (SI 2016/614) which they amend.

In contrast, the Water Supply (Water Quality) Regulations 2018 (SI 2018/647 (W. 121)), and formerly the Water Supply (Water Quality) Regulations 2010 (SI 2010/994 (W. 99)) which SI 2018/647 revoked and replaced, apply to water suppliers wholly or mainly in Wales. SI 2018/647 was made by the Welsh Ministers on 22 May, was laid before the National Assembly for Wales on 25 May and before Parliament on 30 May and came into force on 15 June 2018. Understandably, a pragmatic demarcation rule has long applied to suppliers straddling the England–Wales border, so neither set of regulations strictly applies only to England or only to Wales. But it would be more helpful and avoid confusion if each set of regulations had incorporated the conventional "(England)" or "(Wales)" as appropriate within its citation title so that it is immediately clear which legislation is (mainly) applicable to England and which to Wales. Since a title has no substantive legal effect, there seems no good reason for eschewing the parenthetic designation that is conventional for naming statutory instruments applicable only to parts of the United Kingdom, notwithstanding the special provisions in this case for cross-border suppliers.

Because SI 2018/706 only amends regulations which already lack any such territorial designation in the title, the point applies with greater force to SI 2018/647, where the Welsh Ministers were revoking previous regulations in their entirety and so had a cleaner slate. But in both cases, Defra could have had a role in considering titles which were less apt to confuse.

As an aside, I would add that it seems only a matter of time before a devolved administration makes an instrument with a title identical to that of a non-devolved instrument made in the same year (eg the hypothetical Water Supply (Water Quality) (Amendment) Regulations 2020). Unfortunately, Scotland and Wales have not adopted the practice of Northern Ireland, where devolved secondary
legislation conventionally has its territorial parenthesis immediately before the year, so the Something Regulations (Northern Ireland) 2018 indicates devolved legislation (belonging to the Statutory Rules & Orders of Northern Ireland) whereas the Something (Northern Ireland) Regulations 2018 indicates non-devolved legislation (belonging to Statutory Instruments of the United Kingdom), hence NI titles can never clash because of devolution. But you may well think that, even if desirable, the initiative for any such general changes to devolved legislation titling practice must lie elsewhere.

Third, in contrast to the above omission by Defra, the Explanatory Memorandum prepared by the Welsh Ministers to accompany SI 2018/647 (which is presumably the same Explanatory Memorandum that was minuted as being laid before Parliament by Command) does frankly note that SI 2018/647 was late in implementing the above directive. But (on pages 2 to 3) the Explanatory Memorandum for SI 2018/647 goes on to offer the following disappointing insight into the cross-border issues that exacerbated the Welsh delay and resulted also in Defra’s delay of SI 2018/706:

"The transposition deadline for the 2015 Directive was 27 October 2017, which has not been met.

The regulations impact on water undertakers who have responsibilities in both England and Wales. Following engagement with the water companies, officials agreed to align the Welsh set of Regulations with the English Regulations; to ensure water companies were not working to two different sets of Regulations with differing requirements, which would impact on their operational efficiency and removes duplication of work within the affected water undertakers. Officials therefore agreed to work to Defra’s timeline to ensure that any changes made to the English Regulations were also included in the Welsh Regulations.

Defra’s timeline has been delayed due to a number of circumstances including delays in their consultation process. If the Welsh Regulations were laid before the final amendments to the English Regulations were made, the regulations would once again differ in specifics for no policy reason. This would not be in the interests of the water undertakers impacted by these Regulations. Defra accept that the delay in laying these regulations is due to the English timeline slipping."

So, having fought and won the right to devolved legislation, Wales has then attempted in this field simply to align with Defra's England proposals and in so doing it has then had to delay implementation well beyond the EU deadline, for which Defra has apparently agree to accept the blame. Yet, after all this delay, it turns out that the Wales regulations will have come into force nearly a month before the England regulations, thus failing even to achieve the stated aim of ensuring that the two regimes are fully aligned, at least for those weeks.

This suggests that devolution in this particular case has not merely duplicated administrative effort but has saddled the Welsh Ministers with a breach of EU law that they appear to believe was not their own fault.

More generally, a cross-departmental question occurs. Where devolved administrations are open to aligning specific areas of devolved policy with those of England, should Whitehall find more efficient ways of identifying such areas and of implementing policy without one side unnecessarily duplicating or unintentionally frustrating the legislative and administrative procedures of the other?

No doubt analogous but less answerable questions could be formulated in relation to the UK’s regulatory alignment with the EU after Brexit.

18 June 2018