

Report Stage of the EU (Withdrawal) Bill

Day 1, Wednesday 18 April 2018

Amendment 12 (savings for rights etc)

The Withdrawal Bill's failure to retain all EU law

The stated aim of the EU (Withdrawal) Bill (EUWB) is to retain all EU law. However, it fails to do this because of the approach it takes to law found in EU Directives that has not, to date, needed to be transposed into standalone domestic law.

For a number of reasons – some justifiable and some not – the UK has not transposed every single obligation found in EU Directives. Some of these have applied directly from the Directives until now.

The approach taken in clause 4 of the EUWB means that many of these rights and obligations will be lost if they have not been recognised by a court before exit day. This effectively amounts to the EUWB changing what law is applicable in the UK without a proper public or parliamentary process.

This includes the loss of a number of environmental obligations such as those listed in the annex.

But also causes problems in other areas of law, such as:

- Article 16 of the Anti-Trafficking Directive on assistance, support and protection for unaccompanied child victims of trafficking in human beings
- Article 4 of the Employment Equality Directive
- Article 15 of the E-Commerce Directive that deals with data protection

Law should not be lost because of patchy government transposition in the past. We must be sure that all our law is properly retained and continued. The validity of law does not depend on it being recognised by a court, but rather it being enacted through the accepted channels.

Concerns about Clause 4(2)(b)

One of our concerns is that clause 4(2)(b) as currently drafted appears to prevent directly effective rights arising under EU Directives being exercised (or claimed) after exit day unless they have been recognised by the courts either before exit day, or in litigation commenced before exit day. **In our view that represents a substantial diminution in existing rights that could have serious consequences for environmental matters where there are significant transposition gaps** (such as the gaps we have identified in the annex).

We welcome the government's decision to bring forward amendments to allow claims based on a breach of the general principles of EU law and claims seeking Francovich damages to be brought before the UK courts for a period of two years

after exit day. As Lord Callanan made clear in his letter to peers of 11 April, the intention of those amendments is to ensure that “people still have a fair opportunity to bring challenges in relation to something which happened before exit”.

We consider that there is a strong analogy between claims for Francovich damages, claims based on breaches of the general principles of EU law and claims based on directly effective rights arising from EU Directives.

Amendment 12

Our preferred way forward in relation to clause 4 remains the approach adopted by Baroness Brown of Cambridge in amendment 12. This new clause, which requires the existing clause 4 to be deleted, aims to preserve, more comprehensively than the existing clause 4, rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from EU law and incorporated into domestic law via the ECA. Where such rights are incorrectly or incompletely transferred, it imposes a duty to make regulations to remedy the deficiency.

This would rectify the problems with the EUWB by properly retaining all EU law and forcing the government to correct any errors it has made. It is simpler and more comprehensive than the existing clause 4, ensuring that rights arising under EU Directives are preserved and that there is a mechanism in place after exit day to deal with problems arising from the incorrect or incomplete transposition of EU law before exit day.

An alternative way forward

However, if the government remains unwilling to support that approach, we would urge it to consider making a concession along the lines of that already made in relation to litigation relating to the general principles and Francovich damages.

We would therefore encourage peers to ask the government to explore the scope for an amendment to the EUWB that would allow potential claimants to rely on directly effective rights arising from EU Directives (provided those rights would have been available immediately prior to exit day) to bring such claims before the courts for a period of two years after exit day.

Aside from the substantive merits of such an approach, it would have the practical advantage of avoiding a rush to commence litigation based on directly effective rights arising from EU Directives immediately prior to exit day. It would also be consistent with the government’s expressed intention that people should still have a fair opportunity to bring challenges based on rights that were available to them before exit day.

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Annex: examples of ‘transposition gaps’ in retained EU law

Without amendment to clause 4, the EUWB puts at risks EU law provisions such as:

- Requirements to review and report on the adequacy and implementation of laws, such as those in the Marine Strategy Framework Directive (Article 20), the Air Quality Directive (Article 32) and the Habitats Directive (Article 17).
- Obligations to report and send information to the European Commission, which is then able to aggregate this information and use it in its consideration of the appropriateness of laws and their implementation. See for example, Article 27 of the Air Quality Directive and Article 10(2) of the Birds Directive. **It is important that these reporting obligations are retained after exit day. Even though it may not be appropriate for the government to continue reporting to the European Commission after exit day, such reporting obligations should remain in place, with an alternative UK body taking the place of the Commission (for example the new green watchdog which the government has promised to establish).**
- Provisions that detail the aim and purpose of Directives, such as Article 1 of the Environmental Liability Directive that includes reference to the polluter pays principle and Article 1 of the Habitats Directive that specifies that the aim of the Directive is to contribute towards biodiversity conservation.
- Loss of standards and conditions. Some obligations incumbent on Member States have not been transposed into UK law – eg the Water Framework Directive’s requirement that water pricing policies that provide adequate incentives for users to use water efficiently (Article 9).
- Provisions that provide for regional co-operation in transboundary environmental matters eg Article 6 of the Marine Strategy Framework Directive.

Further examples are available.

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