We have reviewed certain chapters of Part 2 (Air Quality) of the Environment (Legislative Functions from Directives) (EU Exit) Regulations 2019. We have identified issues which, in our view, are legally important and give rise to issues of public policy likely to be of interest to the House.

Set out below are examples of two such issues.

1. Amendments to non-technical information key to determining the Secretary of State’s compliance with existing air quality duties

Regulation 7 introduces powers for the Secretary of State to amend, by regulation, provisions in any enactment which corresponds to that made by a number of listed “relevant” Annexes to the Ambient Air Quality Directive.

Pursuant to Regulation 47, such amending regulations are subject to a negative resolution procedure.

However, much of the content of the “relevant” Annexes is key to determining the Secretary of State’s compliance with its own duties under the Air Quality Standards Regulations 2010, and is not simply technical in nature. For example:

- Annex XV sets minimum content requirements for air quality plans. These include a description of measures to be adopted, a timetable for their introduction and an estimate of the improvement of air quality planned. The Air Quality Standards Regulations 2010 provide that the duty to ensure such a plan is in place falls on the Secretary of State.

- Annex III sets requirements regarding assessment of ambient air quality. These include requirements relating to the siting of sampling points which require, inter alia, that air quality is assessed in areas where “the highest concentrations occur”. The Air Quality Standards Regulations 2010 provide that the duty to assess pollution concentrations against these standards and ensure that measured concentration do not exceed set limit values falls on the Secretary of State.

It is not easy to foresee how such requirements would need to be updated in light of advances in scientific evidence or understanding. They do not set out quantitative or technical specifications.

The concern is that Regulation 7 therefore grants to the Secretary of State the power to change how it itself is regulated, with potentially significant effect and very little scrutiny of these changes. For example, removing a requirement to assess air quality in areas where the highest concentrations occur and/or the need to include properly impact-assessed measures in air quality plans carries the risk of undermining the purpose and effectiveness of the Regulations that transpose the Ambient Air Quality Directive.
Ideally, the Secretary of State should not have the power to amend its own duties in this way. At the very least, we suggest that the regulations used by the Secretary of State to make these amendments should be subject to more rigorous scrutiny including approval of both houses before the SI is made – such as that afforded through the draft affirmative procedure.

2. Amendments to provisions with respect to which the European Commission has an existing oversight role

Regulation 12 introduces a power for the Secretary of State to make provision in connection with, inter alia, exercising a derogation under Regulation 8 of the National Emission Ceilings Regulations 2018.

Again, pursuant to Regulation 47, such amending regulations would be subject to negative resolution.

Regulation 8 of the National Emission Ceiling Regulations 2018 sets out a number of scenarios in which the Secretary of State can be deemed to be in compliance with its duty to meet emission reduction commitments relating to a number of harmful air pollutants, even where emissions exceed the relevant target amount (for example, in the event of a cold winter). These derogations transpose equivalent provisions set out in the National Emissions Ceiling Directive 2016. However, the Directive establishes an oversight function for the European Commission in this context; a function that neither this nor previous SIs have replaced.

With no regulatory oversight to the application of the relevant derogations, it is concerning that the draft SI would provide the Secretary of State the power to make related provisions with very little legislative scrutiny.

13 June 2019

Response by the Department for Environment, Food and Rural Affairs

The legislative functions being transferred under Part 2 of this EU Exit SI (“the instrument”) accurately reflect the functions presently held by the Commission and the procedural requirements that the Commission needs to follow to make them.

The relevant provision of the Ambient Air Quality Directive (2008/50/EC) being transferred in Regulation 7 of the instrument is Article 28(1). This provides that “measures designed to amend the non-essential elements of this Directive” (the Annexes listed in Regulation 7(3)) shall be adopted by the Commission using implementing acts. Recital 32 of the Directive emphasises that the Commission should be empowered to amend the Annexes by way of the implementing act procedure, and the level of scrutiny it entails, “since those measures are of general scope and are designed to amend non-essential elements of this Directive”.

The relevant provision of the National Emissions Ceiling Directive (2016/2284/EU) being transferred in Regulation 12 of the instrument is Article 5(7). This provides the Commission with the power to make implementing acts specifying the rules for the use of the flexibilities
set out in Directive (those “flexibilities” are accurately transposed in the relevant domestic regulations).

In both instances the communication from Green Alliance sent to the Secondary Legislation Scrutiny Committee suggests that these functions could be exercised with no “regulatory oversight” and “little legislative scrutiny.”

Regulation 15 of this instrument stipulates that before making any regulations under Part 2, the Secretary of State must consult bodies or persons representative of the interests likely to be substantially affected by the regulations. Those regulations are also subject to Parliamentary scrutiny by way of annulment by a resolution of either House of Parliament. Accordingly, the instrument provides for scrutiny both by virtue of prior consultation and through Parliamentary oversight.

It is the role of Parliament and its select committees to hold the executive to account and this will not change after we leave the EU. However, in addition to this Government has announced its intention to go further to address the issue of environmental law governance once the UK is no longer an EU member. The Government published its draft Environment (Principles and Governance) Bill in December 2018, which stated that we will establish a world-leading, statutory and independent environment body: the Office for Environmental Protection (OEP), which will scrutinise environmental policy and law. This again demonstrates that there will be continued scrutiny and oversight of environmental matters and legislation when the UK is no longer a member of the EU.

17 June 2019