

## Third Reading of the EU (Withdrawal) Bill (EUWB)

Wednesday 16 May 2018

### Maintenance of EU environmental principles and standards

Greener UK strongly supports [the amendment](#) that has been tabled by Lord Krebs and co-signed by Baroness Jones of Whitchurch, Baroness Bakewell of Hardington Mandeville and Lord Deben. The motivations underpinning this amendment have been consistently supported by parliamentarians from all parties throughout the EUWB process.

The government's ambition is to ensure we leave our environment in a better state than we inherited it. This amendment is needed in order to hold the government to this ambition and to ensure that Brexit does not lead to a weakening or diminution of environmental protections and governance.

### Purpose of the amendment

The amendment would require the Secretary of State to:

- Take steps designed to ensure that the UK's withdrawal from the EU does not result in the removal or diminution of any environmental rights or protections.
- Publish proposals for primary legislation establishing a duty on public authorities to apply EU environmental principles in the exercise of relevant functions after exit day.
- Publish proposals for primary legislation to establish an independent environmental watchdog to ensure compliance with environmental law by public authorities.
- Publish a list of functions currently exercised by EU bodies that must be retained or replicated in UK law.
- Lay before Parliament a Statement of Environmental Policy which sets out how the environmental principles will be given effect.

### The government's consultation on environmental principles and accountability for the environment

On Day 2 of Lords Report on 23 April, the Minister, Lord Callanan, promised the imminent publication of a consultation document that would deal with the issues that amendment 27 had sought to address. Defra's [consultation document](#) on environmental principles and accountability for the environment was published on 10 May.

While the publication of the consultation is welcome, it does not provide the reassurances and certainty that many stakeholders had been expecting.

The government has promised a world-leading environmental watchdog and enhanced environmental standards after Brexit. Yet, in practice, the consultation

proposes to give the environment less protection after Brexit than exists now. The status of the environmental principles are at risk of being downgraded and the proposals for a new watchdog are far from world-leading.

### The watchdog

There is no commitment to give the proposed new watchdog the power to initiate legal action. Instead the new body would only have the ability to serve 'advisory notices' on central government. However, an 'advisory notice' is just that – it provides advice, but cannot compel action. There is no sanction available if that advice is ignored.

This is far weaker than the current arrangements in which the European Commission has the power to initiate court action to remedy breaches of environmental law. This power has proved a powerful tool in ensuring compliance with environmental law both in the UK and in other EU member states. Greener UK believes that it is essential that the new watchdog has similar powers to initiate court action. A power to issue advisory notices is not adequate. A world-leading watchdog needs strong legal powers, not merely the ability to make suggestions, no matter how persuasive.

The amendment seeks to remedy this by insisting that the watchdog is able to ensure compliance with environmental law. While it may often be possible to ensure compliance without recourse to the courts, an effective watchdog will need a range of meaningful legal powers, including the power to initiate court action.

The consultation document is also ambiguous about how the watchdog will engage with people and communities. It is essential that this new institution engages closely with those affected by environmental problems, but the consultation document does not even commit the watchdog to receiving complaints from the public. This would represent a backwards step from the already imperfect (though valuable) complaints process of the European Commission.

Additionally, the consultation is far too limited in its jurisdictional scope. It suggests that the remit of the watchdog will apply only to central government, and not to other public authorities. This is despite the consultation's own acknowledgment that "actual delivery of policy measures and laws ... is more commonly performed by responsible authorities such as the Environment Agency [and] the Forestry Commission" (para 144).

Restricting the watchdog's enforcement role to central government will take away important safeguards, and risks alienating communities from those responsible for looking after their local environments. It will not be possible to challenge those who make the decisions that affect people and nature directly and personally. The few teeth that the watchdog has will soon fall out once people realise that it cannot help them solve the environmental problems they face.

The amendment makes clear that the watchdog and the principles should apply to public authorities in general, rather than only to central government.

## Environmental principles

The impact of the environmental principles in EU law is somewhat understated in the consultation document (especially paras 23 and 28). The environmental principles perform a number of different roles in EU law, including guiding policy development and policy implementation, guiding the interpretation of legislation, structuring the exercise of discretion by public decision-makers, and providing in some cases a standard for judicial review.

The impact of the principles extends deeply and routinely into administrative decision making, often having a binding effect on those delivering EU measures, including for example in respect of GMOs, pesticides, waste regulation and water regulation. The most striking example may be the way in which the Habitats Directive is said to give expression to the precautionary principle: Planning Inspectorate decisions are often notable for their careful, but pragmatic, application of a very demanding judicial approach to the precautionary principle.

So the impact of the environmental principles in EU law goes beyond '[guiding] our environmental policy making and legislation' (para 28 of the consultation document). After the UK leaves the EU, the environmental principles should continue to play their current role of routinely guiding and shaping day to day administration affecting the environment. This would not be novel or disruptive, and would not trump the language of the legislation governing the regulatory regime being applied, which always remains central.

It is therefore disappointing that the consultation contains no commitment to enshrine the environmental principles, such as the precautionary principle and the polluter pays principle, on the face of the upcoming Environment Bill. Instead the preferred option is a proposal to create a Policy Statement, which would allow the government "to balance environmental priorities alongside other national priorities" (para 40), and "offer greater flexibility to Ministers" (para 39).

The standard of duty proposed for this Policy Statement is also too weak – government must only "have regard" to the policy statement. Previous experience of the sort of duty proposed by the government has shown them to be weak and easily ignored, as the Select Committee on the Natural Environment and Rural Communities Act 2006 [recently concluded](#) in relation to the biodiversity duty, finding it to be "ineffective as it stands".

Such an approach would not replicate the current status of the environmental principles which are enshrined in the EU treaties, one of the fundamental sources of EU law. In order to keep its promise that Brexit will not weaken our environmental protections, the government must ensure that the environmental principles continue to have an equivalently high status in UK law after Brexit. The Policy Statement method alone, as proposed in the consultation paper, is simply not good enough.

## **The need to incorporate environmental principles within UK law**

The EUWB does not adequately retain the three key roles of the environmental principles: in interpreting the law, in guiding future decision making, and as a basis for legal challenge in court.

Environmental principles are key to the interpretation and application of environmental law by a wide range of public bodies: from the Environment Agency to the courts. However, the consultation proposes that the principles will apply only to central government. This is not good enough, and misinterprets how the environmental principles currently function in EU law. It is not the case that the environmental principles currently exist only as guidance to national government. While not 'directly effective' in the technical EU law sense, the EU principles do apply directly to UK public authorities.

If the UK government's stated aim of ensuring legal continuity on day one of Brexit is to be achieved, the environmental principles need to be a part of domestic law on day one, with public bodies following them, courts applying them and the public able to rely on them.

The creation of a duty on public authorities to apply the environmental principles, supplemented by the introduction of a national policy statement, is the best way to enable the government to stay true to its pledge, expressed by Dominic Raab MP during Commons Committee stage, to ensure that it does not diminish its commitment to the environmental principles and, moreover, that the principles are reinforced.

There has been strong support throughout the parliamentary process for the environmental principles to be embedded in statute, not least for the UK to comply with its international obligations and because this is a more binding option than a national policy statement alone. We note that the Scottish government has also supported the need for the principles to be carried through into domestic law and that the Welsh government has committed to take the first proper legislative opportunity to enshrine the environmental principles into law.

The UK government has put forward various arguments as to why it believes it is unnecessary to address the environmental principles within the EUWB, including its view that they are already included in various international treaties and agreements and certain bits of retained EU law. This sort of unclear, non-binding and piecemeal retention of the environmental principles is exactly what we want to avoid. Public bodies should not have to trawl through CJEU case law in order to find out whether, and in what circumstances, the environmental principles will continue to apply after exit day. Nor can we rely on non-binding and often weak international law to properly safeguard our precious environment.

## The continued need for urgency

The government is under no obligation to publish its response to reviews or consultations within a certain timescale. There are many examples where government proposals have stalled – for example, there is still no clarity on when the government intends to announce the next steps following its [call for evidence](#) on the important issue of corporate liability. The consultation closed in March 2017 and the government is yet to publish its response or give any indication of when this might be available. This is despite this particular consultation emanating from an announcement by the Prime Minister at the landmark Anti-Corruption Summit in 2016. We understand that one of the reasons for the continued delay is a lack of cross-government agreement. A similar lack of cross-

government agreement appears to have delayed the publication of the principles and governance consultation.

In November 2017, parliamentarians were told that the consultation on environmental governance and principles was imminent, but it took six months for this to emerge and only then following significant scrutiny and debate at Lords Committee and Report and pressure from external stakeholders.

The pressure on the parliamentary business schedule shows no signs of reducing and the concerns that we understand have been expressed by other government departments during write round are also not guaranteed to be addressed either during or following the consultation. While the consultation says that a draft environmental principles and governance bill will be published this autumn, this is by no means certain.

There therefore remains a significant risk that the government may not be able to deliver on its commitments within a reasonable timescale. The amendment would reduce that risk as it would ensure that draft legislative proposals emerge within six months of the EU (Withdrawal) Act receiving royal assent. The Minister may say that this is what the government intends to do; the amendment would ensure that this actually happens.

## Conclusion

Greener UK strongly supports the amendment as it would:

- Remove the risk and uncertainty that the consultation document has introduced on the role of the new watchdog and the legal status of environmental principles.
- Deliver what the government has repeatedly claimed the bill is intended to deliver: the continuation of the same environmental rights and protections after exit day as those that exist before exit day.
- Set a clear legislative framework and timescale in which the consultation outcomes must be brought forward.
- Provide vital transparency through the publication of a list of EU body functions that must be retained or replicated in UK law, which in turn would be important for ensuring public confidence in the process of exit.
- Embed in UK domestic law key elements of EU law (the environmental principles) which otherwise would be lacking or carried across in a sub-standard way.
- Ensure that Brexit does not lead to a weakening of environmental rights and protections, as the government has repeatedly promised.
- Reduce the risk of the government setting up a toothless watchdog. It would be very easy for a watchdog to be set up which promises much but delivers little in practice. For example, when the Office for Product Safety and Standards was announced in January, it was given a cautious welcome by stakeholders. There is now concern that the body lacks the independence and powers to deliver the due diligence and standard compliance demanded by consumers.

We encourage peers to support the amendment during Third Reading, including in any division which might be called. This is an occasion on which we believe Parliament needs to give the government a helping hand to deliver the commitments which it is seeking but struggling to deliver, and which enjoy wide support across civil society.

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