

## Greener UK briefing for Report Stage of the EU (Withdrawal) Bill, 16 and 17 January

### Summary

Greener UK supports amendments to the bill in four areas:

- NC13 Classification of retained EU law
- NC18 Consultation on environmental governance and principles
- NC19 Savings for rights
- NC21 Environmental protection and improvement: continuation of powers and functions

### NC13 Classification of retained EU law

Greener UK supports this new clause which would provide greater legal certainty by classifying retained EU law as either primary or secondary legislation.

A considerable amount of EU-derived environmental law in the UK takes the form of Statutory Instruments (SIs) enabled by powers contained in the European Communities Act (ECA). While the UK has been a member of the EU, this has been an appropriate arrangement, since ministerial powers under the ECA to make and amend laws have been appropriately constrained to the transposition of EU laws. Government ministers can only use the powers provided by the ECA to implement EU laws (which have already undergone a democratic process within the EU).

However, post-Brexit, the status of retained EU law is at best unclear and at worst allows for modification to be made to significant and important areas of policy without proper parliamentary oversight. Amendment NC13 seeks to avoid this situation by providing a method for clarifying the status of retained EU law according to its origins in EU law. This will avoid a problematic situation raised by the Bar Council, and endorsed by the House of Lords Constitution Committee:

“It would be a matter of great constitutional concern if the [Withdrawal Bill] were to contemplate the possibility that repeal, or other significant change to the substantive content, of law currently deriving from EU Directives could be effected by a process similar to the making of ECA s2(2) instruments. Such a process would bring about a significant democratic deficit which would undermine the legitimacy of resulting legislation. It is one thing to use a secondary instrument to implement legislation that has been the subject of an extensive legislative process at European level. It is another thing entirely to use that process to implement policy which simply emerges from ministerial decision-making within the confines of Whitehall departments or Cabinet committees”<sup>1</sup>.

NC13 ensures that retained EU law is treated appropriately once we have left the EU and prevents it from future modification without a proper democratic process.

## NC18 Consultation on environmental governance and principles

Greener UK supports this new clause which would enshrine the government's stated intentions in respect of the environmental principles and the establishment of a new independent environmental regulator. It sets out the minimum standards for consultation on these matters.

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. For example for a number of years, the UK authorities have allowed the damaging practice of burning blanket bogs within English Special Areas of Conservation (SACs), without the appropriate assessment required by the Habitats Directive. The European Commission is now taking steps to require appropriate action by UK authorities to address this; failure to do so could end in referral to the European Court of Justice.

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.

The secretary of state has indicated that Defra will publish a consultation early in the New Year on the scope, powers and functions of a new environmental watchdog but no clarity has been provided on the precise timescale for this.

While we welcome the secretary of state's commitment to consult, consultations can often be delayed and in some cases not materialise at all (nor are the outcomes following consultation guaranteed). New clause 18 would guarantee that this consultation, including the prospect of primary legislation, would be brought forward within a reasonable timescale (one month of Royal Assent).

This would have significant public benefit as it commits the government to bringing forward proposals for the establishment of a new environmental watchdog with responsibility for, and appropriate powers to oversee the implementation of, compliance with and enforcement of environmental law, policy and principles by relevant public bodies (including ensuring an effective complaints mechanism for civil society). The new clause would also ensure that consultation took place on how to ensure that important EU environmental principles are incorporated in primary legislation as a basis for relevant decision-making.

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. The new clause also reflects that it is equally important that a UK-wide body is co-designed across the governments of the UK to ensure that the UK-wide gap is addressed and that any proposals are truly "co-developed" and "jointly owned".

We note that new clause 18 has support from across the House of Commons reflecting the strong cross-party consensus in ensuring that the government delivers consultation proposals for a new environmental regulator as quickly as possible to ensure that adequate arrangements are in place before exit day.

We also support NC12 on environmental protection after EU exit, which would result in a similar outcome to NC18.

## NC19 Savings for rights

Greener UK supports this new clause (and linked amendment 57 to leave out clause 4) which would aim 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 European Communities Act 1972.

The government's ambition for the Withdrawal Bill is for the same rules and laws to apply after we leave the EU as they did before. This ambition has been repeatedly stated, including in the government's [repeal bill white paper](#). However, the bill as drafted fails to retain all EU law. In fact, the bill explicitly excludes certain aspects of EU law without justification. New clause 19 seeks to rectify some of these errors.

Dominic Raab, the then 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 its 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 (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 been inaccurately or incompletely transposed into UK law. This failure to properly transpose EU law into UK law arises both through existing errors in transposition and because some parts of EU law have not required transposition while the UK is a member state of the EU. On exit, this must be rectified.

However, the bill contains two exceptions to its clause 4 sweeping that are inexplicable and unnecessary. Firstly, in clause 4(1)(b), it excludes those provisions that are not "enforced, allowed and followed accordingly". The government has argued that this is simply to mirror the language of the ECA. But while this language can be found in s2(1) of the ECA, it does not function there as a test for becoming recognised as part of UK law as it does in the Bill, but rather as a requirement of that recognition. While the bill mirrors the language found in the ECA, it reverses its function.

Secondly, clause 4(2)(b) excludes those rights etc. that have not been recognised by a court before exit day. But this distinction is arbitrary: many rights may simply not have been recognised by a court because they are so straightforward as to 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.

Thirdly, clause 4 does not adequately engage with failures to properly transpose EU law. 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.

New clause 19 rectifies 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.

## NC21 Environmental protection and improvement: continuation of powers and functions

Greener UK supports this new clause which would ensure oversight of the transfer of functions from EU institutions to domestic institutions, by requiring the Government to establish a publicly accessible register of environmental governance functions and powers exercised by EU institutions, and to make regulations that ensure that all relevant environmental powers and functions are continued.

New clause 21 would require the government to establish and maintain a publicly accessible register of EU environmental powers and functions, ensuring that there is public transparency about the functions that need to be replicated/replaced, including through the establishment of a new regulatory body.

The register would also enable the public to monitor and hold the government to account on its plans for ensuring that robust arrangements will in place on exit day to deliver its ambition for a world-leading environmental justice system.

We note that new clause 21 has support from across the House of Commons reflecting a strong cross-party consensus on the need to ensure that there are robust, deliverable plans in place to ensure that the environmental governance gap that would arise upon departure from the EU is filled as quickly as possible.

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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 the following:

- Requirements to review and report on the adequacy and implementation of laws, such as those contained 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 – for example the Water Framework Directive's requirement that water pricing policies that provide adequate incentives for users to use water efficiently (Article 9), or the Energy Efficiency Directive's requirements for energy performance requirements for publically owned buildings (Article 5(1)).
- Provisions that provide for regional co-operation in transboundary environmental matters, such as Article 6 of the Marine Strategy Framework Directive that requires member states to use existing regional institutional co-operation structures where practical and appropriate.

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<sup>i</sup> Cited in House of Lords Constitution Committee, 'The 'Great Repeal Bill' and delegated powers' (9th Report of Session 2016-17, HL Paper 123, 7 March 2017) [57].

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