

The Repeal Bill: securing a strong foundation for a greener UK

Briefing for parliamentarians and policy makers
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Summary

To meet the UK government's aspiration to be a world leader in environmental protection and leave the environment in a better condition than we inherited it, the Great Repeal Bill must:

- 1 Bring over the whole body of EU environmental law and related laws required to be coherent with environmental law, including the relevant parts of the Common Agricultural Policy, Common Fisheries Policy and energy policy, in line with a principle of non-regression.¹ This means:
 - effectively converting all existing EU environmental law (including preambles, principles and jurisprudence) into domestic law;
 - ensuring that domestic laws made through secondary legislation to implement EU obligations are saved.
- 2 Allow no opportunity for gaps in domestic environmental protections to open up without full parliamentary scrutiny. This means:
 - confining any delegated powers to the purpose of faithful conversion by putting time limits and appropriate parliamentary scrutiny on such powers, ensuring any non-technical changes (ie. changes beyond those necessary for the legislation to continue to operate, post-Brexit) are made by primary legislation only, and giving a full and proper role to the relevant legislatures in each of the four nations;
 - once faithfully converted into domestic law, the entirety of the UK's EU-derived environment laws should be granted a status equivalent to statute (primary legislation), that can be amended or repealed only by an Act of Parliament in the relevant legislature.
- 3 Make sure the law is properly implemented and enforced. This means:
 - introducing new domestic governance arrangements to ensure equivalent provision of the regulatory, monitoring, oversight, accountability, enforcement and other functions currently provided by EU institutions.

1 The conversion of environmental law and principles

UK membership of the EU has resulted in a shared body of environmental legislation and associated governance arrangements. These are relied on to protect our environment, in line with national and international commitments to biodiversity conservation, environmental quality, public health and sustainable development. In fact, an estimated 80 per cent of environmental policies in the UK are shaped by EU law.²

Building on these firm, well tested foundations by strengthening our current environmental protections will be vital for long term well-being and prosperity, whatever our future relationship with the EU.

Eighty per cent of British adults believe that the UK leaving the EU should lead to equal or stronger levels of environmental protection to those currently in place.³

As set out in the Repeal Bill White Paper (legislating for the United Kingdom's withdrawal from the European Union), the first step will be for the bill to "ensure that the whole body of existing EU environmental law continues to have effect" in domestic law, to provide "maximum certainty" for businesses and other stakeholders as the UK leaves the EU.⁴ This is necessary to achieve a high level of environmental protection and to prevent the state of our environment deteriorating, underpinning the UK government's commitment to ensuring we become "the first generation to leave the environment in a better state than we found it." And it aligns with the Welsh and Scottish governments' strong commitment to maintaining high environmental standards in their respective white papers.⁵

Effectively converting all current EU environmental law into domestic law and preserving laws already made to implement EU law, is an essential but inevitably complex task. While the White Paper's broad commitment to maintaining environmental protections is reassuring, it also states that the bill will only convert EU law into domestic law "wherever practical and sensible". It is unclear what these criteria imply for environmental law. And the government has not stated what its approach will be regarding EU directives that have been previously incorrectly or incompletely transposed into domestic law. Clarification on these points is urgently needed.

In addition, the White Paper makes no specific commitment to carry across the general principles in EU treaties which underpin environmental law and policy, such as the precautionary principle, the polluter pays principle nor the goals of sustainable development and a high level of environmental protection. To ensure full and effective transposition of environmental law, the bill must bring these general principles into domestic law.

2 Parliamentary scrutiny

Legislative scrutiny of the conversion process

To ensure an appropriate degree of legislative scrutiny, the bill must confine any UK or devolved ministerial powers to amend EU-derived law through delegated legislation to the purpose of faithful conversion (through technical changes only). These powers should be strictly time limited, and should lapse at the point of the UK's exit from the EU. Any non-technical changes to these laws, ie changes beyond those strictly necessary to the continued functioning of the legislation – whether before or after the UK leaves – should be made by primary legislation only, giving a full and proper role to the four parliaments in the UK, ie in Westminster and the devolved legislatures in Scotland, Wales and Northern Ireland.

Given the complexity of the task at hand, it is unlikely that a single scrutiny procedure will be sufficient to provide the oversight necessary to prepare the UK and devolved countries' statute books in the time available. A number of procedures will be needed, and an appropriate sifting mechanism should determine which procedure should be used on a case by case basis. For some extremely straightforward corrections, the existing negative procedure for statutory instruments may suit. However, for other more nuanced or contentious corrections, a strengthened scrutiny procedure will be required.

The strengthened scrutiny procedure that needs to be outlined in the Repeal Bill must ensure, at least, the following:

- a requirement to lay supporting documents before the appropriate parliament, including an explanation of the existing function of the law and the reason why corrections are necessary;
- power for a relevant committee to block or amend any proposals before they are laid before the appropriate parliament; and
- power to call for further debate and approval by the appropriate legislature.

With regard to technical changes or 'corrections' to ensure that the law can continue to operate, the White Paper includes a concerning case study (Case Study 2) of a purportedly technical amendment that is anything but.⁶ The case study concerns the potential removal of an important oversight mechanism, specifically intended to ensure the adequacy of measures to ensure correct and consistent decision making. The erosion of transparency that would result from this is especially worrying given the absence of any proposals from government for new governance arrangements to enable proper implementation and oversight.

Further clarification from the UK government on how such issues will be dealt with, and the type of legislative scrutiny to which they will be subject, is urgently required. Any use of delegated powers must be appropriately and narrowly restricted, and strictly time limited by general provisions placed on the face of the bill, with the overall goal defined as ensuring the whole body of existing EU law continues to have effect in domestic law. The same onus will be placed on the devolved governments to ensure the proper restriction of powers created to amend any legislation that falls within their competency.

Environmental laws accorded status equivalent to primary legislation

The Repeal Bill must ensure that, once EU law has been faithfully converted into domestic law, that the UK's EU-derived environment laws have a status equivalent to statute (primary legislation), by any subsequent changes requiring full and proper public policy and parliamentary law making processes (white papers, pre-legislative scrutiny and the passage of primary legislation through the appropriate legislature).

Currently, much EU-derived law is in the form of statutory instruments (secondary legislation). Without a guarantee that, once converted, they will be given equivalent status to primary legislation, the UK (either in totality or in one or more of the devolved countries) would be left with substantially weakened environmental protections, meaning that major laws governing the environment could be amended or repealed without the higher standard of scrutiny afforded to primary legislation. Whilst the UK has been a member of the EU, using statutory instruments for important environmental laws has been acceptable since ministerial powers to make and amend statutory instruments derived from EU law have been constrained: government ministers have only been able to exercise these powers to give effect to EU laws.

Therefore, to maintain equivalence with current levels of protection, the Repeal Bill must state that statutory instruments created to convert EU law under the Repeal Bill, and existing statutory instruments given continuing legal force by the Repeal Bill can only be amended or repealed by primary legislation. This would ensure that our environmental protections remain strong after the UK leaves the EU.⁷

In some cases, it may be necessary to amend EU-derived environmental law to match or improve on standards, requirements or prohibitions (such as energy efficiency standards). In these cases, the use of delegated legislation may be appropriate and expedient. However, any future amendments to environmental law, via delegated powers, should be restricted to their usual purpose, such as the elaboration of technical details or allowing standards to be easily updated in the light of new scientific evidence. Any additional amendments other than those specified above must be specifically enabled by future primary legislation, rather than relying on powers created by the Repeal Bill.

3 Replacement governance arrangements

As noted by the House of Lords EU Committee, "The importance of the role of the EU institutions in ensuring effective enforcement of environmental protection and standards...cannot be over-stated".⁸ Currently, the European Commission carries out an important watchdog function in overseeing the compliance of all member states with the EU's set of common environmental standards and requirements. If member states do not act in compliance, they risk legal proceedings via the Court of Justice of the European Union (CJEU), potentially resulting in a requirement to rectify the non-compliance in question and significant fines if they still fail to comply.

The White Paper makes it clear that, in repealing the European Communities Act, the Repeal Bill will bring an end to the jurisdiction of the CJEU in the UK. However, it does not make it clear what, if any, domestic governance arrangements will replace the CJEU, the European Commission and other relevant institutions (eg the European Environment Agency). This includes the role these bodies play in providing the necessary monitoring, oversight, co-ordination, accountability and enforcement functions to effectively implement and ensure compliance with environmental legislation. Current domestic arrangements, such as those for parliamentary scrutiny and judicial review, are not sufficient to meet the requirements comparable to the current level of protection.

Proposals must be presented to set out how this governance gap will be addressed to ensure no erosion of environmental protections after the UK leaves the EU. The relevant parliaments should have the opportunity to approve or reject ministerial proposals for substituting current EU institutions, bodies and agencies with domestic institutions during the conversion process. The four governments of the UK need to work together co-operatively to ensure coherence if the decision is separate replacement institutions, bodies or agencies.

Confirmation in the White Paper that historic jurisprudence of the CJEU will have the same status in our courts as that of the Supreme Court (unless and until altered in future by the Supreme Court) is welcome. However, the government(s) needs to confirm whether or not relevant UK courts will be obliged to take account of future CJEU case law in relation to the environment. This is likely to be required to ensure minimal divergence and to maintain legal clarity and certainty.

Note on inter-governmental arrangements

Governance of environmental matters in the UK is largely devolved, but many environmental problems do not respect borders. To date, EU environmental law has provided a common framework, requiring similar approaches and standards in all the UK's jurisdictions. It is unclear whether, and in what ways, the proposed bill will affect the current devolution settlements.

It will, therefore, be important for the UK and devolved governments to work collaboratively to maintain high standards of environmental protection and effectively address cross border environmental issues, in line with the UK's international obligations.

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Endnotes

¹ The non-regression principle means that governments will not backtrack once an environmental protection has been established in law.

² *The future of the natural environment after the EU Referendum, sixth report of session 2016–17*, p15, www.publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/599/599.pdf

³ See: www.independent.co.uk/environment/brexit-greener-uk-pledge-environment-climate-change-global-warming-a7462746.html

⁴ *Legislating for the United Kingdom's withdrawal from the European Union*

⁵ *Securing Wales' future transition from the European Union to a new relationship with Europe; Scotland's place in Europe*, The Scottish Government, Edinburgh

⁶ Department for Exiting the European Union, March 2017, *Legislating for the United Kingdom's withdrawal from the European Union, Case Study 2*:

"There will be law which will, upon leaving the EU, no longer work at all and which will need to be corrected to continue to work. An example of this would be the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001. These domestic regulations contain a requirement to obtain an opinion from the European Commission on particular projects relating to offshore oil and gas activities. Once we leave the EU, the Commission will no longer provide such opinions to the UK (and we would not seek them). However, this requirement in the existing regulations would prevent certain projects from taking place unless we correct it.

In this instance the power to correct the law would allow the Government to amend our domestic legislation to either replace the reference to the Commission with a UK body or remove this requirement completely."

⁷ See: Lords Constitution Committee Report, especially paragraphs 57-67 on the democratic deficit implicit otherwise.

⁸ House of Lords European Union Committee, February 2017, *Brexit: environment and climate change*, 12th Report of Session 2016-17

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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