GREENER UK

Briefing for second reading of the EU (Withdrawal) Bill, 30 and 31 January 2018

Summary

Greener UK believes that, no matter what the outcome of the Brexit negotiations, the people of these islands deserve a world class environment: clean air and water, a stable climate, healthy seas, beautiful landscapes and thriving wildlife in the places we love. We welcome the UK government's commitment to leave the environment in a better state. The Withdrawal Bill should be an important first step towards achieving this ambition. But, as currently drafted, the bill contains flaws that could weaken environmental protections. It remains deficient in several areas.[1]

We would be grateful if you could consider mentioning the following points in your contribution to the second reading debate:

1. The bill as drafted fails to retain all EU law
2. The future status of retained EU law must be clarified
3. A new joint watchdog should be established to close the environmental governance gap
4. The EU environmental principles must be enshrined in domestic law
5. UK and devolved governments must co-operate to ensure continued high environmental standards across the UK

1. The bill as drafted fails to retain all EU law

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.[2]

However, the bill as drafted fails to retain all EU law. In fact, the bill explicitly excludes certain aspects of EU law without justification: the Explanatory Notes 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]."[3]

This problem is not exclusive to environmental law, although it is felt particularly strongly there because 80 per cent of environmental law stems from the EU. In addition, aspects of EU directives that are 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 at the moment, a number of provisions of directives are relied on directly rather than via transposition into UK legislation. These provisions will be lost by the bill as it stands. There is an urgent need to retain many of these provisions, 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, parliament).

During Committee stage, 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 not been properly 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.

However, clause 4(2)(b) contains an inexplicable and unnecessary exception to this sweeping: it 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. 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.

Secondly, 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.

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.

Greener UK believes that the bill should be amended to ensure full transposition and maintain legal certainty.

2. The future status of retained EU law must be clarified

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. This problem exists both for law that currently exists as an EU Regulations and law that is implementing EU Directives: it is essential that the bill properly deals with the future status of both these forms of law. During the bill's passage through the House of Commons, we worked with MPs to seek 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".[4]

At Report stage in the House of Commons, there was cross-party support for new clause 13 on the certainty of retained EU law which MPs described as "…a very good mechanism for distinguishing between primary and secondary legislation in terms of the appropriate protections that will apply to UK citizens" and "… quite a clever solution to the vexed question of EU retained law". This should be contrasted with the government's proposal that each measure will be dealt with on a case-by-case basis which was described by Dominic Grieve as "…a rather extraordinary way in which to proceed."

Greener UK believes the bill should be amended to provide greater legal certainty by classifying different bits of retained EU law as either primary or secondary legislation according to its origins in EU law. This would ensure that this new category of law is treated appropriately once we have left the EU and prevented from future modification without a proper democratic process.

3. A new green watchdog is needed to close the environmental governance gap

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. Greener UK has prepared a background briefing on the governance gap, which will be created when the UK leaves the EU[5]. The government has now accepted this gap exists and has on several occasions pledged to address it by creating a new independent body to hold the government to account [6].

The UK government's Environment Secretary has promised a consultation early in 2018 on the scope, powers and functions of the new body. However, this consultation is yet to be published and there is no firm commitment to the legislation that would be needed to set up the body on a statutory basis.

Greener UK believes that a new joint body should be established to scrutinise and enforce the implementation of environmental laws and policies by the UK and devolved governments, including by initiating investigations into possible breaches and responding to complaints from citizens and civil society organisations.

Respecting the devolution settlements, such a body should be co-created and co-owned by the UK and devolved governments. We are concerned that a consultation on an England only body would risk leaving the governance gap across the rest of UK unaddressed.

A new joint body would be well-placed to:

- Scrutinise and enforce the implementation of environmental laws and policies by the UK and devolved governments, including by initiating investigations into possible breaches and responding to complaints from citizens and civil society organisations;
- Scrutinise and enforce the compliance of governments and public bodies with international agreements and treaties;
- Ensure and scrutinise the transboundary management of common resources;
- Receive implementation reports from the agencies and/or governments currently responsible for producing them, ensuring the adequacy, consistency and transparency of these reports before using them as inputs into its evaluation of governments' and agencies' compliance and performance against targets; and

– Advise governments on the setting of environmental standards/targets (some of which could be expected to vary between countries).

It must have:

– Adequate resources (to allow for effective governance, but not a large bureaucracy);
– Full independence from governments but accountability to parliaments;
– Relevant expertise with an evidence-led approach;
– Sufficient legal powers to uphold and enforce the law; and
– A statutory basis, with a clear legal purpose.

The UK and devolved governments will need to work together to address the post-Brexit 'governance gap' – ie to replace the role currently played by EU-level institutions in overseeing compliance with common standards of environmental protection across the four nations. When it comes to the environment, there is no area where the UK has more consistently been found to be in breach of EU rules. There is currently a concerning lack of clarity regarding the plans for how the UK and devolved governments will work together in this respect, in spite of recent statements made by the UK government's Environment Secretary.

Greener UK is concerned that the new watchdog will not be in place by exit day. The bill's passage through the House of Lords provides an opportunity to hold the government to account on its stated intention to close the governance gap.

4. EU environmental principles must be enshrined in domestic law

EU environmental principles, such as the precautionary principle, must continue to be applied by courts, businesses and government in their decision-making. They form an essential component of environmental law, which necessarily must be able to look ahead to the long term and be flexible in its application.

The environmental principles are not unique to EU law – they are principles of environmental law in general, and are also found in a number of international environmental treaties to which the UK is a signatory. This includes the Convention on Biological Diversity, the Convention on Climate Change and the Convention on the Law of the Sea. Currently, the UK gives effect to these obligations to the international community through its membership of the EU, and in particular the appearance of these principles within the Treaty on the Functioning of the European Union.

The bill 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. During the bill's passage through the House of Commons there was cross-party recognition of the importance of the principles, with debate focusing on how, rather than whether, they should be retained.[7]

The limitation of relying exclusively on UK case law to retain these principles can be seen in a recent analysis by Professor of Environmental Law at UCL, Richard

Macrory. He notes that "when it comes to, say, the Habitats Regulations the UK courts will still be obliged to apply the interpretation of the precautionary principle as contained in Waddenzee". But this emphatically does not mean that the precautionary principle will necessarily apply more broadly, as it currently does.[8]

This risk is exacerbated by the fact that "in Judicial Review, the British courts have been reluctant to employ [the principles] in the resolution of disputes in the absence of a clear steer from the CJEU. With the exception of the precautionary principle, it is difficult to find any material application of other core environmental principles in the higher courts in the last thirty years".[9]

In order to retain the law we have, to leave the environment in a better state than we found it, and to be world leaders in high environmental standards, we must specifically retain the environmental principles in UK law so that polluters will be forced to pay for their polluting activities, so that dangerous chemicals posing risks to health are not authorised for use while we remain unsure of their effects, and so that environmental considerations are properly woven into decision-making across government.

The government has recognised the importance of EU environmental principles and proposes to consult on including them within a new National Policy Statement. **While this is welcome, it does not replace the need for the principles to continue to have a statutory underpinning both in the Withdrawal Bill and in the new environment bill which the UK government's Environment Secretary has indicated he may be minded to bring forward in the current parliamentary session.**[10]

5. Co-operation is needed to ensure continued high environmental standards

No area of policy will be more affected by the outcome of this debate than the environment (approx. 80 per cent of environmental laws in the UK, including in the devolved nations, have some basis in EU legislation). According to analysis by the Institute for Government, there are over 140 distinct policy areas where EU law intersects with devolved powers. In each of the three devolved nations, the greatest number of these relate to the environment. This is unsurprising, given the widely recognised importance of transboundary co-operation for the effective protection of the environment.

In a sign of welcome progress, the UK and devolved governments reached an agreement in October – via the Joint Ministerial Committee (EU Negotiations) – of principles for developing and agreeing 'common frameworks' in at least some of these policy areas post-Brexit, not only to ensure 'the effective functioning of the UK single market' and the UK government's ability to negotiate future trade deals, but also for the effective management of common environmental resources that naturally cross boundaries between the four nations.

For the effective protection of the environment, there are strong reasons for maintaining common standards across the four nations post-Brexit by replacing existing EU common frameworks with new UK common frameworks.

To give just one example, EU legislation relating to the natural environment (the Birds and Habitats Directives) currently helps to underpin co-operation by providing minimum common standards for site and species protection across the four nations, facilitating the creation of a more ecologically coherent network of protected sites than would otherwise have been the case. Such an approach will still be needed for a UK outside the EU. After all, wildlife and the threats that wildlife faces (such as pollution and non-native species) do not respect internal (or external) borders. The principles justifying EU-level co-operation on such matters would seem to apply equally, if not more strongly, to intra-UK co-operation post-Brexit.

For the sake of the environment, we need to see continued co-operation and joint agreement on common frameworks that provide minimum common standards. This should not be about stopping environmental ambition, which encourages a 'race to the top', but about preventing a 'race to the bottom'. It would help to avoid the risk that one jurisdiction could seek to gain a short term competitive advantage by unilaterally lowering its environmental standards, with others then following suit.

It is vital that the UK and devolved governments work together so as to ensure that there is no weakening of environmental protections as the UK leaves the EU.

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Endnotes

[1] http://greeneruk.org/resources/Parliamentary_Briefing_Withdrawal_Bill.pdf
[2] https://www.gov.uk/government/publications/the-repeal-bill-white-paper
[3] Para. 96.
[4] Constitution Committee, The Great Repeal Bill and delegated powers, March 2017
[5] http://greeneruk.org/resources/Greener_UK_Governance_Gap.pdf
[6] Michael Gove's evidence to the Lords Select Committee on the Natural Environment and Rural Communities Act 2006
[7] https://greenallianceblog.org.uk/2017/11/16/this-parliamentary-debate-was-a-significant-moment-for-the-uks-environment/
[8] Richard Macrory and Justine Thornton QC, Environmental Principles: will they have a legal role after Brexit? 2017. Journal of Planning & Environmental Law.
[9] ibid
[10] Michael Gove's evidence to the Lords Select Committee on the Natural Environment and Rural Communities Act 2006

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