

***Response to Environmental Audit Committee and Environment, Food and Rural Affairs Committee
Call for evidence on the draft Environment (Principles and Governance) Bill***

The UK Sustainable Investment and Finance Association (UKSIF) is the membership organisation for those in the finance industry committed to growing sustainable and responsible finance in the UK. Our vision is a fair, inclusive and sustainable financial system that works for the benefit of society and the environment. UKSIF was created in 1991 and has over 240 members and affiliates including financial advisers, institutional and retail fund managers, pension funds, banks, research providers, consultants and NGOs.

We welcome the opportunity to provide feedback on the Government's draft Environment Bill. We support the aims and objectives of this Bill. Investors and businesses alike crave stability and certainty in environmental policy with clear rules, consistently enforced and upheld. Leaving the EU presents a number of risks for UK environmental policy. Nevertheless, this draft Bill presents an opportunity for the UK to demonstrate leadership on environmental protection. At present, we do not believe the proposals in the draft Bill would provide the same level of environmental protection as is provided by the enforcement and governance activities of the EU institutions. Our submission contains suggestions to improve the draft Bill.

Does the proposed constitution of the oversight body provide it with enough independence to scrutinise the Government?

For the OEP to have sufficient independence to scrutinise the Government, the process for appointing members of the OEP must not be under the control of the Secretary of State, members must be guaranteed independence during the term of their appointment, and the OEP's funding must be set independently of ministers. The proposed constitution fails to meet these three criteria.

Appointment process

We are concerned the proposals in the Schedule to the draft Bill give the Secretary of State too much control over the appointment and removal of members of the OEP. Paragraph 1 proposes to give the Secretary of State the power to appoint the chair, and the majority of members of the OEP. This risks future Environment Secretaries appointing friendly voices to be members of the OEP. In general we believe Parliament should have a greater role in the appointment of members.

The role of the chair will be crucial to the OEP's scrutiny role. It is important that the candidates for chair are willing to scrutinise and challenge the Government. The Secretary of State's preferred candidate for chair should be appointed with the consent and input of Parliament. We suggest that the schedule should be amended so that the chair may only be appointed when:

- a relevant select committee has held a pre-appointment scrutiny and made a report to the House of Commons,
- the House of Commons has agreed a motion confirming the appointment,
- a motion confirming the Chair's appointment may be moved:

- by the Secretary of State, and
- only after the Secretary of State has secured the agreement of a chair of the Environmental Audit Committee or the Environment, Food and Rural Affairs Committee, whichever is from an opposition party.

The early removal of the Chair should only happen with Parliamentary consent. To ensure the senior management is accountable to Parliament, the chair and chief executive should give evidence once a year to relevant Commons select committee(s) and committee(s) of the House of Lords.

Terms of Appointment

We are concerned that the draft Bill does not provide for terms of the appointment of members that protect and guarantee their independence. Some public bodies' establishing statute provides protections for their members against direction by Ministers. This is the case with members of the governing body of the Financial Conduct Authority, who are required to be appointed on terms which must secure that members are not subject to direction by Ministers or other public authorities.¹

It is vital that members of the OEP are held to high standards of probity. Clauses 18 and 19 provide the OEP with the freedom to choose which matters it investigates and pursues, and clause 28 may prevent the OEP from explaining why it has decided not to pursue some matters. Strong safeguards against members' conflicts of interest will therefore be vital to ensuring the independence of the OEP, but also protecting the OEP from accusations that it has decided not to investigate a matter because of a conflict of interest. The draft Bill does not contain any provisions that do this. We therefore recommend that the draft Schedule includes a requirement for members not to have or acquire financial interests relevant to work conducted by the OEP.

Terms of service should guarantee members' independence by providing them a safeguard against any attempts by Ministers to remove them from office. But the schedule proposes to give the Secretary of State the power to remove members from office if the member is 'in the opinion of the Secretary of State' unable or unfit to carry out their functions.² This could undermine the independence of the OEP, since the test that must be met for the Secretary of State to be able to remove a member would only be that the Secretary of State holds a particular opinion. We believe that OEP members should be afforded the same protections enjoyed by members of the FCA's governing body, who may only be removed on the grounds of incapacity, serious misconduct, or conflicts of interest.³

Paragraph 3(2) gives the Secretary of State the power to require that, in circumstances the Secretary of State deems to be 'special', the OEP must make payments to recently-departed members of the OEP. We believe there are insufficient safeguards in the draft Bill to prevent this power from being abused. The draft Bill should be amended to provide an exhaustive list of circumstances in which such payments are permissible, and to create a requirement for the Secretary of State to make a written statement to Parliament to explain a decision to make a payment under this part of the Bill.

Funding

¹ 2000 c. 8, sch ZA, para 3(4).

² Draft Environment (Principles and Governance) Bill, Schedule, para 2(5)(c)(ii)

³ Financial Services and Markets Act 2000, sch ZA, para 4

A secure and sufficient source of funding is fundamental to the OEP's ability to be an independent, strong voice for the environment. Any organisation will be reluctant to bite the hand that feeds, so we are concerned that the draft Bill proposes to require the Secretary of State only to provide such funds as he 'considers reasonably sufficient'.⁴ We note that the Committee on Climate Change is funded by a grant from the Department for Business, Energy and Industrial Strategy, and between 2010/11 and 2017/18 BEIS has cut the CCC's grant by 19%.⁵ The OEP's funding should be determined by select committee of Parliament so that it is protected from Ministerial interference.

Does the proposed oversight body have the appropriate powers to take 'proportionate enforcement action'?

Clarity about the ability to fine

Environmental policies often have implications for tax and spend policy, such as taxes or charges on pollution, which falls under the responsibility of the Treasury. As EAC's report, 'Sustainability and HM Treasury' found, environmental policies have often suffered as a result of inter-departmental disagreements between the Treasury and spending departments.

The role of the EU institutions as enforcers of environmental law has helped take environmental issues out of inter-departmental politics. EU membership protects EU-derived environmental policies from abrupt or unannounced changes, providing a level of policy stability and predictability which enables businesses and investors to plan. The EU's ability to threaten the whole of Government with fines in the event of repeated failures to implement environmental law has been key to environmental policy stability. The Government should clarify whether, if the OEP applied for a judicial review against a public authority and is successful, the courts may be able to impose a fine on the Government.

Time limits

Under the proposals in the draft Bill, there is no time limit between the OEP receiving a complaint and acting, or between receiving a response to an information notice and taking further action. Clauses 20-23 should be amended to include an obligation on the OEP to act on complaints or responses to information or decision notices, or to explain to the complainant why no further action has been taken.

Holding the whole of Government to account

⁴ Draft Environment (Principles and Governance) Bill, Schedule, Para 9(1)

⁵ Annual Report and Accounts 2017-2018, Committee on Climate Change. HC1179. p. 40 <https://www.theccc.org.uk/wp-content/uploads/2018/07/Annual-Report-and-Accounts-2017-2018-Committee-on-Climate-Change.pdf> (accessed 4th January 2019), and Annual Report and Accounts 2010-2011, Committee on Climate Change. HC1182. p. 50. https://www.theccc.org.uk/wp-content/uploads/2011/07/1427_CCC-AnnualReport-2010_6_bookmarks.pdf (accessed 4th January 2019).

While we welcome the OEP's ability to investigate the conduct of a variety of public authorities, we believe the definition of 'failure to comply with environmental law' in clause 17(2) and the grounds for complaints in clause 18(1) are too restrictive.

Under the European Commission's complaints procedure, a citizen can make a complaint if they think their government has failed to achieve an environmental outcome. For example, a UK citizen living in Leeds, Manchester, London or Bristol can complain to the European Commission that they are living in an area with illegally high levels of air pollution, without any further need to specify an authority, a Government department, or other public body who they feel is responsible. The European Commission may then investigate whether the UK Government is meeting legally-binding obligations. The European Commission's process starts with an environmental outcome and an environmental legal minimum standard (e.g. the degree to which the air is polluted, and the legally permissible level of pollutants in the air), putting the environmental rights and needs of the citizen first.

The proposals in the draft Bill do not provide the same level of recourse as is available under the European Commission's process. The process is restricted by the draft Bill's narrow definition of 'failure to comply with environmental law'. In the draft Bill, failures to comply with environmental law come in two varieties.

First, a failure to comply with environmental law may be public authority's failure to "take proper account" of environmental law in the exercise of its functions. The draft Bill's explanatory notes say that the question of whether an authority has "take[en] proper account" is a legal test similar to a "have regard to" test. A public authority could act in an environmentally harmful way, but still pass this test so long as it thinks carefully about, but has clear reasons for ignoring, environmental law.

Second, a failure to comply with environmental law would occur when a public authority unlawfully exercises or fails to exercise its functions under environmental law. For a public authority to fall foul of this test, citizens must identify a 'function' which a public authority has failed to carry out or carried out, which has resulted in environmental harm. However, if an environmental outcome (i.e. water quality) is not meeting the legally targeted minimum, and there is no identifiable public authority with a function that has been insufficiently fulfilled, then that does not count as a failure to implement environmental law. In such a case, where a citizen is suffering from illegally high levels of air pollution, or illegally poor water quality, but no authority can be identified to have failed to fulfil its functions.

The OEP must put the environmental rights and needs of the citizen first. The draft Bill should be amended so that a citizen can approach the OEP with what she or he believes is an illegally poor environmental outcome, such as illegally high levels of air pollution. It should then be for the OEP to determine whether Government or another public authority is responsible.

If there is no single identifiable public authority, the responsibility to act lies with Ministers. Correcting these failures to meet environmental targets will require changes in Government policy. For example, if the volume of household waste going to landfill fails to meet legally binding targets, the OEP should have the power to issue a direction to Ministers to remedy the problem. This would give Ministers the flexibility to work with local government and other public bodies in a way that they think best, to introduce policies that drive up recycling rates.

As drafted are the principles legally enforceable? What will need to be included in the National Policy Statement to interpret the application of the principles?

It is not possible to provide a direct answer to this question because, according to the draft Bill, it will be up to the Secretary of State to decide, in a statement made under clause 1, the extent to which the principles will have legal force. We do, however, have comments on some of the restrictions to the application of the principles, and the process of scrutinising the statement in clauses 1, 3 and 4.

The draft Bill proposes that the policy statement will set out which areas of government policy by means of a positive list.⁶ We believe the scrutiny process in clause 3 would be improved if the Secretary of State were under a requirement to set out a negative list containing the areas of government policy which the statement will not apply to.

Clauses 1 and 4 restrict the legal effect of the policy statement. Clause 1(6)(c) exempts taxation and spending from the effect of the principles, and clause 4 allows Ministers to ignore the policy statement if acting or refraining from acting would have “no significant environmental benefit”, or if acting or not acting “would be in any other way disproportionate to the environmental benefit”. The draft Bill does not set out how the test of “no significant environmental benefit” will be carried out, but the explanatory notes say that the aim of clause 4 is to prevent the policy statement from impeding the development of policy which has nothing to do with the environment. The notes give pensions legislation as an example of an area of government policy which would be exempt under clause 4.⁷

This choice of example serves to show how difficult a judgment about environmental benefit can be. EAC’s report ‘Greening Finance: embedding sustainability into financial decision-making’ judged pensions regulation to be important to the environment. The report recommended that pension schemes should be required to consider environmental issues in developing their investment strategy. Indeed the Government shares this view, and in October 2018 DWP changed pension legislation to require pension fund trustees to consider environmental factors in their investment policies.⁸

The tests in clause 4 are vague, and the draft Bill provides no guidance as to how those interpreting the law are to apply it. Clause 4 should be removed from the draft Bill, and clause 1 amended to require a negative list specifying the areas of Government policy which will be exempt from the statement so that Parliament scrutinise the statement and make a judgment about what should fall under its remit.

⁶ Clauses 1(3)-(4) and 4(1).

⁷ Paragraph 63 in the Draft Environment (Principles and Governance) Bill Explanatory Notes.

⁸ The Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018 (SI 2018/988)

Does the Bill meet the government's commitment to non-regression from EU environmental standards?

Is there anything else missing that should be included to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union?

We will answer these two questions together. Yes, the OEP should assess whether any loss of environmental law has occurred because of the operation the EU (Withdrawal) Act 2018. After exit day, EU Directives will have no legal effect in the UK,⁹ which could create a governance gap. The majority of EU environmental law is contained in EU Directives covering issues such as air pollution, habitats conservation, water quality, flooding, greenhouse gas emissions, renewable energy targets, pollution, and waste and recycling.¹⁰

Broadly, EU law has force in Member States one of two ways. It may be 'direct EU legislation', which applies directly (EU Regulations, for example) or it may be 'non-direct EU legislation', which is addressed to Member States, and must be transposed into domestic law (EU Directives, for example). Directives are usually transposed into UK law as statutory instruments made under powers in the European Communities Act 1972, which is the main statutory basis for the UK's relationship with the European Union.¹¹

The EU (Withdrawal) Act 2018 will repeal the European Communities Act 1972 on exit day,¹² after which the majority of EU legislation will be saved in UK law in two ways. First, direct EU legislation will simply become a new part of domestic law on and after exit day.¹³ Second, non-direct EU legislation (the Directives) will no longer have legal force, but the transposing domestic provisions (mostly statutory instruments made under the European Communities Act 1972) will be saved in UK law.¹⁴ Any EU environmental law which is located in the Directives but has not been correctly or completely transposed into UK law before exit day will be lost.

Courts will lose their ability to find against the Government on the grounds that it has failed correctly to transpose a Directive into domestic law, or that policies or legislation is incompatible with the Directives. Moreover, the principle, established in *Factortame*,¹⁵ that EU law is supreme and that courts may refer to the original text of EU Directives, will no longer apply. Judges referred to the text of the Air Quality Directive (2008/50/EC), for example, in many of the successful court cases against the Secretary of State for failing to produce adequate plans to tackle air pollution. These judgments made explicit reference to the Directive rather than the implementing legislation.¹⁶

Finally, it will remove the right of citizens to claim for damages under *Francovich* suffered because of the Government's failure to transpose EU environmental law into UK law after exit day.¹⁷

⁹ 2018 c. 16, ss. 2, 4(2)(b)

¹⁰ 'EU Environmental Legislation and UK Implementation', Chartered Institute of Ecology and Environmental Management, November 2015. (Accessed 28th January 2019): https://www.cieem.net/data/files/Resource_Library/Policy/Policy_work/CIEEM_EU_Directive_Summaries.pdf

¹¹ 1972 c. 68, (mostly) s. 2

¹² 2018 c. 16, s. 1

¹³ 2018 c. 16, s. 3(1)

¹⁴ 2018 c. 16, s. 2

¹⁵ *Factortame* (No 1) [1990] 2 AC 85; *Factortame* (No 2) [1991] 1 AC 603.

¹⁶ [2016] EWHC 2740 (Admin), for example.

¹⁷ 2018 c. 16, Sch. 1, para. 4.

While we welcome the fact that the OEP has a remit covering all areas of environmental law, we would welcome a specific remit to address these three gaps. The Government has broad powers to correct retained EU law to ensure it continues to function, but we believe this process would benefit from independent scrutiny. The OEP should assess whether EU-derived UK environmental law is providing the same degree of rights, powers, liabilities, obligations, restrictions or remedies as were available before exit day, and make recommendations to Government about how to close any gaps in environmental protections which have arisen from leaving the EU and the operation of the EU (Withdrawal) Act 2018.

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