GREENER UK

Committee Stage of the EU (Withdrawal) Bill Briefing on amendments 21, 26, 28, 33, 58 and 59

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Amendments 26 and 28: full retention of all EU law

The government's ambition for the EU (Withdrawal) Bill (EUWB) is for the same rules and laws to apply after the UK leaves the EU as they did before. This ambition has been repeatedly stated, including in the government's great repeal bill white paper.[1]

However, the bill as drafted fails to retain all EU law. In fact, the Explanatory Notes explicitly state that "directly effective provisions of directives that have not been recognised [by a court] prior to exit day … will not be converted by [clause 4]." [2]

This problem is not exclusive to environmental law, but because 80 per cent of environmental law stems from the EU, it is felt particularly strongly in this area. In addition, aspects of EU directives currently incompletely or incorrectly transposed will be lost; and the relevance of the preambles, used to interpret existing EU legislation, is unclear.

This problem with the bill must be remedied because a number of provisions of directives are relied on directly rather than via transposition into UK legislation. The status of these provisions is unclear as the bill stands. There is an urgent need to retain many of them, including putting the government's existing environmental reporting obligations on a domestic footing. Otherwise, a serious and immediate governance gap will be created. These obligations should be retained and transferred to the appropriate domestic body (eg government or parliament).

During the Committee stage, Dominic Raab, when he was Minister of State for Courts and Justice, described clause 4 as a "sweeper provision [that] picks up the other obligations, rights and remedies that would currently have the force of UK law under section 2 of the European Communities Act 1972". But clause 4, as it stands, fails to do this sweeping properly.

Clause 4 works alongside clauses 2 and 3 to retain EU legislation. Clause 2 saves UK domestic statutory instruments made under the European Communities Act 1972 (ECA) to implement EU directives and clause 3 converts EU regulations into standalone domestic law. However, not all EU law is captured by clauses 2 and 3 alone: this motivates the existence of clause 4 of the bill.

Clause 4 is necessary for a number of reasons. It must capture rights and principles from the EU treaties, but it must also carry over provisions from EU directives that have not been properly transposed into UK law. This failure to transpose EU law properly into UK law arises both through existing errors in transposition and because some parts of EU law do not require transposition while the UK is a member state of the EU.

However, clause 4(2)(b) contains an inexplicable and unnecessary exception to this sweeping: it excludes those rights, powers, obligations etc that have not been recognised by a court before exit day. But this distinction is arbitrary: many rights simply may not have been recognised by a court because they are so straightforward that they do not require litigation. If a piece of legislation creates a legal position, then it does not need a judge to verify that this is the case. It is worth noting that no such 'judicial recognition requirement' is placed on directly effective provisions of the EU treaties for them to form part of retained EU law.

Second, clause 4 does not adequately engage with failures to transpose EU law properly. An obligation should be placed on the government to remedy incorrect and incomplete transposition. The powers to do so are contained in cl7(2)(f) of the bill, but there is a significant difference between a power to do something and a duty to use that power.

Lord Krebs has tabled **amendment 28, which is supported by Greener UK**. 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 these problems with the bill. 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.

Examples of law that will be lost if clause 4 is not amended are given in the annex.

We note that **amendment 26** tabled by Lord Pannick and co-signed by other members of the Constitution Committee seeks to remove cl 4(2)(b) of the Bill. Greener UK supports this amendment since removing this subparagraph is desirable for the reasons outlined above. However, Greener UK prefers the more comprehensive redrafting of clause 4 provided by amendment 28, in particular because it also solves the problem of incomplete and incorrect transposition.

Amendments 21 and 33: the future status of retained EU law

The proper status of retained EU law

Discussions over the processes by which laws are made and amended has become mainstream thanks to the presence of extremely broad, general and vague powers in the EUWB. Powers created by this bill can be used to correct any deficiencies that are found in EU law. However, the problems associated with this issue go further than many have realised. The bill also increases the scope of powers contained in other legislation, potentially allowing ministers to make substantive modifications to retained EU law without adequate scrutiny after the UK has left the EU.

The issue of the future status of retained EU law has been considered by the House of Lords Constitution Committee in its two reports on the EUWB.[3] This has resulted in members of that committee laying amendment 33 to clause 5 of the Bill, which sets out that "[r]etained EU law is to be treated as primary legislation, enacted on exit day". **Greener UK supports amendment 33.** Amendment 21 has a similar intention, while also allowing technical aspects of retained EU law to be amended by statutory instrument subject to certain procedural and substantive constraints.

Without an amendment such as this, executive powers that were initially created in the context of EU membership will now be exercisable without the restraints that EU law (via the European Communities Act 1972, ECA) put on them. In advice obtained by ClientEarth, Pushpinder Saini QC points out that provisions of the bill "make it far easier for ministers to use existing delegated powers to amend retained EU law. This is concerning. Retained EU law may deal with matters of such importance that they would in a domestic context be dealt with in primary legislation".[4] Saini notes that powers that were initially created in the context of EU membership will now be exercisable without the restraints that EU law, via the ECA, put on them. This is explicitly set out in paragraphs 3(1), 3(2), 3(3) and 5(1) of Schedule 8 EUWB.

The result of this is that important UK laws derived from its membership of the EU will be subject to modification without the same level of scrutiny currently provided by EU legislative procedures. The ring-fencing that protects EU law from being dismantled without proper oversight will be gone, leaving vital environmental protections vulnerable.

It is essential that the EUWB is amended to prevent the creation of a democratic deficit in UK law. For the main part, this means setting out that it should normally only be possible to modify retained EU law by primary legislation post-Brexit.[5]

EU directives are as important as EU regulations

Greener UK is concerned by narratives that suggest that only law previously found in EU regulations should be ring-fenced (ie excluding law that comes from EU directives). This would be inappropriate since there is no hierarchy in status between EU regulations and EU directives. It is not the case that EU regulations contain, as a rule, law that is of greater policy importance or significance than EU directives. It is, thus, crucial that the future status of *all* retained EU law (rather than the narrower category of 'retained direct EU legislation') is properly provided by the EUWB.

While it is true that the law retained by clause 2 is already contained within UK legislation, and, therefore, already exists as either primary or secondary law, this must not be taken as an appropriate indicator for the status of that law once the safeguard provided by the ECA is gone. The legal position of statutory instruments made under s2(2) ECA will be materially and significantly altered by the repeal of that Act. The Constitution Committee quotes Sir Keir Starmer QC MP in making this point:

“Almost of all the workplace rights, from memory, are in delegated legislation. That has not mattered much until now, because they are underpinned by our EU membership. Nobody particularly felt that their workplace rights were vulnerable,

because everybody knew that unless and until either we left the EU or the EU provisions changed, although it was a lesser form of legislation, they were in truth enhanced or ring-fenced. If, through this process, they become ordinary delegated legislation, those rights can be removed by provisions other than primary legislation. The ring-fencing just falls apart with the designation. Tied up with what seems like quite a narrow legalistic point about designation are a whole series of possible constitutional consequences, which are very, very wide-ranging." [6]

And in its first report, the committee noted that:

"[W]hile EU law embodied in secondary legislation made under section 2(2) of the ECA will technically be secondary legislation, that is a consequence of the fact that it simply implemented law agreed at an EU level — it does not mean that the law it encompasses is not important enough to be worthy of primary legislative status." [7]

It is inappropriate to allow modification of retained EU law without undergoing the appropriate parliamentary process. For those aspects of retained EU law that detail important policy choices that protect the environment, people's health and well-being, this requires an Act of Parliament. Whether the retained EU law in question began life as an EU regulation or an EU directive is beside the point, and should not be used as a determinant of the future status of domestic legislation.

Amendments 58 and 59: recitals and preambles

Recitals are interpretative tools in the EU legal order. They explain the background to, and the aims and objectives of, legislation and thus provide an understanding of the legislation which follows.

Normally a new government proposal or policy would go through certain processes, including informal consultation with relevant government departments, a green paper to allow stakeholders to comment, a white paper which sets out how the government intends to proceed and proposed new legislation which is subject to parliamentary scrutiny.

EU derived law has not gone through those processes so there is no reference back to green or white papers or parliamentary debate. This lack of historical context reinforces the importance of preambles and recitals which clearly set out the reasons for, as well as the intention, aims and objectives of, the legislation.

Greener UK is concerned that, without a clear legal status for recitals and preambles, there is a risk they will either be forgotten or ignored by decision makers or the courts. Even now, there is a reluctance to use these helpful guides when considering EU derived legislation within the UK, with some judges refusing to interpret the legislation purposively by considering the recitals.

Greener UK supports amendment 58, which has been tabled by Lord Krebs, as it seeks to ensure a clear legal status for recitals and would provide that any question as to the meaning of retained EU law will be determined in UK courts in accordance with relevant recitals and preambles, as well as case law and principles. We note

that amendment 59, tabled by Baroness Bowles of Berkhamsted, would achieve a similar effect.

If the government is not inclined to accept either of these amendments, we believe that the minister should be asked how the government intends to ensure that there is legal certainty after exit day and what future status the recitals and preambles will have.

The great repeal bill white paper made some references to the aim and content of EU legislation and the explanatory notes recognised the importance of recitals (especially in footnotes 17 & 24) but these references are insufficient to ensure the legal certainty that is needed.[8]

The following example highlights a preamble that clearly set out the reasons for as well as the intention, aims and objectives of the legislation.

The preamble to the Strategic Environmental Assessment Directive[9] contextualises it within the larger international framework, referring explicitly to Art 174 of the Treaty, the Fifth Environment Action Programme: Towards Sustainability, the Convention on Biological Diversity and the United Nations/Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context. This establishes the environmentally focused objective of the directive, whereas the Explanatory Notes of the UK Regulations appear to be focused on planning and development. They present the Regulations as a requirement to be satisfied, rather than as a clear attempt to integrate environmental protection obligations into procedural matters of planning law.

Schedule 2 of the Regulations outlines the requirements for Environmental Reports. Environmental protection objectives are placed 5th on the list of requirements, with the Schedule only requiring that objectives "relevant to the plan or programme" be considered. This should be contrasted with the preamble, which prioritises sustainable development, conservation and sustainable use of biological diversity.

For more information, please contact Ruth Chambers, senior parliamentary affairs associate, Greener UK

e: rchambers@green-alliance.org.uk
t: 020 7630 4524

Annex: examples of 'transposition gaps' in retained EU law

Without amendment to clause 4, the bill 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.

- 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.

Endnotes

[1] www.gov.uk/government/publications/the-repeal-bill-white-paper
[2] Para. 96.
[3] *The 'Great Repeal Bill' and delegated powers* (HL Paper 123, 9th Report of Session 2016-17), 7 March 2017; *European Union (Withdrawal) Bill* (HL Paper 69, 9th Report of Session 2017-19) 29 January 2018.
[4] Available at www.documents.clientearth.org/library/download-info/qc-opinion-on-the-eu-withdrawal-bill-from-blackstone-chambers/ at [24].
[5] A more nuanced approach is possible through considering whether the underlying EU law is a legislative act, a delegated act or an implementing act (see Articles 289-291 TFEU). For more detail, see para 34 of the QC advice above and Dominic Grieve's amendment NC13 from House of Commons Report stage.
[6] Second Report [63].
[7] First Report [58].
[8] www.gov.uk/government/publications/the-repeal-bill-white-paper, paras 2.9–2.10.
[9] Directive 2001/42/EC – Strategic Environmental Assessment Directive (corresponding UK Regulation is Environmental Assessment of Plans and Programmes Regulations 2004)

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