

Briefing for MPs for Day 6 (Tuesday 12 December)

Committee stage of the European Union (Withdrawal) Bill

We hope that this briefing provides useful background information for any points you are planning to raise on Day 6 of committee of the Withdrawal Bill on Tuesday 12 December.

Summary

This briefing covers two issues: the environmental governance gap and the appropriate use of delegated powers.

The secretary of state has signalled a welcome intention to address the governance gap by setting up a new independent body to hold the powerful to account, with plans to consult on the scope, functions and powers of the body early in the New Year.

The government must now commit to a firm timetable both on the consultation (which should be published as quickly as possible) and the parliamentary bill that would be needed to establish the new body before March 2019.

Michael Gove has said that there will be an announcement next week on an appropriate legislative vehicle for achieving stronger protection for animal welfare. Given the pressure on parliamentary time, it would make sense for the secretary of state to use that same opportunity to set out plans for the bill for closing the environmental governance gap and ensuring environmental principles continue. This bill is an essential part of the 'Brexit package' of legislation and must be announced immediately.

While such a bill would be welcome, [Greener UK is clear](#) that there is also a need to enshrine more ambitious environmental protections in law. The Conservative manifesto pledged to leave the environment in a better state, and this government has repeatedly committed to doing so. A green Brexit means going further than existing levels of protection, and so the government should commit to setting out plans for a new, ambitious environment act, which aims not just to maintain but restore our natural commonwealth.

Many environmental issues do not respect borders and a collective approach is needed to address devolution issues on environmental governance.

The government's existing environmental reporting obligations must be put on a domestic footing.

It is crucial that any powers given to ministers by the Withdrawal Bill to modify laws are restricted: they must be used only to ensure that retained EU law continues to operate with equivalent scope, purpose and effect. Environmental law must not be tampered with during the process of 'correcting' the UK's statute book.

The need for new governance arrangements

Several amendments have been tabled on the issue of governance, including NC27, 104, NC37, NC62, NC63, 342. **Greener UK strongly supports amendments NC27 and 104.**

There is a governance gap and it must be addressed

Significant progress has been made in developing and improving environmental laws over the past 40 years. However, these laws are only effective when they have strong institutions and mechanisms to support and implement them in practice. Laws on paper are not self-executing, and governments often do not fully implement measures they have agreed to. Furthermore, robust enforcement mechanisms are needed for when environmental requirements and standards are not being met. Greener UK has prepared a [background briefing on the governance gap](#), which will be created when the UK leaves the EU. The government has now accepted this gap exists and pledged to address it on several occasions, eg Michael Gove in evidence to the Environmental Audit Committee on 1 November.

A new body (or bodies) is needed

Existing domestic accountability mechanisms, through the environment agencies, courts and legislatures within the UK, have worked alongside EU mechanisms to give substance and impetus to environmental law. These national arrangements are necessary, but insufficient by themselves. With adequate resources, they will provide important safeguards but, on their own, and without reinforcement, they will not fill the post-Brexit governance gap, not least because they have been significantly eroded in terms of resources, expertise, powers and independence in recent years.

More fundamentally, these agencies must be subject to external scrutiny because they regulate on behalf of government, and as such they cannot be both policeman and judge of their own activities and powers.

A new body (or bodies) is, therefore, needed to address the gap and show global leadership in environmental protection.

A number of governance functions will need to be replaced

Future governance systems will need to:

- monitor and measure the state of the environment;
- ensure proper implementation of environmental law and policy;
- check compliance with environmental law and policy by government and others;
- enforce environmental law;
- review, report on and publish environmental information.

Any new body (or bodies) must be independent of government and meet a number of other critical tests

A new, fully independent, high level body or set of co-ordinated bodies should be jointly established to oversee implementation, with responsibility for a range of compliance checking, monitoring, supervisory and information provision roles and with the power to initiate action through the courts.

This body (or bodies) would need to:

- have oversight of all environmental law and be independent of government;
- be established under primary legislation and report to parliaments or assemblies;
- receive and publish regular reports on implementation of environmental objectives;
- have a technically qualified staff with the knowledge to fulfil a demanding role;
- be publicly funded with an agreed five year budget;
- oversee a free and accessible mechanism for civil society to raise breaches of environmental legislation, as they can do now via the European Commission;
- comment on the performance of delivery bodies and competent authorities.

Our environmental justice system must have teeth and enable the public to voice concerns and seek to get these remedied

When the UK leaves the EU, it will lose an important element in the enforcement of environmental legislation and standards. The European Commission's monitoring of member states' action to implement agreed legislation, backed up by the European Court of Justice's ability to impose effective sanctions has been a key driver in delivering environmental improvements.

Existing UK mechanisms for enforcement are much weaker, in terms of monitoring, in terms of the role for public interest organisations, and in terms of the sanctions that courts can impose for failure to implement standards.

New governance arrangements should recognise the important role citizens and NGOs play in protecting the environment and ensure that they have accessible, low cost ways to take complaints to any new institution and are guaranteed full access to justice without prohibitive expense to take public interest environmental cases before the courts.

Collective working is needed to address devolution issues

Many environmental issues do not respect borders. A co-ordinated transboundary approach based on minimum common standards is necessary for both the effective protection of the environment and the prevention of competitive deregulation.

The UK and devolved governments must put in place arrangements to ensure that the key environmental protection functions currently carried out by the European Commission and other EU institutions continue immediately after exit day.

The UK and devolved governments must ensure continuity in existing environmental reporting obligations, and reports should be delivered to parliament(s) and any new body or bodies coming in to place as well as being publicly available.

The government's existing environmental reporting obligations must be put on a domestic footing

Some governance matters can only be remedied by amendment to the bill, such as the need to put the government's existing environmental reporting obligations on a domestic footing.

As these currently sit in directives, and as the bill is currently drafted, such reporting obligations will be lost. This will create a serious and immediate governance gap. These obligations should be retained and transferred to the appropriate domestic body (eg government, parliament).

These issues were not addressed satisfactorily when the relevant amendments were discussed in haste on Day 2 of Committee and must be returned to during the report stage.

Defra consultation on the new body must be published urgently

The secretary of state has indicated that Defra will publish a consultation early in the New Year on the scope, powers and functions of the new body.

The consultation should be published as quickly as possible to ensure that stakeholders have sufficient time to respond, and to allow parliamentarians an opportunity to consider the consultation outcomes, and any legislative implications, in time to inform decisions regarding the Withdrawal Bill.

The earlier the consultation starts, the earlier its results can be fed into parliamentary processes and the more likely it is that new arrangements will be in place before exit day, which is vital to ensure that there are no gaps in our environmental governance framework.

In annex 1, we have set out a number of points which we believe the consultation needs to address.

The parliamentary bill to establish the new body must be passed by March 2019

The new body should be established through primary legislation to ensure that it is durable and has a stable footing. During Day 2 of Committee the secretary of state indicated that he was considering bringing forward a bill to establish both a new environmental enforcement body and a policy statement on environmental principles.

The government must now commit to a firm timetable both on the consultation (which should be published as quickly as possible) and the parliamentary bill that would be needed to establish the new body before March 2019.

Michael Gove has said that there will be an announcement next week on an appropriate legislative vehicle for achieving stronger protection for animal welfare. Given the pressure on parliamentary time, it would make sense for the secretary of state to use that same opportunity to set out plans for the bill for closing the environmental governance gap and ensuring environmental principles continue. This bill is an essential part of the 'Brexit package' of legislation and must be announced immediately.

While such a bill would be welcome, [Greener UK is clear](#) that there is also a need to enshrine more ambitious environmental protections in law. The Conservative manifesto pledged to leave the environment in a better state, and this government has repeatedly committed to doing so.

We must not forget that nature is struggling. We are depleting our soils and water supplies, generating mountains of food and plastic waste, changing our climate and making the air in our cities dangerous to breathe. Our wild places are dwindling, and we face the sadness of once familiar animals and plants fading away from our gardens and countryside.

A green Brexit means going further than existing levels of protection, and so the government should commit to setting out plans for a new, ambitious environment act, which aims not just to maintain but restore our natural commonwealth.

Restrict appropriately the use of delegated powers

Amendment numbers NC24, 96, 1, 2, 15, 25, 56, 138

Considerable modification of the UK's statute book will be needed to make sure that it functions properly and effectively once we have left the EU. It is appropriate for a significant proportion of these modifications to be made by statutory instrument, given their technical nature and the limited time available before exit day.

However, it is crucial that any powers given to ministers to make such modifications are restricted: they must be used only to ensure that retained EU law continues to operate with equivalent scope, purpose and effect. Environmental law must not be tampered with during the process of 'correcting' the UK's statute book as we leave the EU resulting in lower standards. For example, ministers must be prevented from using Withdrawal Bill powers to lower permissible air quality levels.

The Explanatory Notes accompanying the Bill give a concerning example of possible use of the power to correct problems arising from withdrawal (p9), where it states 'there will be law which will, upon leaving the EU, no longer work properly and which will need to be corrected...for example, where law requires the UK to obtain an opinion from the European Commission on a given issue... the power to correct the law would allow the government to amend UK domestic legislation to either replace the reference to the Commission with a UK body, or remove this requirement completely.' Whilst it may no longer be appropriate to refer to the Commission for an opinion, the removal of this requirement entirely fails to recognise the importance of gaining such an opinion. Its removal would be completely inappropriate and would go far beyond that which might be considered

a correction to ensure that the legislation continues to operate with equivalent scope, purpose and effect on exit day.

Greener UK supports NC24, which places a general and overarching restriction on the use of all delegated powers in the Bill; amendment 96 also additionally specifies that powers must not be used in a way that lowers environmental standards.

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Annex 1

Consultation content: governance

There are a number of issues that the Defra consultation on a new body should cover, including:

- Consider how to ensure that any new overseeing bodies set up to safeguard the environment are robust, independent from the UK and devolved governments, evidence-led and adequately funded, and how to secure the most effective framework to achieve this.
- Provide clarity on the UK/England nature of the plans, and for parallel action/agreement by the devolved administrations either to implement similar measures in their jurisdictions or to agree (eg via legislative consent motions) to Westminster doing so.
- Consider which functions might best be done at a UK or devolved level or both, as well as any cross-border issues.
- Explicitly list the key environmental governance functions to be filled after departure from the EU. Solutions to governance gaps may require a range of solutions and more than one body, but the functions that need to be preserved somehow following Brexit include:
 - Monitoring and measuring the state of the environment in a fully transparent fashion.
 - Ensuring proper implementation of environmental law and policy. For example, by supervising plans that give effect to environmental law, overseeing permitting regimes (including responsibility for granting exemptions), and ensuring robust and consistent application of the law.
 - Checking compliance with environmental law and policy by government, business and other actors. This includes reviewing progress against plans, assessing the legality of decisions and scrutinising whether targets, conditions and requirements are being adhered to.
 - Enforcing environmental law by initiating investigations into possible breaches and responding to complaints from citizens and civil society organisations. Breaches must be identified and acted on, with the application of appropriate remedies and sanctions.
 - Reviewing, reporting and publishing information regarding both the state of the natural world and performance against policy objectives.
- Consider how to ensure that any new bodies can be furnished with sufficient expertise, resources, powers and independence to investigate breaches of environmental law and, if necessary, pursue action against the relevant executive.

- Consider the most appropriate funding streams for new bodies to ensure their security, longevity and independence.
- Consider how to create durable bodies so that they are protected against subsequent abolition or erosion of their objectives or functions.
- Consider the powers, remedies and sanctions available to the body or bodies (directly or by application to a judicial body), such as the power to fine, the ability to demand information and the power to take the government to court.
- Consider whether the reporting/monitoring and the compliance and access to justice functions are better done within a single body or separate bodies.
- Fully address the need to maintain access to justice for citizens and civil society groups in relation to environmental matters, including a zero cost complaints procedure of the kind now in place and to consider ways of achieving this.
- Consider how policy and parliamentary processes can be adapted to complement the work of new institutions.
- Explore what mechanisms for environmental co-operation could be included within a future partnership agreement with the European Union to help manage transboundary issues (eg migratory wildlife, air quality) and delivery of international agreements. This is particularly important in relation to the land border between Northern Ireland and Ireland.
- Address how the UK will fulfil those international obligations, contained in multilateral environmental agreements to which it is a signatory, which the UK is currently implementing via EU legislation and institutions.

Annex 2

Relevant extracts from the House of Commons: ‘Exiting the European Union Committee, European Union (Withdrawal) Bill First Report of Session 2017–19’, published on 17 November 2017.

The Committee noted that the environment secretary has indicated that the government is planning a new environmental watchdog, independent of government and with clear legal authority, to deliver a “green Brexit”. This was welcomed as a step in the right direction whilst awaiting more detail on powers and resources available to the body.

“The powers in Clause 7 for the government to transfer regulatory functions from EU institutions to UK regulatory bodies are integral to the government’s approach to transferring the acquis into UK law. However, the government must be alive to the consequences of the loss of EU infringement proceedings (and complementary dispute tribunals such as the Appeal Board of the European Chemicals Agency) and the risk of creating an enforcement gap if regulatory functions are transferred to bodies that do not have the resources, expertise or independence to carry them out effectively. Such a risk could result in important protections being lost and the UK’s

credibility in negotiating its future regulatory relationship with the EU being undermined.

In this respect, the devil will be in the detail of the statutory instruments under Clause 7 that are brought to this House. We note the current provisions that creating a new public authority and transferring functions to a new body require affirmative resolution. However, transferring functions to an existing body could also entail a major policy decision. It is difficult to define on the face of this legislation which decisions will be purely technical and which will require a greater level of scrutiny. This underlines how important it is to ensure that effective procedures are in place to identify which proposals merit further examination in parliament. As we said in paragraph 41, it is important that the house gets this right and we reiterate our recommendation that the proposals put forward by the Procedure Committee for a new scrutiny committee should be given proper consideration during the Committee Stage of this bill.

It will also be important that the government publish details of how they will ensure that regulatory agencies in the UK have the resources and enforcement powers to do their job effectively. The relationship between consumers, industry and regulatory agencies not only provides legal redress but also product and standards approval which is vital for buyer confidence and access to markets. It will be important to avoid any unnecessary duplication of regulatory functions or any reduction in confidence in UK products or services. We welcome the environment secretary's commitment to the establishment of a new agency to fill the "governance gap" and to ensure that the UK's environmental standards and enforcement are as good as or even better than at present. We intend to return to the important question of the UK's continuing relationship with EU agencies, including seeking clarification from ministers about how sufficient institutional capacity can be created if and when functions are repatriated."

Greener UK is a group of 13 major environmental organisations, with a combined public membership of 7.9 million, united in the belief that leaving the EU is a pivotal moment to restore and enhance the UK's environment.

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